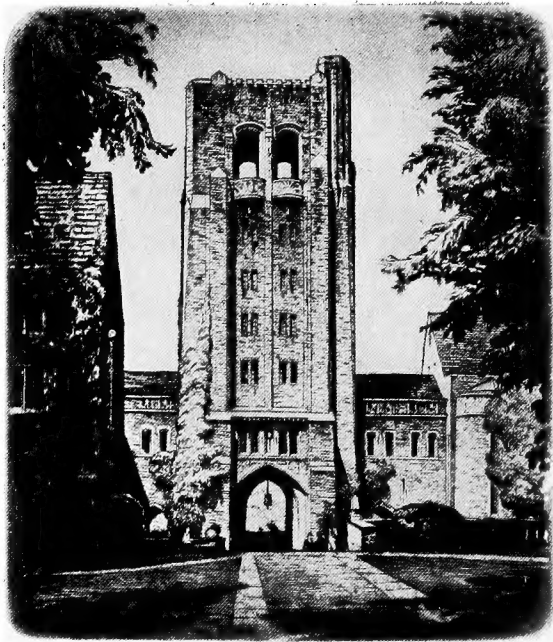






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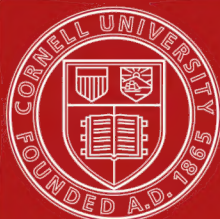
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A TREATISE
ON THE LAW OF
CORPORATIONS

HAVING A
CAPITAL STOCK

BY
WILLIAM W. COOK, LL. D.
OF THE NEW YORK BAR

SIXTH EDITION

VOL. III

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1908

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CONTENTS OF VOLUME III.

PART IV (CONTINUED).

FRAUDS—ULTRA VIRES ACTS—INTRA VIRES ACTS—NEGLIGENCE
AND IRREGULAR CONTRACTS OF DIRECTORS, STOCKHOLDERS,
PROMOTERS, AND AGENTS (CONTINUED).

CHAPTER XLII.

	SEC.
STOCKHOLDER'S ACTIONS TO HOLD THE DIRECTORS LIABLE FOR NEGLIGENCE IN THE DISCHARGE OF THEIR DUTIES.....	701

CHAPTER XLIII.

THE POWER OF VARIOUS OFFICERS AND AGENTS TO CONTRACT FOR A CORPO- RATION, AND THE MODE OF DRAWING AND EXECUTING CORPORATE CONTRACTS—ADMISSIONS AND NOTICE.....	704
A. Power of Promoters, Stockholders, Directors, Executive Com- mittee, President, Secretary, Treasurer, Cashier, General Man- ager, and Miscellaneous Agents to Contract for a Corporation.	
B. The Form of Corporate Contracts—Corporate Seal—Drafting, Signing, and Sealing—Liability of Officers on Contracts Irregu- larly Executed.	
C. Admissions of Officers and Notice to Officers.	

CHAPTER XLIV.

RATIFICATION, ACQUIESCENCE, OR LACHES AS A BAR TO A STOCKHOLDER'S ACTION HEREIN	728
--	-----

CHAPTER XLV.

PARTIES, PLEADINGS, ETC., IN SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION—SUITS BY OR AGAINST THE CORPORATION IN GENERAL	734
A. Suits by Stockholders in Behalf of the Corporation.	
B. Suits by or Against the Corporation in General.	

PART V.

BONDS, MORTGAGES, FORECLOSURES, RECEIVERS, AND REORGANIZATIONS.

CHAPTER XLVI.

	SEC.
BONDS, NOTES, ETC., OF A CORPORATION—GUARANTIES AND ACCOMMODATION PAPER	760

CHAPTER XLVII.

MORTGAGES—POWER TO ISSUE AND FORM THEREOF.....	779
A. Power to Make Mortgages.	
B. Form and Provisions of the Mortgage Deed of Trust.	
C. Authorizing, Executing, and Recording Mortgages.	

CHAPTER XLVIII.

TRUSTEES AND BONDHOLDERS—REMEDIES OF EACH.....	812
A. The Position, Duties and Liabilities of Trustees.	
B. The Remedies of the Trustee to Enforce the Security—Foreclosure, Sale, and Taking Possession.	
C. Bondholders' Suits to Foreclose and to Protect or Enforce Their Rights.	

CHAPTER XLIX.

THE FORECLOSURE OF MORTGAGES BY SUIT IN EQUITY.....	832
---	-----

CHAPTER L.

PRIORITY OF THE MORTGAGE LIEN OVER OTHER LIENS, MORTGAGES, DEEDS, LEASES, CLAIMS, JUDGMENTS, DEBTS, AND LIABILITIES.....	851
---	-----

CHAPTER LI.

RECEIVERS	862
A. Appointment of Receiver—Effect as to Title to the Property.	
B. Suits and Claims by and Against Receivers.	
C. Duties and Powers of Receivers.	
D. Liability, Compensation, Accounts, and Discharge of Receivers.	

CHAPTER LII.

PURCHASES AND REORGANIZATIONS.....	883
------------------------------------	-----

VOLUME III.

CHAPTER XLII.

STOCKHOLDER'S ACTIONS TO HOLD THE DIRECTORS LIABLE FOR NEGLIGENCE IN THE DISCHARGE OF THEIR DUTIES.

§ 701. Remedy of the stockholder herein. 702. Instances of negligence of directors in the performance of their duties.	§ 703. Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.
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§ 701. *Remedy of the stockholder herein.*—Where, by reason of the negligence of the directors or other officers, the corporate funds, property, or rights have been lost, the injury is practically and ultimately an injury to the stockholders. But, in the eye of the law, the injury is to the corporation itself. The loss has depleted its treasury. Moreover, the negligent act was in reference to the affairs of the corporation. Accordingly, it is for the corporation to call the directors to an account for their negligence. The action is not one which the stockholder is to bring. The negligence affects him, not directly, but indirectly. Hence, the law is well settled that a stockholder cannot bring the ordinary action at law for damages against the corporate directors for their negligence in the management of the corporate affairs.¹ It is clear also that the stockholder cannot hold the corporation itself liable for the negligence herein of its directors. To allow such an action would be to make part of the stockholders liable to other stockholders for the loss, when all are equally injured, equally innocent, and equally in position to complain.² The usual and proper remedy is for the corporation itself to institute a suit at law against the guilty directors.³ If, however, the corporation is under the control of the guilty parties, or if it refuses to sue when requested by stockholders to do so, then the stockholder himself may bring a suit in equity in his own behalf, and in behalf of all other stockholders who may wish to come in, making the corporation and the guilty parties the defendants, and compel them to make good to the corporation the corporate money or property lost by their negligence.⁴ The money or property recovered in such an action be-

¹ See § 734, *infra*.

² *Oliphant v. Woodburn, etc. Co.*, 63 Iowa, 332 (1884).

³ *Empire State Sav. Bank v. Beard*, 151 N. Y. 638 (1896), reversing 81 Hun, 184. In Wisconsin it is held

that the remedy of the corporation may be in equity. *North Hudson, etc. Assoc. v. Childs*, 82 Wis. 460 (1892). See also *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889), and § 734, *infra*.

⁴ See §§ 734, 740, *infra*.

longs to the corporation, and not to the stockholder who brings the suit.¹ In a stockholder's suit to hold the directors liable for negligence, the acts of negligence need not be set out with great particularity. The suit is in a court of equity, and the court decides the questions of fact, since the suit is in the nature of an accounting.² A general allegation, however, that the board of directors were negligent does not render a particular director liable.³ A receiver's suit in equity against directors to hold them liable for negligence is not multifarious nor indefinite, where it charges that they failed to attend meetings and to use due diligence in selecting subordinates and to watch the acts of the subordinates, and charged them with making loans in violation of the charter and by-laws.⁴ It has been held that a suit by the corporation against the directors for negli-

1 *Evans v. Brandon*, 53 Tex. 56 (1880); *Dewing v. Perdicaries*, 96 U. S. 193, 198 (1877); *Smith v. Poor*, 40 Me. 415 (1855); *Carter v. Ford*, etc. Co., 85 Ind. 180 (1882). See also § 734, *infra*.

2 *Halsey v. Ackerman*, 38 N. J. Eq. 501 (1884), *aff'g Ackerman v. Halsey*, 37 N. J. Eq. 356. This case holds also that the stockholder's action lies even after the corporation has become insolvent. See also *Smith v. Poor*, 3 Ware, 148 (1858); s. c., 22 Fed. Cas. 627; *Gardiner v. Pollard*, 10 Bosw. 674 (1863); and § 734, *infra*. A receiver of a national bank may file a bill in equity against the directors to hold them liable for misconduct or negligence and the bill need not allege in detail the transactions complained of. *Allen v. Luke*, 141 Fed. Rep. 694 (1906). Where a stockholder brings a suit at law against a board of directors for negligence in allowing the cashier to wreck the bank, the directors having been such for different periods of time, there is a misjoinder of causes of action. *Sayles v. White*, 18 N. Y. App. Div. 590 (1897). Where the stock which a person holds in a national bank has been sold for non-payment of an assessment, rendered necessary by negligence of the directors, he cannot maintain a bill in equity to hold them personally liable for his loss. *Hanna v. People's*, etc.

Bank, 76 N. Y. App. Div. 224, *rev'g* 35 N. Y. Misc. Rep. 517 (1901).

3 *Fisher v. Graves*, 80 Fed. Rep. 590 (1897).

4 A director who is not present at a meeting, however, cannot be charged for an illegal loan authorized at such meeting. Directors who continue an officer in office after he has squandered the assets are liable for further losses by him, and they are liable for failure to renew his bond when it ran out. *Murphy v. Penniman*, 66 Atl. Rep. 282 (Md. 1907). In a suit brought by the attorney-general under the statutes of New York to hold directors liable for waste or neglect, several directors cannot be joined where the cause of action against one is not the same cause of action as against another. Each director is liable only for his own acts or omissions, unless he had knowledge from which he might reasonably have prevented a loss. An allegation in the alternative that a director participated in an act or was negligent in not ascertaining it will not save such a complaint. Moreover the remedy against some of the directors may be in equity while as against others it may be at law. If there is a concurrent remedy at law and in equity the statute of limitations will be applied by a court of equity. *People v. Equitable*, etc. Soc., 124 N. Y. App. Div. 714 (1908).

gence may be in equity;¹ but the prevailing rule is that its remedy is at law alone.² A receiver may institute the suit.³ An action by the

1 *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. *National Bank, etc. v. Wade*, 84 Fed. Rep. 10 (1897). The remedy of a corporation against its manager for mismanagement, fraud, neglect, and wrongful acts may be in equity on the ground of an accounting, even though an action at law for tort would lie. *Empire State Tel. Co. v. Bickford*, 72 Hun, 580 (1893), reversed on another point in 142 N. Y. 224. The decision in *American, etc. Co. v. Easton*, 120 Fed. Rep. 440 (1903), that a suit by the corporation itself to recover secret profits made by a director in purchasing property for the corporation could not be maintained in equity, the remedy at law being sufficient, was reversed in 129 Fed. Rep. 1004.

2 *Empire State Sav. Bank v. Beard*, 151 N. Y. 638 (1896), reversing 81 Hun, 184 (1894), holding also that all the guilty parties should be joined as defendants.

3 *Robinson v. Hall*, 59 Fed. Rep. 648 (1894); *O'Brien v. Fitzgerald*, 143 N. Y. 377 (1894). A suit against directors to hold them liable for negligence and mismanagement may be in equity and may be filed by the receiver. *Fisher v. Parr*, 92 Md. 245 (1901). A receiver of a national bank may sue the directors for negligence and fraud on their part. *Cockrill v. Abeles*, 86 Fed. Rep. 505 (1898). A receiver may sue them for negligence, as the corporation might have done. *Movius v. Lee*, 30 Fed. Rep. 298

(1887); aff'd, 141 U. S. 132. As to the right of corporate creditors to sue for negligence, and an action by a receiver or assignee in behalf of them, see *Warner v. Hopkins*, 111 Pa. St. 328 (1886). Where a receiver sues directors for negligence, stockholders are not proper parties. *Kimball v. Ives*, 30 Hun, 568 (1883). Where a receiver has been appointed it is for him and not for a stockholder to hold the directors responsible for mismanagement of a bank. *Howe v. Barney*, 45 Fed. Rep. 668 (1891). A stockholder or creditor may hold a director liable for negligence where a receiver cannot. *Briggs v. Spaulding*, 141 U. S. 132, 150 (1891). A receiver of a national bank may hold the directors personally liable for losses where they left the entire management in the hands of the officers and made no inquiries. The court held them liable from the time when, dividends having ceased, they were bound to investigate. *Gibbons v. Anderson*, 80 Fed. Rep. 345 (1897). A creditor of an insolvent bank may hold the directors liable for allowing the president to borrow an unreasonably large sum without good security, and for allowing him to purchase stock of the bank with bank funds. Such suit must be for the benefit of all creditors and the results of the suit will be administered by the court. *Gores v. Day*, 99 Wis. 276 (1898). A receiver of an insolvent bank may sue the directors for damages for their negligence, and it is not necessary to join as defendants all the directors. *Coddington v. Canaday*, 157 Ind. 243 (1901), holding also that even though the stockholders of a bank assent to the notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor. A receiver of an insolvent bank may, in behalf of creditors, hold the directors personally

receiver against directors for negligence should be at law, and there must be a separate suit against each director.¹ The acts of negligence must be clearly set forth in the complaint.² An action by the receiver to hold a director liable for negligence does not abate by the death of such director.³ The court may authorize the receiver to compromise claims against directors for negligence.⁴ The receiver of a bank may by suit in equity hold the directors liable for gross negligence, but if some of the defendant directors had nothing

liable for negligence leading to a defalcation by the cashier. *Campbell v. Watson*, 62 N. J. Eq. 396 (1901). Under the statutes of Wisconsin the affairs of an insolvent corporation may be wound up and the directors held liable for fraud or negligence and stockholders held liable under statutory liability, all in one suit. *Gager v. Marsden*, 101 Wis. 598 (1899). A stockholder in a national bank who has been subjected to a statutory liability may sue the directors in behalf of the corporation, to render them liable for their gross negligence, the receiver having neglected to sue. *Nelson v. Burrows*, 9 Abb. N. Cas. 280 (1881), giving the complaint in full. After a receiver has been appointed the remedy of the stockholder to hold the directors liable for negligence is by petition to the receiver to institute a suit. *Cunningham v. Wechselberg*, 105 Wis. 359 (1900). In a stockholder's suit to hold directors in a national bank liable for negligence, a request to the receiver to bring the suit is unnecessary where the receiver was one of the directors. *Flynn v. Third Nat. Bank*, 122 Mich. 642 (1900).

¹ *O'Brien v. Fitzgerald*, 143 N. Y. 377 (1894); s. c., 150 N. Y. 572; *Higgins v. Tefft*, 4 N. Y. App. Div. 62 (1896); *Dykman v. Keeney*, 154 N. Y. 483 (1897). In *Stearns v. Lawrence*, 83 Fed. Rep. 738 (1897), the receiver held the president liable for negligence in the management of a bank by a suit in equity. A receiver of a national bank may file a bill in equity against the directors to hold

them liable for misconduct or negligence and the bill need not allege in detail the transactions complained of. *Allen v. Luke*, 141 Fed. Rep. 694 (1906). A court of equity is the proper forum for a receiver to bring suit against directors for negligence and loss. *Buist v. Melchers*, 44 S. C. 46 (1895). If the receiver refuses to sue, a stockholder may sue. See § 740, *infra*. A suit against directors to hold them liable for negligence and mismanagement may be in equity and may be filed by the receiver. *Fisher v. Parr*, 92 Md. 245 (1901). A receiver may bring a suit in equity to hold a director liable for misconduct where particular property or the proceeds thereof are involved; otherwise his remedy is at law. *Mabon v. Miller*, 81 N. Y. App. Div. 10 (1903).

² *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).

³ *O'Brien v. Blaut*, 17 N. Y. App. Div. 288 (1897).

⁴ The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders where such contract is a fair one, even though some of the stockholders dissent. *People v. Anglo-American, etc. Assoc.*, 66 N. Y. App. Div. 9 (1901); s. c., 169 N. Y. 606. In the case of *Woerz v. Schumacher*, 37 N. Y. App. Div. 374 (1899); *aff'd*, 161 N. Y. 530, a suit by a receiver of an insolvent bank against the directors was compromised by the directors paying thirty-five per cent. of the liabilities of the bank and taking all the assets and agree-

to do with some of the acts complained of, the bill is multifarious as to them.¹ Corporate creditors cannot hold directors liable for mere non-feasance, but a receiver may hold them liable.² Depositors in a national bank may join in maintaining a single suit against directors for negligence in conducting the affairs of the bank, it having become insolvent thereby.³ In a stockholder's suit against the executive committee of a bank for negligence in managing the business of the company, a settlement with one of the defendants and a release to him releases the others.⁴ Where directors and officers of an insolvent bank are also creditors, their liability for negligence may be offset against their claims as creditors.⁵

§ 702. *Instances of negligence of directors in the performance of their duties.*—It is difficult to lay down any rules as to what acts will constitute negligence on the part of corporate officers. Each case is to be determined largely on its own facts. Thus, where the directors kept no accounts, paid no calls, and collected no subscriptions, they were quite properly held guilty of negligence and were made liable therefor.⁶ So also the directors of a national bank are liable when they loan money to irresponsible persons, allow overdrafts, employ dishonest, unfaithful, and incompetent clerks, and neglect to take security from the cashier, president, and other officers for good conduct and the performance of duties.⁷ Directors are not personally liable for error of judgment in declaring dividends unless they were culpably or grossly negligent in the matter.⁸

ing to pay to the receiver anything realized by them over and above such thirty-five per cent. Where the court has ordered the receiver to sue the directors for negligence, the court has no power to authorize a settlement with one director under seal, especially where the effect would be to discharge the others. *Murphy v. Peniman*, 66 Atl. Rep. 282 (Md. 1907).

¹ *Emerson v. Gaither*, 103 Md. 564 (1906).

² *Stone v. Rottman*, 183 Mo. 552 (1904).

³ *Boyd v. Schneider*, 131 Fed. Rep. 223 (1904).

⁴ *Chetwood v. California Nat. Bank*, 113 Cal. 414, 649 (1896).

⁵ *Elliott v. Farmers' Bank, etc.*, 57 S. E. Rep. 242 (W. Va. 1907).

⁶ *Neall v. Hill*, 16 Cal. 145 (1860).

⁷ *Brinckerhoff v. Bostwick*, 88 N. Y.

52 (1882). See s. c., 105 N. Y. 567. See also *Smith v. Rathbun*, 22 Hun, 150 (1880). As to the liability of a cashier, see *Commercial Bank v. Ten Eyck*, 48 N. Y. 305 (1872).

⁸ Even though a director knew his name was signed to a report to the stockholders after he resigned, yet he is not liable for negligence where he took no part in drawing the report or in recommending the dividends based thereon. *Re National Bank of Wales* (1899), 2 Ch. 629, rev'g 79 L. T. Rep. 667. Directors are not liable to corporate creditors either at common law or under a statute for paying dividends when they supposed, and the books showed, that the company was prosperous and had profits for distribution, but it subsequently turned out that the president had embezzled the funds and substituted fictitious notes

Where the president of a corporation sells large quantities of coal to a firm which his sons control, and allows the debt to increase when he could easily have collected it, and ultimately the debt is lost, he is liable for negligence and must make good the loss.¹ The president of a bank may be held personally liable to the bank for negligence in permitting the cashier to loan bank funds on inadequate security and concealing the facts from the board of directors.² The business usages of the community enter into the question of whether a director was negligent in making loans. The directors may commit the business to the officers, but must give reasonable supervision and not be guilty of gross inattention. Thus, the loan of one-third of the capital stock to one person is not necessarily negligent.³ Where for three years the directors turn the management over to the cashier, of no responsibility, and know of illegal loans and neglect to record mortgages, they are liable for losses incurred thereby.⁴ Directors in a national bank are not liable for the misconduct of the cashier in making excessive loans to a particular corporation where such directors have no reason to suspect such loans; but an examining committee of directors whose duty it is to examine the securities are liable, where such committee knew of such loan.⁵ Where the president of a bank cancels a debt of the bank

of customers and had falsified the books in omitting debts for material, there being no proof that the directors even in the exercise of ordinary diligence would have discovered that the company was insolvent. *Chick v. Fuller*, 114 Fed. Rep. 22 (1902).

1 *Doe v. Northwestern, etc. Co.*, 78 Fed. Rep. 62 (1896).

2 *Commercial Bank v. Chatfield*, 127 Mich. 407 (1901). The president of a bank is personally liable to the bank if he permits the cashier to borrow a large sum on inadequate security. He is bound to exercise that degree of care that a careful man would exercise in his own affairs of like importance. A director, however, who takes no part in the transaction is not liable for the negligence of other directors. *Commercial Bank v. Chatfield*, 121 Mich. 641 (1899).

3 *Whceler v. Aiken County, etc. Bank*, 75 Fed. Rep. 781 (1896).

4 *Robinson v. Hall*, 63 Fed. Rep. 222 (1894), rev'g 59 Fed. Rep. 648. Bank

directors are liable for defalcations of the cashier where the by-laws requiring them to examine the accounts were not complied with by them, and overdrafts were continued on insufficient security, after the bank examiner had called their attention to them; and it is no defense that the directors did not know that the accounts were incorrect and relied upon the reports of the officers and the examinations of the state officials. *Campbell v. Watson*, 62 N. J. Eq. 396 (1901).

5 *Warner v. Penoyer*, 91 Fed. Rep. 587 (1899). Where the directors of a national bank know that excessive loans are being made to its president and others and they take no steps to reduce the loans or prevent their increase, and the bank becomes insolvent, they are liable for losses thereby incurred, and such liability may be enforced by a suit in equity, even though a suit at law will be

barred by the statute of limitations.

against one of his relatives in exchange for securities which ultimately become worthless, he is liable for the loss.¹ It is negligence for directors to build a hotel before they have provided funds therefor and before they have the title to the land.² Directors of a bank are not liable in an action for deceit brought by a purchaser of stock, although they signed the cashier's annual statement which was false, there being proof that they believed it to be true.³ A director is not liable for a deposit made in a bank after it was insolvent, where there was no fraud on his part inducing the deposit.⁴ But a director in a bank is personally liable to persons who deposit their money in the bank after he knows that it is hopelessly insolvent, where he fails to initiate measures to close the business of the bank. It is his duty to call a meeting of the directors, or report the condition of things to the state authorities, or instruct the cashier to stop taking deposits, or to warn individual depositors, or, if necessary, make public announcement of the condition of things.⁵ A depositor in a bank may sue the directors for gross negligence leading to the loss of his money, and may join also a cause of action against them for false statements as to the condition of the bank.⁶ The president is negligent and is liable if he does not require the secretary to give a bond for his good conduct, as required by the by-laws of the corporation.⁷ But it has been held that the directors are not liable for a failure to have the secretary's bond renewed, they supposing that it did not expire at the end of the year.⁸ The law is well established that the corporate officers are not liable on the ground of negligence for *ultra vires* acts which they have done or sanctioned, but in good faith and without knowledge of their *ultra vires* character. The act itself may be impeached and set aside, and property transferred

The fact that such a director could not attend to his duties by reason of ill health is no excuse. *Rankin v. Cooper*, 149 Fed. Rep. 1010 (1906).

¹ *Lawrence v. Stearns*, 79 Fed. Rep. 878 (1897). Where the president, who is also a director, of an investment company waives security for a loan and takes securities of small value in exchange therefor, causing the loss of the loan, he may be held personally liable at the instance of a stockholder, and if the doubtful securities cannot be returned their value may be ascertained. The statute of limitations and laches do not commence to run until the stockholder has discovered

the facts. *Brinckerhoff v. Roosevelt*, 143 Fed. Rep. 478 (1906).

² *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895).

³ *Foster v. Gibson*, 38 S. W. Rep. 144 (Ky. 1896).

⁴ *Minton v. Stahlman*, 96 Tenn. 98 (1896).

⁵ *Cassidy v. Uhlmann*, 170 N. Y. 505 (1902).

⁶ *Solomon v. Bates*, 118 N. C. 311 (1896). Such a suit is in tort. *Tate v. Bates*, 118 N. C. 287 (1896).

⁷ *Pontchartrain R. R. v. Paulding*, 11 La. 41 (1837).

⁸ *Vance v. Phoenix Ins. Co.*, 4 Lea (Tenn.), 385 (1880).

thereunder may be recovered back; but if the directors have made an honest mistake, and it was a mistake which a man of usual intelligence might make, they are not personally liable therefor. The law does not require them to be learned in the law.¹ Bank directors who meet but once or twice during the year, and do not examine the books, and have no knowledge of affairs, are liable for losses resulting from long-continued overdrafts by insolvent parties.² A bank has no power to accept notes in payment of a subscription to its stock, and the directors are personally liable for so doing, unless the notes were good or the directors had reasonable cause to believe they were good.³ Managers of a building-loan corporation are liable for loans made to a firm in excess of the amount allowed by a by-law; but are not liable for a mistaken estimate of value of the security taken, nor for a defect in the acknowledgment of the security—a mortgage.⁴ A director has been held not liable for negligence in failing to sue for a debt due to the corporation.⁵ Directors are not liable for money lost by an overdrawn account.⁶ A director of a loaning company is not liable for an unsecured loan merely because it appeared on the books and turns out to be uncollectible. Proof is necessary that he knew of the loan.⁷ One director is not liable for the acts or omissions of another unless he knew thereof or participated therein or failed in his duty to object to them.⁸ Bank directors are not liable for negligence merely because the cashier has for years been embezzling the funds and making false entries.⁹ A treasurer is not liable for depositing funds in his name as treasurer of the corporation, in a private bank, which

¹ *Watts's Appeal*, 78 Pa. St. 370 (1875); *Hodges v. New England Screw Co.*, 1 R. I. 312, 348 (1850); *Spering's Appeal*, 71 Pa. St. 11, 24 (1872); *Williams v. McDonald*, 37 N. J. Eq. 409 (1883). *Cf.* s. c., 42 N. J. Eq. 392 (1886); *Joint Stock Discount Co. v. Brown*, L. R. 3 Eq. 139; s. c., L. R. 8 Eq. 381 (1869). See also § 682, *supra*.

² *Marshall v. Farmers', etc. Bank*, 85 Va. 676 (1889).

³ *Coddington v. Canaday*, 157 Ind. 243 (1901).

⁴ *Citizens' Bldg. etc. Assoc. v. Coriell*, 34 N. J. Eq. 383 (1881).

⁵ *Re Forest, etc. Min. Co.*, L. R. 10 Ch. D. 450 (1878).

⁶ *Turquand v. Marshall*, L. R. 4 Ch. App. 376 (1869).

⁷ *Couper v. Whitson*, 9 Ct. of Sess. Cas. (4th ser.) 1115 (1882).

⁸ *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).

⁹ *Louisville Sav. Bank v. Caperton*, 8 S. W. Rep. 885 (Ky. 1888). The directors of a bank are not bound to know of the cashier's mismanagement and are not liable therefor. *Clews v. Bardon*, 36 Fed. Rep. 617 (1888). For an English case holding the trustees and managers of a savings bank liable for a defalcation of the actuary, see *Re Cardiff Sav. Bank*, L. R. 45 Ch. D. 537 (1890). Where the president of a bank purchases a note which contains a guarantee on the part of the payee, which guarantee subsequently reduces the amount of the note, the president may be guilty of

is reasonably considered solvent, even though it turns out to have been insolvent.¹ The directors, however, are liable for allowing the treasurer to use corporate funds for lobbying purposes;² but not for allowing one of their number to manage the business, though he appropriate its property to himself.³ A president is not liable for losses due to mismanagement unless it amounted to fraud.⁴ Where a corporation authorizes the issue and sale of bonds, without specifying any officer to make the sale, the president is not personally liable for such bonds, even though he turned them over to the vice-president to sell and the vice-president kept the proceeds.⁵ Directors are liable for making investments contrary to the charter.⁶ Directors who waste the funds of the company in purchasing the worthless stock of another corporation are personally liable to a receiver for the amount so expended.⁷ Where a bank holds stock as collateral, and on sale purchases the same, the stock being in a coal company, it

negligence in purchasing the note. *Stearns v. Lawrence*, 83 Fed. Rep. 738 (1897).

¹ *Booth v. Dexter, etc. Co.*, 118 Ala. 369 (1898). A treasurer is not liable for loss of funds by the failure of a bank, where he deposited such funds in the bank as treasurer and with the consent of the company, nor is he liable for interest on money which he keeps in the bank by order of the court, unless it is shown that he received a profit therefrom. *Laurel Springs Land Co. v. Fougerey*, 57 N. J. Eq. 318 (1898). The treasurer may be liable for a deficit, even though the cause of the deficit cannot be ascertained. *Equitable, etc. Assoc. v. Roland*, 198 Pa. St. 643 (1901). The treasurer is not liable for losses by deposits made by him, where the corporation acquiesced in the deposits. *New York, etc. R. R. v. Dixon*, 114 N. Y. 80 (1889). A treasurer of an association who receives no compensation is a gratuitous bailee, and is only liable for gross negligence in paying out funds. *Hibernia Bldg. Assoc. v. McGrath*, 154 Pa. St. 296 (1893).

² *Shea v. Mabry*, 1 Lea (Tenn.), 319 (1878). See also § 682, *supra*.

³ A director is not liable to a creditor of the bank for negligence in allowing the president to gradually

embezzle all its assets, where such director received no pay, and once or twice a week he attended to the discounts, saw how much money was on hand, and once a year counted the cash and securities. *Swentzel v. Penn Bank*, 147 Pa. St. 140 (1892), holding also that the plaintiff was not entitled to costs, having failed to prove his case. *Contra* in New Jersey. The corporation should be a party defendant. Creditors also may be made parties defendant. *Camp v. Taylor*, 19 Atl. Rep. 968 (N. J. 1890).

⁴ *David Reus, etc. Co. v. Conrad*, 101 Md. 224 (1905), holding that the president was not liable for accepting as security for a loan certain real estate subject to a *lis pendens*.

⁵ *Owego, etc. Co. v. Boyer*, 111 N. Y. App. Div. 140 (1906).

⁶ The case of *Williams v. McKay*, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers, etc., had made investments contrary to the by-laws, charter, and statutes.

⁷ *Bowers v. Male*, 186 N. Y. 28 (1906).

should sell the stock within a reasonable time. If it continues to hold it and a large loss results, the president is personally liable.¹ Directors are not liable for errors of themselves or the cashier in making loans.² Inasmuch as directors serve in nearly all cases without pay, the law is not exacting in its requirements of them. But a director may be liable even though he served without pay.³ Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown.⁴

It is not actionable negligence in directors to proceed to business where only a small part of the capital is subscribed.⁵ They are not liable for special deposits where there was no negligence on their part.⁶

Directors are not bound to make a thorough examination of the books and papers of a bank.⁷

A director who is absent on leave of absence is not liable for losses occurring during that time,⁸ nor for losses occurring shortly after he becomes a director.⁹

1 *Stone v. Rottman*, 183 Mo. 552 (1904).

2 The directors of a building corporation may not be liable for investing in second mortgages, although it was *ultra vires*. *Sheffield, etc. Soc. v. Aizlewood*, L. R. 44 Ch. D. 412 (1889). Directors are not liable for a negligent or *ultra vires* act in lending the funds without taking proper security, unless it is shown that they failed to really exercise in good faith their discretion and judgment as directors. *Re New Mashonaland, etc. Co.*, [1892] 3 Ch. 577. Negligence is not proved by the facts that the bank's capital is gone; that large dividends were declared based on large amounts of assets that turned out to be worthless; that real estate taken for debts depreciated in value; that real estate was bought in on foreclosure sales by the bank; that the directors did not closely watch the cashier, there being no proof of lack of reasonable skill, etc., on his part; that they intrusted the management to the cashier, a man of experience and ability; that overdrafts were allowed to responsible parties; and that there was delay in

suings on notes. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). Various acts of mismanagement were considered in *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890).

3 *Michleson v. Pierce*, 107 Wis. 85 (1900).

4 *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901).

5 *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890).

6 An officer of a corporation is not liable for the loss of corporate securities without negligence on his part, though intrusted with their care. *Mowbray v. Antrim*, 123 Ind. 24 (1890).

7 *Briggs v. Spaulding*, 141 U. S. 132 (1891). Although the directors trust the management of the bank entirely to the cashier, and do not examine the books, they are not liable to the creditors of the bank, even though the cashier, by dishonesty and reckless management, wrecks the bank. *Warner v. Penoyer*, 82 Fed. Rep. 181 (1897).

8 *Briggs v. Spaulding*, 141 U. S. 132 (1891).

9 A bank director is not liable for

The measure of damages for negligence cannot be the entire capital stock which was paid in in cash, and also the debts which the stockholders may have to pay.¹ Various instances relative to the liability of directors are given in the notes below.²

§ 703. *Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.*—

The directors of a corporation are not guarantors that no mistakes will be made in the management of the corporate business, nor do they insure the corporation against loss from the frauds or embezzlement of subordinate officers and agents. They are required to exercise reasonable care and sound business judgment, but nothing further than this. They generally serve without pay, and usually by reason of their own interest in the stock of the company are directly interested in the welfare of the corporation. But, though this is the case, they must use ordinary diligence in ascertaining the condition of things, and ordinary intelligence in their action as directors.³ They are liable for losses if they pay no attention to busi-

negligence where the bank becomes insolvent within a short time after he became a director. *Briggs v. Spaulding*, 141 U. S. 132 (1891).

¹ *Bloom v. National, etc. Loan Co.*, 152 N. Y. 114 (1897), aff'g 81 Hun, 120.

² A director of an insolvent corporation who stands by and allows the treasurer to draw checks payable to the president to be used by him for his personal debts is personally liable to corporate creditors to the amount of such checks. *Bird v. Magowan*, 43 Atl. Rep. 278 (N. J. 1898). Directors are not personally liable because they make a mistake in the price paid for property, even though they knew all about the property, nor are they liable because they pay the purchase price after discovering defects in the property, time being given to the vendors to remedy the defects. *Lagunas, etc. Co. Ltd. v. Lagunas Syndicate, Ltd.*, [1899] 2 Ch. 392. A committee to which the board refers, as auditors, the reports of the secretary, are not liable for embezzlement of the secretary not discovered by them, it appearing that such committee were not directors or officers and that the

items appearing in the statements corresponded with the items upon the books of the company. *Alpena, etc. Assoc. v. Denison*, 121 Mich. 159 (1899). In the case of *San Pedro, etc. Co. v. Reynolds*, 121 Cal. 74 (1898), a general manager was held liable for negligence leading to embezzlement on the part of the bookkeeper. Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and, even though one of them resigns, the liability continues for the benefit of past as well as future creditors. *Nix v. Miller*, 26 Colo. 203 (1899). Where a lease of a street railway has been made, in accordance with the vote of the stockholders and directors, a stockholder cannot hold the directors personally liable for not informing the stockholders of an offer to purchase the property, it not being shown that the offer was from a responsible party or that it would have made any difference in the stockholders' action. *Strunk v. Owen*, 199 Pa. St. 78 (1901).

³ The leading case on the liability of directors for negligence is *Charita-*

ness at meetings of the directors, or if they regularly fail to attend such meetings. They must exercise a reasonable amount of diligence

ble Corp. *v. Sutton*, 2 Atk. 400 (1742). The most important, recent, and fully considered case, however, is *Briggs v. Spaulding*, 141 U. S. 132 (1891), where the supreme court of the United States laid down rules (pp. 147, 151, 152) which very largely exempt directors in national banks from any liability whatsoever. In *North Hudson, etc. Assoc. v. Childs*, 82 Wis. 460, 476, 477 (1892), the court said that an officer is "responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of the business." The court also said: "Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions." In *Percy v. Millaudon*, 8 Mart (La.) 68 (1829); s. c., 3 La. 568, the court said: "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." This case also holds that directors are not liable for errors of judgment unless they are grossly wrong. *United Society, etc. v. Underwood*, 9 Bush (Ky.), 609 (1873), holding that the director must use ordinary diligence; *Williams v. Gregg*, 2 Strobb. Eq. (S. C.) 297 (1848). In *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263 (1861), the court said: "The rule is a just one that an agent is bound to apply the same diligence to obtain payment of debts in his care that he does to recover his own." In *Land Credit Co. v. Fermoy*, L. R. 5 Ch. App. 763 (1870), rev'g L. R. 8 Eq. 7, an attempt was made to hold liable, for negligence, directors who innocently approved of a loan which in reality had not been made, but the money had been used by other directors for speculative purposes. See also *Re Railway Imp. Co.*, 42 L. T. Rep. 206 (1880); *Scholefield's Case*, 17 W. N. 22 (1882); *British, etc. Ass. Co., L. R. 14 Ch. D. 335* (1880). In *Dunn v. Kyle*, 14 Bush (Ky.), 134 (1878), where a cashier had embezzled the funds of the bank, the court said: "Bad faith or gross negligence is certainly necessary to render the director liable to a stockholder in a case like this." The court also approved of the rule given in *Morse on Banking*, p. 117, to the effect that, "for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable. Though in cases in which their action has been so grossly ill-advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible." The mere fact that loans by a bank turn out to have been unwise and hazardous does not render the director liable therefor. *Witters v. Sowles*, 31 Fed. Rep. 1 (1887). Bank directors cannot be held liable for negligence in loans, etc., at the suit of a stockholder, where they have used ordinary care

and care. A director who is not present at a meeting cannot be charged for an illegal loan authorized at such meeting. Directors

and acted in good faith. *Jones v. Johnson*, 86 Ky. 531 (1888). In order to render bank directors liable, in an action of deceit, for a false statement as to the condition of the bank, thereby inducing deposits, it must be shown that they knew the statement to be false and not merely that they should have known it. *Pieratt v. Young*, 49 S. W. Rep. 964 (Ky. 1899). In a suit by a receiver to hold officers liable for negligence it is no defense that the directors knew of the mode in which the business was transacted. *New Haven T. Co. v. Doherty*, 74 Conn. 353 (1902). Under the Indiana statute directors in a bank are liable for gross inattention to business. *Coddington v. Canaday*, 157 Ind. 243 (1901). The fact that a by-law of a bank requiring the directors to examine the bank every three months has been long disregarded does not raise a presumption of repeal and does not release the directors from liability for negligence leading to a defalcation. *Campbell v. Watson*, 62 N. J. Eq. 396 (1901). For the mere failure of bank directors to exercise ordinary diligence in the management of the bank they cannot be held liable by general creditors. *Union Nat. Bank, etc. v. Hill*, 148 Mo. 380 (1899). The directors of a bank are entitled to accept statements made by discount or examining committees. *Stone v. Rottman*, 183 Mo. 552 (1904). The directors of a banking corporation are not liable to its creditors for violation or neglect of duty, there being no deceit. *Hart v. Hanson*, 14 N. Dak. 570 (1905). Where the statutes render directors liable for intentional neglect, it is no defense that they believed the president to be honest and competent and left the management to him. *Fletcher v. Eagle*, 74 Ark. 585 (1905). Directors in a bank are liable for losses due to the care-

lessness and mismanagement of the executive officers to whom the directors turned over the management, without exercising ordinary care and prudence in supervising their action. *Warren v. Robison*, 19 Utah, 289 (1899); s. c., 70 Pac. Rep. 989 (1902). The case of *Re Cardiff Sav. Bank*, [1892] 2 Ch. 100, is an example of one mode of doing business. The Marquis of Bute was made president of a savings bank at the age of six months. He continued to be president from 1848 until 1886. During this time he attended one meeting, in 1869. His name, however, always appeared in the pass-books, annual reports, and circulars. He paid no attention whatsoever to the bank. It transpired in 1886 that the deceased actuary of the bank had defrauded it of a great deal of money. The court held that the marquis was not liable. The duty of an auditor is to examine the books, ascertain their correctness, and prepare a balance sheet showing the company's financial position at the time he is appointed, but he is bound to use only a reasonable amount of care and skill, varying according to the case. *Re Kingston Cotton Mill Co.*, [1896] 2 Ch. 279. A director who is habitually absent from meetings of the board may be liable for the acts of the board. *Schout v. Conkey, etc. Assoc.*, 87 Hun, 568 (1895); *aff'd*, 156 N. Y. 668.

The law on this subject is ably and clearly set forth by Mr. Justice Earl, in *Hun v. Cary*, 82 N. Y. 65 (1880). *Cf. Van Dyck v. McQuade*, 86 N. Y. 38 (1881). See also *Scott v. Depeyster*, 1 Edw. Ch. 513 (1832); *Litchfield v. White*, 3 Sandf. Super. 545 (1850); *Liquidators, etc. v. Douglas*, 32 Scot. Jur. 212 (1860); *Spering's Appeal*, 71 Pa. St. 11 (1872), an important case, and one which is frequently spoken of as the leading case herein. A

who continue an officer in office after he has squandered the assets are liable for further losses by him, and they are liable for failure to renew his bond when it ran out.¹

The directors are not bound to examine the books of the company, nor to investigate the mode of living of their employees. But they are required to attend the directors' meetings with reasonable regularity; to have statements of the business made to them; to object to the transaction of important business without the knowledge and consent of the board of directors; to examine with rea-

director who trusts everything to the other directors, or who performs all acts as a mere man of straw, is liable. *Joint-Stock Discount Co. v. Brown*, L. R. 8 Eq. 404, 405 (1869). See also *Williams v. McKay*, 40 N. J. Eq. 189 (1885); *Ackerman v. Halsey*, 37 N. J. Eq. 356 (1883); *aff'd*, *Halsey v. Ackerman*, 38 N. J. Eq. 501; *Mutual, etc. Bank v. Bosseilux*, 3 Fed. Rep. 817 (1880). That directors are not liable for the fraud or misconduct of co-directors, see *Movius v. Lee*, 30 Fed. Rep. 298 (1887); *aff'd*, 141 U. S. 132. Directors are not liable for gross negligence in buying out a business where the corporation was organized for the express purpose of buying out that business. *Overend, etc. Co. v. Gibb*, L. R. 5 H. L. 480 (1872). Where loans without securities are improperly made, and the guilty directors are liable therefor, a director who did not participate is nevertheless liable, if he does not take steps to remedy the matter as soon as he learns of it. *Jackson v. Munster Bank*, 15 L. R. Ir. 356 (1885). After a director sends in a letter of resignation he is not liable for the wrongful acts of the directors, even though no attention is paid to his letter. *Perry's Case*, 34 L. T. Rep. 716 (1876). In the case of *Movius v. Lee*, 30 Fed. Rep. 298, 307 (1887); *aff'd*, 141 U. S. 132, the court held, reviewing the cases, that "there is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct

of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. . . . It is nowhere adjudged that all must always act, or that they must not trust one another to act, or that they are liable for the mere omission to watch and restrain the others, without wrong intention on their own part, or actual knowledge of the wrong on the part of the others." Directors are required to use such care and diligence as a prudent man exercises in his own affairs. If he utterly neglects his duties he is liable. *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889). Misfeasance is such non-feasance as is negligence amounting to a breach of trust. Liability for negligence cannot be imputed to directors unless it is gross negligence resulting in loss. To constitute gross negligence there must be, first, a plain duty to do or abstain from a particular thing; secondly, such abstention or such action as the court would be justified in holding to be mischievous or reckless. When a duty incumbent on the directors has not been performed, the burden of proving gross negligence is on those who allege that conclusion; but where the facts establish gross negligence, but at the same time show that it is possible or likely that a satisfactory explanation ought to be forthcoming, the burden of proof is shifted. *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890).

¹ *Murphy v. Penniman*, 66 Atl. Rep. 282 (Md. 1907).

sonable care the reports and matters of business brought before them; and not to shut their eyes to obvious objections to the business transactions and general condition of the corporation, or to the character and well-known reputation of the employees. The failure of a national bank director to perform his duty, as required by the act of congress, subjects him to damages only when he knowingly violated the national banking act as specified in the act, and there is no common law liability.¹ In England it is held that a salaried bank president is not liable, even though he publishes accounts which do not correctly state the actual condition of the bank, it being shown that the account was prepared by the cashier and audited by independent auditors, and that the president acted in good faith.² The New York court of appeals has said: "The law is settled in this state that directors of monetary corporations are held to the same degree of care that men of ordinary prudence exercise in regard to their own affairs."³ On the other hand, in Missouri it is held that a director is not bound to exercise the care he exercises in his own business, but only such care as a reasonably prudent man would exercise under the same circumstances.⁴ When a director has knowledge that an unauthorized act is being done, he cannot escape liability, however innocent he may be, unless he prevents the act by his protest, or files a bill in equity to remedy the wrong.⁵

¹ *Yates v. Jones Nat. Bank*, 206 U. S. 158 (1907), rev'g 105 N. W. Rep. 287.

² *Prefontaine v. Grenier*, 95 L. T. Rep. 623 (1906). A director and officer of a bank cannot avoid liability for negligence on the ground that he did not know of matters which it was his duty to know. *Elliott v. Farmers' Bank, etc.*, 57 S. E. Rep. 242 (W. Va. 1907).

³ *Hanna v. Lyon*, 179 N. Y. 107 (1904). Directors in a bank cannot be held liable for loss made by the cashier where they have exercised reasonable supervision and the same degree of care which is used by ordinarily careful and prudent men under the same circumstances. *Mason v. Moore*, 73 Ohio St. 275 (1906).

⁴ *Stone v. Rottman*, 183 Mo. 552 (1904).

⁵ *Cassidy v. Uhlmann*, 170 N. Y. 505 (1902); *Joint-Stock Discount Co. v. Brown*, L. R. 8 Eq. 381, 402 (1869); *Ashhurst v. Mason*, L. R. 20 Eq. 225 (1875). That a director is not in general liable for misdeeds of subordinate corporate agents, see *Bath v. Caton*, 37 Mich. 199 (1877); *Bacheller v. Pinkham*, 68 Me. 253 (1878); *Nicholson v. Mounsey*, 15 East, 384 (1812); *Stone v. Cartwright*, 6 T. R. 411 (1795); *Hewett v. Swift*, 85 Mass. 420 (1862). *Cf. Weir v. Barnett*, L. R. 3 Exch. D. 32, 238 (1878). But knowledge obtained by the director previous to becoming such does not compel him to act. *Re Forest, etc. Co.*, L. R. 10 Ch. D. 450 (1878).

CHAPTER XLIII.

THE POWER OF VARIOUS OFFICERS AND AGENTS TO CONTRACT FOR A CORPORATION, AND THE MODE OF DRAWING AND EXECUTING CORPORATE CONTRACTS—ADMISSIONS AND NOTICE.

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| <p>§ 704. Under what circumstances is a corporation bound by a contract made in its name.</p> <p>A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COMMITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER, AND MISCELLANEOUS AGENTS TO CONTRACT FOR A CORPORATION.</p> <p>705-707. Promoters—Their liability and the liability of the corporation and subscribers.</p> <p>708-711. Stockholders—Their power to make by-laws and contracts, expel members and remove directors.</p> <p>712-714. Directors:
 Their power to contract.
 Ratification by directors.
 <i>De facto</i> directors.
 Directors' meetings, call quorum.
 Their minute-book as evidence.</p> <p>715. Executive committee.</p> <p>716. President.</p> <p>717. Secretary and treasurer.</p> <p>718. Cashier.</p> <p>719. General manager and superintendent.</p> <p>720. Subordinate agents.</p> <p>B. THE FORM OF CORPORATE CONTRACTS—CORPORATE SEAL—DRAFTING, SIGNING, AND SEALING—LIABILITY OF OFFICERS ON CONTRACTS IRREGULARLY EXECUTED.</p> | <p>§ 721. Ordinary corporate contracts, by the modern rule, need not be under seal.</p> <p>722. Method of drafting, signing, sealing, and acknowledging a corporate contract—Proof of seal and authority to attach it.</p> <p>723. Corporate instruments made out in the name of an officer or agent instead of in the name of the corporation may be enforced by or against the corporation.</p> <p>724. Liability of officers on irregularly executed instruments.</p> <p>725. Charter and by-law requirements as to manner of executing corporate contracts—Right of party, contracting with corporation, to rely on proper corporate action having been taken.</p> <p>C. ADMISSIONS OF OFFICERS AND NOTICE TO OFFICERS.</p> <p>726. When is the corporation bound by its officers' or agents' admissions?</p> <p>727. Notice to the corporation by notice to the officers—Corporate books as evidence against directors and stockholders—Notice of fraud perpetrated on the corporation.</p> |
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§ 704. *Under what circumstances is a corporation bound by a contract made in its name—The three tests for determining whether a contract may be enforced against a corporation.*—In determining whether a contract may be enforced against a corporation, three things are to be considered. First, did the corporation have the power to enter into such a contract? Second, was the contract entered into by a duly-authorized agent of the corporation? Third, was the contract drawn, signed, and sealed in a form which binds the corporation?

The first of these questions has been already treated in the preceding chapters of this book.¹

There is an infinite variety of contracts which the corporation may enter into, and the great mass of law on this subject is constantly being increased by new decisions. A corporation may enter into any contract which is within its express or implied powers. And even a contract which is not within the express or implied powers of the corporation is sometimes enforced against it or in its behalf when one party to the contract has already performed, or when the parties cannot be restored to their original positions.²

The second and third tests of whether a contract is enforceable against a corporation are considered in this chapter.

A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COMMITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER, AND MISCELLANEOUS AGENTS TO CONTRACT FOR A CORPORATION, AND CONTRACTS BINDING ON THE CORPORATION BY RATIFICATION.

§ 705. *Promoters—Liability to strangers, to the corporation, and to subscribers for stock—Liability to subscribers herein—Contribution—Liability of the corporation herein to strangers and to promoters.*—A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.³ The "flotation" of a property means a sale thereof at a profit to a substantial company.⁴

¹ See particularly chs. XL and XLI, *supra*.

² See ch. XL, *supra*.

³ Quoted and approved in *Dickerman v. Northern T. Co.*, 176 U. S. 181, 203 (1900), and *Burbank v. Dennis*, 101 Cal. 90 (1894). An interesting description of the "promoter" is given by Judge Lurton, in *McMullen v. Ritchie*, 64 Fed. Rep. 253, 260 (1894), as follows: "He was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or 'boomer' he seems to be unrivaled; a man of large general information and robust constitution,

extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions." Promoters are "the persons who undertake to form and set going a company with reference to a given project." *First, etc. Co. v. Hildebrand*, 103 Wis. 530 (1899). A trust company receiving subscriptions to the stock of a corporation and issuing receipts therefor, to the effect that upon payment the party should receive from the trust company a certificate for the stock in the proposed corporation, may be liable for mis-

⁴ *Torva, etc. Syndicate v. Kelly*, [1900] A. C. 612.

There has been great difficulty in determining who is to be considered a promoter and who is not. As regards the liability to strangers, however, it seems that every one is liable herein as a promoter who induces such stranger to act in expectation of payment from the prospective corporation. Having induced the party to act, the promoter must see that he is paid.

In America the question of the liability of promoters to persons who have performed services or entered into contracts relative to a prospective corporation has rarely arisen. But in England this question has frequently been passed upon. In general the promoter of a prospective corporation is liable for services rendered by others who are employed as clerks, engineers, or in a similar capacity in the work of promoting the enterprise.¹

statements in the prospectus which had been issued by the promoters. *McClure v. Central Trust Co.*, 165 N. Y. 108 (1900). In England the word "promoters" is often used in special acts of incorporation in place of the word "incorporators." *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36. For definitions of a promoter, in reference to his liability to the corporation itself, see § 651, *supra*. It has recently been well said: "The business promoter seems temporarily to have fallen into disrepute. He is regarded with the same suffering and suspicion as was the financier in the fifteenth century. There may be some ground for this suspicion. In itself, however, the task of a promoter is not only essential for industrial progress, but it demands for its successful exercise a high grade of intelligence and judgment. It is he who seeks out new opportunities for investment, who formulates plans for working those opportunities, and who so organizes the conditions and forces at his disposal as to give market value to an enterprise which first existed as an idea in his mind."

1 Promoters of a corporation organized but not used may be liable on a debt incurred by one of them, with the knowledge of the others, in connection with the enterprise. *Ijams v.*

Andrews, 151 Fed. Rep. 725 (1907). The promoters may be liable for royalties according to contract, even though they organized a corporation which did all the business. *American Paper Bag Co. v. Van Nortwick*, 52 Fed. Rep. 752 (1892). Promoters are liable for goods ordered and delivered for a corporation that is never organized. *Hub Pub. Co. v. Richardson*, 13 N. Y. Supp. 665 (1891). Where the individuals who intend to incorporate a company employ an attorney and authorize him to contract for printing, they are personally liable for the printing bill. *Hersey v. Tully*, 8 Colo. App. 110 (1896). Promoters may be liable on a contract to pay a commission to a person obtaining subscriptions to the stock of the company. *Pratt v. Finkle*, 99 Ga. 616 (1896). A promoter is liable for preliminary debts incurred. *Sandusky Coal Co. v. Walker*, 27 Ont. (Can.) 677 (1896). Where the promoters after incurring debts abandoned the enterprise, each one of them is liable for at least his proportionate part of such debts. *Roberts Mfg. Co. v. Wright*, 62 Minn. 337 (1895). The secretary of a prospective company ordering advertisements is liable for the same, though he orders as "secretary *pro tem.*" *Hopcroft v. Parker*, 16 L. T. Rep. 561 (1867). An architect employed by one of the promot-

Where, however, the owner of land, with knowledge that several parties contemplate forming a corporation, makes a lease to one of

ers may hold the promoters liable, the scheme having been abandoned, and he may file a *lis pendens* on land which the promoter intended to turn into the corporation for stock. *Friedman v. Janssen*, 66 S. W. Rep. 752 (Ky. 1902). A committee appointed at a public meeting of mechanics to carry out certain things are personally liable for the wages of workmen employed by them. *McCartee v. Chambers*, 6 Wend. 649 (1831). The chairman of the promoters who signs the prospectus may by the jury be held to have authorized the expense of printing, and is liable personally. *Riley v. Packington*, L. R. 2 C. P. 536 (1867). In *Collingwood v. Berkeley*, 15 C. B. (N. S.) 145 (1863), a director who allowed his name to be used as such for a proposed company was held liable for a passage ticket which was purchased on a representation of the secretary that the company would be organized. That the interested parties may be liable to the attorney of the provisional committee of a company which is abandoned before incorporation, see *Parsons v. Spooner*, 5 Hare, 102 (1846). A promoter who employs a person in behalf of a proposed company is liable. *Bell v. Francis*, 9 Car. & P. 66 (1839). A local committee to form a company are liable to their secretary. They are not allowed to say that he must look to the corporation for pay. *Kerridge v. Hesse*, 9 Car. & P. 200 (1839). A promoter is liable personally on contracts made by him in behalf of the company with third persons, and his liability is not released by the subsequent adoption of the contract by the company. *Kilner v. Baxter*, L. R. 2 C. P. 174 (1866); *Scott v. Embury*, L. R. 2 C. P. 255 (1867). The question of whether a surveyor employed by promoters can look to them for compensation, the company not having

been formed, is for the jury, considering all the facts of the employment. *Higgins v. Hopkins*, 3 Exch. 163 (1848). If he was present when the promoters resolved that they should not be liable he cannot recover from them. *Laudman v. Entwistle*, 7 Exch. 632 (1852). In *Lake v. Argyle*, 6 Q. B. 477 (1844), it was left to the jury to decide whether the president of a proposed corporation thereby held himself out as liable on a contract made by an agent of the proposed company. It is a question for the jury whether the president of a proposed corporation is liable. *Wood v. Argyle*, 6 M. & Gr. 928 (1844). Persons induced to subscribe for bonds on misrepresentations are not liable to advertisers, even though from the former's subscriptions the advertising expense was to be paid. *Barron v. International T. Co.*, 184 Mass. 440 (1903). Allowing one's name to be used as a director and suggesting that advertising be done does not render a person liable for the advertising. *Burbridge v. Morris*, 3 H. & C. 664 (1865). A promoter is not liable on a contract made before he joined in the enterprise, though the contract is performed afterwards. *Newton v. Belcher*, 12 Q. B. 921 (1848). A promoter is not liable on contracts made in writing before he became such. *Beale v. Moulds*, 5 Ry. & Can. Cas. 105 (1847). Where after adopting articles of incorporation some of the parties withdraw and take no further part, they are not liable for the expense of the subsequent incorporation. *Middle Branch, etc. Co. v. Jones*, 115 N. W. Rep. 3 (Iowa, 1908).

A person contracting with a partnership may hold the partners liable, although he knew that their articles provided for incorporation and they afterwards did incorporate. *Witmer v. Schlatter*, 2 Rawle (Pa.), 359

such promoters, the intent, being that the lease shall be assumed by the corporation, he cannot hold the individual taking the lease

(1830). But the rule is otherwise where the party allows the account to be transferred to the corporation and then carries on a long running account. *Whitwell v. Warner*, 20 Vt. 425 (1848). Or where the party knew that he was contracting with the other as an agent of an unincorporated association. *Abbott v. Cobb*, 17 Vt. 593 (1845). As to this subject of liability, see also §§ 245, 503c, *supra*, on the liability of trustees; § 508, *supra*, on the liability of officers of unincorporated associations; § 888, *infra*, on the liability of committee-men, and § 724, *infra*, on the liability of persons who sign their names and add an official title. Managers of a syndicate are not personally liable on their contracts as managers if the syndicate itself is known, because an agent of a disclosed principal is not so liable. *Jones v. Gould*, 123 N. Y. App. Div. 236 (1908). In England a provisional committee is generally appointed by the subscribers. This committee is generally held not liable. But a committee of management is usually appointed subsequently, and this committee is generally held liable. That a provisional committee is not liable, see *Nevins v. Henderson*, 5 Railw. & Can. Cas. 684 (1848); *Dawson v. Morrison*, 5 Railw. & Can. Cas. 62 (1847); *Ex parte Roberts*, 2 Macn. & G. 192 (1850); *Carmichael's Case*, 17 Sim. 163 (1850); *Ex parte Clarke*, 20 L. J. (Ch.) 14 (1851); *Maitland's Case*, 3 Giff. 28 (1861); *Hall's Case*, 3 De G. & S. 214 (1850); *Ex parte Stocks*, 22 L. J. (Ch.) 218 (1853); *Tanner's Case*, 5 De G. & S. 182 (1852); *Forrester v. Bill*, 10 Ir. L. Rep. 555 (1847); *Ex parte Osborne*, 15 Jur. 72 (1851); *Burnside v. Dayrell*, 3 Exch. 224 (1849); *McEwan v. Campbell*, 2 Macq. 499 (1857). *Contra*, *Lefroy v. Gore*, 1 Jo. & Lat. 571 (1844). It is for the

jury to say whether a provisional director is liable for advertisements which he authorized the secretary to publish at the secretary's expense. *Maddick v. Marshall*, 17 C. B. 829 (1864), affirming 16 C. B. 387. As to a provisional committee-man, see also *Williams v. Pigott*, 2 Exch. 201 (1848). Merely allowing one's name to be used as a member of a provisional committee does not render a person liable on contracts made. *Barker v. Stead*, 3 C. B. 946 (1847); *Patrick v. Reynolds*, 1 C. B. (N. S.) 727 (1857). Nor is he liable to an engineer, although the former took part in meetings. *Rennie v. Wynn*, 4 Exch. 691 (1849). Moreover, the person sued may show that no personal liability was to be incurred and that the plaintiff knew it. *Rennie v. Clarke*, 5 Exch. 292 (1850). It is a question for the jury whether the provisional committee authorized and became liable on contracts made by the managing committee. *Williams v. Pigott*, 5 Ry. & Can. Cas. 544 (1848). For a case where the provisional committee were held not to have so authorized, see *Dawson v. Morrison*, 5 Ry. & Can. Cas. 62 (1847). But *Barrett v. Blunt*, 2 Car. & K. 271 (1846), made it a question for the jury. *Barker v. Lyndon*, 2 Car. & K. 651 (1847), held the committee not liable. So also *Giles v. Cornfoot*, 2 Car. & K. 653 (1847); *Griffin v. Beverley*, 2 Car. & K. 648 (1847). In *Bailey v. McCauley*, 13 Q. B. 815 (1849), the court said that it was a question for the jury whether a committee-man, *i. e.*, a promoter, allowed himself to be held out as liable, and that if the debt incurred was a necessary and usual one he is liable. In *Ex parte Cottle*, 2 Macn. & G. 185 (1850), affirmed *sub nom. Norris v. Cottle*, 2 H. L. Cas. 647 (1850), it was held that the mere fact of allowing one's name to appear

personally liable, the lease having been assigned by such individual

as a member of the provisional committee does not render a person liable at law for the debts. To same effect, *Ex parte Roberts*, 2 Macn. & G. 192 (1850).

A person who consents to the use of his name as a provisional committee to promote and organize a company is liable, as a partner, for the debt of the committee for stationery. *Barnett v. Lambert*, 15 M. & W. 489 (1846). But not where a board of managers afterwards takes charge and incurs the expense. *Bright v. Hutton*, 3 H. L. Cas. 341 (1852), rev'g 1 Sim. (N. S.) 602, and substantially overruling *Hutton v. Upfill*, 2 H. L. Cas. 674 (1850). To same effect, *Reynell v. Lewis*, 15 M. & W. 517 (1846). As to the matters to be proved in rendering a promoter liable, see *Carrick's Case*, 1 Sim. (N. S.) 505 (1851). *Lindley, Partn.* (see *Thompson, Liability of Officers*, p. 202), says of *Bright v. Hutton*, 3 H. L. Cas. 341 (1852), that it overruled directly or indirectly the following cases: "*Upfill's Case*, 2 H. L. Cas. 674 (1850); *Ex parte Besley*, 2 Macn. & G. 176 (1850). This case occurs three times in the books. It was first decided by Vice-Chancellor Knight-Bruce (3 De G. & S. 224), who held that *Besley* was not a contributory. This decision was appealed against and reversed by Lord Cottenham (2 Macn. & G. 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the vice-chancellor (3 Macn. & G. 287). The case as reported in 3 De G. & S. 224, and 3 Macn. & G. 287, is still law. *Bright's Case*, 1 Sim. (N. S.) 602 (1851). This was reversed on appeal (3 H. L. Cas. 341). *Ex parte Brittain*, 1 Sim. (N. S.) 281 (1851), decided reluctantly on the authority of *Upfill's Case*. *Hole's Case*, 3 De G. & S. 241 (1850), decided on the authority of *Ex parte Besley*, 2 Macn. & G. 176 (1850). *Markwell's Case*, 5 De G.

& S. 528 (1852), decided on the authority of *Upfill's Case*, but after the decision of *Bright v. Hutton*. It cannot, however, be considered law. See *Ex parte Capper*, 1 Sim. (N. S.) 178 (1851), and *Carrick's Case*, 1 Sim. (N. S.) 505 (1851). *Ex parte Morrison*, 15 Jur. 346, and 20 L. J. (Ch.) 296 (1851), decided on the authority of *Upfill's Case*, and in effect overruled by *Sharp and James's Case*, 1 De G., M. & G. 565 (1852). *Nicholay's Case*, 15 Jur. 420 (1851), decided on the authority of *Upfill's Case*. *Ex parte Sichell*, 1 Sim. (N. S.) 187 (1851), decided reluctantly on the authority of *Upfill's Case*. *Ex parte Studley*, 14 Jur. 539 (1850). This case is very briefly reported, but it seems inconsistent with such cases as *Hall's* (3 De G. & S. 214—1850), *Stocks's* (22 L. J. (Ch.) 218—1852), and *Carrick's* (1 Sim. (N. S.) 505—1851)."

A member of the managing committee is liable where he attended a meeting and knew of the employment. *Norbury's Case*, 5 De G. & S. 423 (1852); *Pearson's Case*, 3 De G., M. & G. 241 (1852). *Cf. Sharp & James's Case*, 1 De G., M. & G. 565 (1852). But not if he is unaware of his being on the committee. *Ex parte Haight*, 1 Drew. 484 (1853). For a case where promoters were held liable on a contract that the company would pay certain damages to a land-owner, see *Bland v. Crowley*, 6 Exch. 522 (1851). In *Webb v. London, etc. Ry.*, 1 De G., M. & G. 521 (1852), reversing 9 Hare, 129, the company was held not liable on such a contract. A promoter who promises that an existing railway company will pay the parliamentary expense of a contemplated new railway is not liable on such promise, the same being illegal and contrary to public policy. *MacGregor v. Dover, etc. Ry.*, 18 Q. B. 618 (1852). Where no stock is subscribed for, but an

to such corporation after it was formed.¹ The promise of promoters that the corporation will make certain payments does not render them personally liable if such payments are not made.² A loan of money for use in a business which was to be turned into a corporation and stock issued for such money does not entitle the loaner to an interest in the business if the corporation is not formed, but merely to a return of the money.³ But a promoter, who makes a contract to purchase, and gives a mortgage in his own name, is personally liable thereon, even though he was acting as agent for a corporation, the stockholders of the vendor and mortgagee not knowing that he was acting as agent.⁴ A promoter who makes a contract in behalf of the corporation to be organized, is personally liable on such contract, where there is no provision exempting him from liability.⁵ Even though promoters send to a person a printed form of application for stock, and he signs and returns the same, this does not obligate them

organization meeting is held and officers elected and debts incurred, the officers are liable for such debts. *Whetstone v. Crane, etc. Co.*, 1 Kan. App. 320 (1895), the ground of the decision being that such officers are merely promoters. In Nova Scotia, where a subscriber sues a promoter for damages for fraud in obtaining for himself stock and bonds illegally, the suit must be by the corporation, or by the stockholder if the corporation refuses to sue. *Weatherbe v. Whitney*, 30 Nova Scotia Rep. 49 (1897). Such claim cannot be joined with a personal claim for services rendered, etc. *Weatherbe v. Whitney*, 30 Nova Scotia Rep. 104 (1897).

¹ *Re Heckman's Estate*, 172 Pa. St. 185 (1896). An agreement of subscribers with promoters cannot be enforced by the promoters after the promoters have accepted a substitute agreement from the corporation. *Miltenberg v. James*, 31 N. Y. Misc. Rep. 607 (1900). The promoters of and subscribers to a corporation are not personally liable on a land contract made before incorporation by an agent, but the corporation itself is liable if it has taken an assignment of the contract. *Esper v. Miller*, 131 Mich. 324 (1902). Persons who lease premises in behalf of a proposed cor-

poration are liable for the rent if the corporation is not formed, but persons who subsequently subscribe for stock in the proposed corporation are not liable on such lease. *Kennedy v. Fulton, etc. Co.*, 108 S. W. Rep. 948 (Ky. 1908). See 112 S. W. Rep. 242.

² *Hogadone v. Grange, etc. Co.*, 133 Mich. 339 (1903).

³ *Fourchy v. Ellis*, 140 Fed. Rep. 149 (1905).

⁴ *Lewis v. Weidenfeld*, 114 Mich. 581 (1897).

⁵ *O'Rorke v. Geary*, 207 Pa. St. 240 (1903). Where a promoter agrees that a bill will be paid by the corporation when organized and the corporation has no power to pay it, the promoter is personally liable. *First Nat. Bank v. Church, etc.*, 129 Iowa, 268 (1906). The promoters are not liable personally for goods purchased for and in the name of the corporation before the final incorporation papers were filed. *Western, etc. Co. v. Davis*, 104 S. W. Rep. 573 (Ind. Ter. 1907). The promoters and originators of a corporation are personally liable for debts created in behalf of the proposed corporation prior to the time of incorporation, even though a corporate name was used. *Meinhard, etc. Co. v. Bedingfield & Co.*, 61 S. E. Rep. 34 (Ga. 1908).

to allot to him such stock or any part thereof.¹ Where promoters transfer an option to a corporation for stock, if the corporation does not exercise the option, any one of them may then purchase the property on his own account.² Where a promoting scheme is abandoned any one of the promoters may proceed to carry out a similar scheme without being under obligations to his first associates.³ Even though a national bank transacts business before it is authorized to do so by the comptroller, the officers and stockholders are not liable therefor as partners, but the officers may be liable on an implied warranty of their authority to act for the corporation.⁴

The subject of the liability of persons who sell a business to a corporation for stocks, bonds, or cash is considered elsewhere.⁵

Where a promoter has been held liable to strangers he may have contribution from his fellow promoters.⁶ Where the secretary was the original promoter and persuaded the others to go in, he cannot recover from them for his services.⁷ They are not liable to each other for services.⁸ A person may collect on a surveying contract from co-promoters though he was also a promoter.⁹ But not for services as secretary.¹⁰

Another difficult question connected with this subject is the liability of one promoter to another for failure to proceed with the promotion. The general rule is that where the contract is definite and the obligations are clear, an action at law for damages will lie by one promoter against another for such a breach thereof.¹¹ In a suit by

¹ *Feitel v. Dreyfous*, 117 La. 756 (1906).

² *Gillet v. Dodge*, 89 Pac. Rep. 741 (Ore. 1907).

³ *Parks v. Gates*, 84 N. Y. App. Div. 534 (1903). Where a promoter sues for damages, for breach of a contract by another promoter that the latter would not go into the enterprise unless he went in with the former, the plaintiff cannot sustain the suit by proving that he was to be paid a certain sum if certain information was furnished and that he furnished the same. *Mengis v. Fitzgerald*, 108 N. Y. App. Div. 24 (1905).

⁴ *Seeberger v. McCormick*, 178 Ill. 404 (1899).

⁵ See chs. III and XLVI.

⁶ *Boulter v. Peplow*, 9 C. B. 493 (1850); *Batard v. Hawes*, 2 El. & B.

287 (1853); *Edgar v. Knapp*, 7 Jur. 583 (1843); *Spottiswoode's Case*, 6 De G., M. & G., 345 (1855); *Lefroy v. Gore*, 1 Jo. & Lat. 571 (1844). A promoter who has advanced money may have contribution. *Hamilton v. Smith*, 5 Jur. (N. S.) 32 (1859). An action at law lies for contribution between promoters. *Batard v. Hawes*, 2 El. & B. 287 (1853).

⁷ *Parkin v. Fry*, 2 Car. & P. 311 (1826). The promoters are not partners. *Lindley, Companies*, p. 143.

⁸ *Holmes v. Higgins*, 1 B. & C. 74 (1822).

⁹ *Lucas v. Beach*, 1 Man. & Gr. 417 (1840).

¹⁰ *Wilson v. Curzon*, 15 M. & W. 532 (1847).

¹¹ Where parties intending to incorporate a company contract in behalf

one promoter against another for breach of contract for failing to organize a corporation and issue to the plaintiff certain paid-up stock,

of that company to purchase certain property, and the parties selling refuse to fulfill, the parties purchasing may sue in their own names for breach of contract. They may recover damages, not as members of the company, but "which they suffered, if any, by reason of the defendants preventing them from successfully establishing and fitting out a business to be conducted by them as a" company. *Abbott v. Hapgood*, 150 Mass. 248 (1889). Where a person owning certain property agrees with others that a corporation shall be formed and he shall receive pay for the property in cash and stock on a certain basis, and he turns over his property to the others for that purpose and they fail to form the corporation, he may hold them liable in damages. *Mosier v. Parry*, 60 Ohio St. 388 (1899). A party who has invested \$15,000 in obtaining a bridge franchise and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former \$15,000 out of \$80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue \$95,000 in bonds, \$80,000 in preferred stock, and \$60,000 in common stock for building the bridge at a cost of \$71,000; but if the former takes his \$15,000 preferred stock and keeps it for six years, he cannot then complain. *Jutte v. Hutchinson*, 189 Pa. St. 218 (1899). An agreement between promoters that one of them should buy certain real estate and turn it over to the corporation must be in writing to satisfy the statute of frauds. *McLennan v. Boutell*, 117 Mich. 544 (1898). Where a promoter contracts with the owners of patent rights to form a corporation and issue

a certain part of its stock for the patents, and to sell the remainder at a certain price, the money to be divided in a certain way, and they refuse to proceed, and he sues for damages, he must prove complete performance on his part, or that he was ready and able to perform and did not do so on account of the acts of the other parties. If he alleges full performance he must prove it, and a charter with \$500 capital, with the right to increase to \$300,000, may not be such performance. *Stern v. McKee*, 70 N. Y. App. Div. 142 (1902). The statement of certain parties to a promoter that in case they organized a company proposed by him he would be made general agent, does not sustain a suit by him on a *quantum meruit*. *Flaherty v. Murray*, 60 N. Y. App. Div. 92 (1901). The owner of stock may pledge it to secure his agreement that he will form a corporation to take over certain property, and he may agree that the stock shall be forfeited to the pledgee if the agreement is not carried out. *Electric, etc. Co. v. Smith*, 113 N. Y. App. Div. 615 (1906). Where several owners of riparian rights and lands agree to organize a company and transfer their property to it for stock, and a few of them make such transfer and the others refuse to do so, the former may have the transfers made by them canceled. *Mack v. Consolidated, etc. Co.*, 101 Fed. Rep. 869 (1900). Where a promoter induces an owner of timber land to convey it to a corporation for stock, one-quarter to go to the owner and three-quarters to the promoter, for which the promoter pays nothing, the owner may cause the whole transaction to be set aside. *Cranor Co. v. Miller*, 147 Ala. 268 (1906). A person who loans money to a corporation organized to bring about a consolidation of other corpo-

the possible value of the stock, which was never issued, is no basis for the measure of damages.¹ Where the owner of a patent and another

rations cannot complain that stock issued in exchange for stock of other corporations was returned upon the failure of the plan, and he cannot hold the directors liable under a statute making them liable for distributing the capital stock, where it appears that he was partially responsible for the failure. *Audenreid v. East*, etc. Co., 68 N. J. Eq. 450 (1904). For the allegations in a complaint by one promoter against another for breach of contract in selling the stock for the benefit of the enterprise and for mismanaging the corporation, see *Woolf v. Barnes*, 46 N. Y. Misc. Rep. 169 (1905). Where a person has turned in securities under a plan of consolidation, which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet, if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. *Jewell v. McIntyre*, 62 N. Y. App. Div. 396 (1901); *aff'd*, 172 N. Y. 638. Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for dividends paid after the time when he would have been entitled to the stock, if he had fully complied with his contract. *Beaty v. Johnson*, 66 Ark. 529 (1899). Where promoters agree to construct a railroad and to give a part of the stock to parties who

furnish valuable privileges, right of way, grants, etc., but instead of doing so sell out the affair to a competing railroad company, which buys with notice and does not go on with the enterprise, the parties who are injured may sue the purchasing railroad company for an accounting, etc. The promoters are not necessary parties defendant. *Hamilton v. Savannah*, etc. Ry. 49 Fed. Rep. 412 (1892). As to the remedy at law, see *Crow v. Green*, 111 Pa. St. 637 (1886); *Hudson v. Spaulding*, 6 N. Y. Supp. 877 (1889). For the measure of damages for the breach of a contract of defendants to organize a company and pay to plaintiff for his patents certain stock and cash, see *Kirschmann v. Lediard*, 61 Barb. 573 (1872). As to the measure of damages in a suit by a vendor of property to the corporation for damages against it and its promoters for breach of the contract to employ him as manager, see *Marston v. Singapore Rattan Co.*, 163 Mass. 296 (1895). Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. *Baumgarten v. Nichols*, 69 Hun, 216 (1893).

¹ *Eisenmayer v. Leonardt*, 148 Cal. 596 (1906). Where by contract between promoters one was to give the other a certain amount of preferred stock in a company to be organized, and he fails to do so because he has not caused the corporation to issue any preferred stock, the former is liable in damages for such value as

person agree that the patent shall be assigned to the latter to hold in trust, and that the latter shall assign it to a corporation to be organized whenever the parties deem it advisable, the latter person agreeing also to furnish the capital needed, and for all this he was to have a half-interest in the enterprise, the patentee, after making the assignment, cannot revoke it, unless the other party has delayed an unreasonable time in proceeding after being requested so to do.¹

Where a promoter agrees to pay a certain compensation to a person for services to be performed by the latter in connection with a reorganization, the promoter must pay such compensation, even though he changes his reorganization agreement and carries out the reorganization with other parties than those originally contemplated.² But an agreement of various stockholders in several street railway companies to form a new corporation and transfer their interest thereto and divide the new stock in a certain proportion does not constitute such a partnership as to entitle one to sue the others for an accounting of profits where the others had formed such a corporation with other parties, leaving out the first-named party.³

the preferred stock would have had if it had been issued. *Crichfield v. Julia*, 147 Fed. Rep. 65 (1906). Where by a promoter's contract one of them was to construct a pipe line for water for a city and for irrigation, and the stock was to be divided between them, and he does not proceed, the measure of damages will include the amount expended by the other after the contract was made and in reliance upon it, but not damages for the stock, because that would be for anticipated profits, which are uncertain, speculative and doubtful, especially where the cost of the line would have been largely in excess of the estimates. *Curran v. Smith*, 149 Fed. Rep. 945 (1906).

¹ *Niles v. Graham*, 181 Mass. 41 (1902). Where a vendor contracts with a person to transfer his patents to a corporation for stock and cash, and such person agrees to furnish the money to carry on the business, but fails to do so, in a suit by the vendor, if he asks for rescission and also for damages, he should separately state these two causes of action. *De Lery v. Rogers*, 71 N. Y. App. Div.

99 (1902). An agreement to incorporate will not be specifically enforced by the court when some of the parties are insolvent. *Hernreich v. Sidberg*, 105 Ill. App. Rep. 495 (1903).

² *Babbitt v. Gibbs*, 150 N. Y. 281 (1896). Where a promoter is by contract to have certain pay for assisting in a water-works scheme, and it fails because the proposed source of water supply is not good, he cannot recover if a new scheme is taken up with a different source. *Orcutt v. Pasadena, etc. Co.*, 93 Pac. Rep. 497 (Cal. 1908).

³ *Schantz v. Oakman*, 163 N. Y. 148 (1900). Where defendant employed plaintiff to assist in building up a business, the plaintiff to be paid necessary expenses, and the balance of his pay to be determined at a future time, and plaintiff to have half the business, and eleven years thereafter the defendant organizes a corporation and turns over the business to the latter, the defendant becoming the owner of the stock, the plaintiff may hold him liable, not only for services before the corporation was organized,

Where a party agrees with a promoter and constructor of water-works that he, the former, will take a certain amount of water from the corporation for ten years, and he fails to do so, the former may hold him liable. It is immaterial that no formal contract was made with the company. The contractor, owning practically all the stock of the company, may sue and collect for himself the price of the water

but for those rendered afterwards. *Bonsell v. Platt*, 153 Fed. Rep. 126 (1907). A contract between a stockholder and a third person by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors, it was illegal. *Kountze v. Flannagan*, 19 N. Y. Supp. 33 (1892). Where a promoter buys property for the corporation before it is formed, and the seller supposes he is selling to a corporation, but the latter is never formed, the seller may recover back the property, even from one who bought the property from the promoter in good faith. *Wyckoff v. Vicary*, 75 Hun, 409 (1894). In *Angle v. Chicago, etc. Ry.*, 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the de-

cision below, held that a demurrer to the bill was not good. Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. *Chicago, etc. Ry. v. Hoyt*, 89 Wis. 314 (1895). A promoter who does not complete the transaction or consummate an enforceable contract cannot recover commissions. *Hammond v. Crawford*, 66 Fed. Rep. 425 (1895). Where one of the promoters agrees with others that he will purchase property and turn it in to the company, the price to apply on his subscription for stock, and he does purchase, and the company takes possession of the property and builds thereon, he will be compelled to transfer title to the company. *Nester v. Gross*, 66 Minn. 371 (1896). Sometimes, where the corporation cannot enforce the contract, the promoters may. *Carmody v. Powers*, 60 Mich. 26 (1886). Where one promoter sues another for failure to form the corporation, and obtains a verdict for the par value of the stock which plaintiff was to receive, there being no proof as to what the value would have been if issued, nor whether the company would be successful, the verdict will be set aside as excessive. *Pitt v. Kellogg*, 11 N. Y. Supp. 526 (1890). A contract between promoters by which one agrees to assist in the building of a road is too definite to sustain an

less the cost.¹ A promise and contract of promoters to subscribers to certain bonds may give the latter an equitable lien on the bonds enforceable in equity.²

On the other hand, even though an inventor is persuaded to turn in his inventions to a corporation for stock on an oral assurance that plenty of money would be forthcoming to take the stock of the company and make the business successful, and even though the parties making such representations do not advance the money, but allow the company to become insolvent, and buy in the assets, including the patents, yet the inventor cannot maintain an action for fraud in failing to furnish money according to promise.³ A promoter who has taken a contract to purchase a property at a certain price based upon reports and representations that the business had not decreased since the reports, may, upon discovering that the business has largely decreased, refuse to carry out the contract, and may hold the party liable for his disbursements, but not for profits which he would have made if his plans had been carried out.⁴ In England by statute money lenders will be compelled by the courts to return harsh and unconscionable interest or bonuses and this applies to a person who loans money to a promoter and takes excessive bonuses of stock in payment.⁵

Another class of cases arises where the enterprise is carried to a successful conclusion, but one promoter refuses to divide the profits in accordance with the contract. In such cases a suit at law for damages is always a proper remedy if the damages can be proven.⁶

action for breach thereof. *Porter v. Blair*, 83 Fed. Rep. 104 (1897).

Where competing applicants for a street-railway franchise agree to act together, whereby one is to withdraw and the other is to obtain the grant, and the benefits are to be divided equally, which is done with the full knowledge of the municipal authorities, and then the one who secured the grant refuses to divide with the other, the remedy of the latter is at law, and not in equity, even if the agreement should be held to be valid. *Hyer v. Richmond Traction Co.*, 168 U. S. 471 (1897), modifying 80 Fed. Rep. 839.

¹ *Drummond v. Crane*, 159 Mass. 577 (1893).

² *Badgerow v. Manhattan Trust Co.*, 64 Fed. Rep. 931 (1894).

³ *Smith v. Parker*, 148 Ind. 127 (1897).

⁴ *Loewer v. Harris*, 57 Fed. Rep. 368 (1893).

⁵ *Bonnard v. Dott*, 92 L. T. Rep. 822 (1905).

⁶ Where by a contract between promoters of a street railway one of them was to have one-fourth of all the profits and the others proceed with the enterprise and transfer the franchise to a corporation and afterwards fraudulently cause the corporation to be sold out to a new corporation, the first named party may hold the other promoters and the two corporations personally liable for one-fourth of the value of the property, less the amount which has been expended, and it is no defense that the original plan contemplated issuing stock without pay-

In some cases the courts may compel an accounting and distribution according to the contract.¹

ing the full par value thereof. *Mulvihill v. Vicksburg, etc. Co.*, 88 Miss. 689 (1906). Where a broker has a contract with the owner of a mine for the sale thereof or the organization of a company, and the broker introduces a party with whom the promoter subsequently organizes a company, it may be a question for the jury as to whether such organization was substantially within the meaning of the contract. *West v. Demme*, 128 Mich. 11 (1901). Where two promoters agree to purchase certain property and organize a corporation to take it over, and one of them purchases it himself and organizes the company and takes all the stock, the other promoter may hold both him and the corporation liable for that portion of the stock which he was to have, it being shown that the corporation knew of the contract. *Sun, etc. Co. v. Frost*, 7 Ariz. 289 (1901). In a promoter's suit the contract may be proved by parol where only a part of it was in the correspondence. *Locke v. Wilson*, 135 Mich. 593 (1904). A contract between promoters, by which one of them is to be employed by a proposed insurance company on a salary and a percentage of premiums, is too indefinite to be enforced, even though some of the promoters proceeded to form the company. It seems also that such a contract is contrary to public policy. *Flaherty v. Cary*, 62 N. Y. App. Div. 116 (1901); *aff'd*, 174 N. Y. 550. Where two parties contribute to locating and developing mines for their equal benefit, but not to working them, and one of them in whose name the mines are taken sells the mines for stock, the remedy of the other is at law for conversion of the bailment, there being neither a partnership nor a trust. *Doyle v. Burns*, 123 Iowa 488 (1904).

¹ A contract between two promoters

by which one advanced a sum of money to the other, and was to receive a proportion of stock therefor, was construed in *Donner v. Donner*, 211 Pa. St. 409 (1905) as entitling the former to such part of the other's holdings of stock as the sum so paid bore to the amount of investment by the other promoter. A promoter who is to have five per cent. of the stock may have specific performance where there is no stock on the market and its value cannot be ascertained. *Denison v. Keasbey*, 200 Mo. 408 (1906). Where one promoter represents he is paying \$8,000 for mining claims, whereas he is paying but \$2,000, and causes another promoter to advance the \$2,000, and they transfer the property to the corporation for stock, the second promoter may claim all the stock. *Mattern v. Canavan*, 3 Cal. App. 493 (1906). A promoter may maintain a bill in equity against another promoter to compel the latter to deliver stock due by contract to the former, in connection with the organization of the company, and the corporation is a proper party defendant in order to obtain a transfer. *Howison v. Baird*, 145 Ala. 683 (1905). A suit by a promoter to compel the delivery of stock to him on the ground that without his consent and knowledge an incorporation made in accordance with his contract had been abandoned and a new one adopted from which he had been excluded, is not for fraud, and hence the statute of limitations applicable to the latter is not a bar. *Farris v. Wirt*, 16 Col. App. 1 (1901). Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract, the court will decree a proper division of the stock, all parties being allowed the amounts invested by them in forwarding the enterprise. *Bates v. Wilson*, 14 Colo.

Thus a court may grant specific performance of a promoters' contract by which some of them were to pay to the corporation a certain

140 (1890). One of the promoters suing for his interest according to the contract cannot hold any of them liable where he has released some. *Burgess v. Sherman*, 147 Pa. St. 254 (1892). Several persons defrauded as to their contract, whereby they were to receive stock, cannot sue jointly. Each must sue separately. *Summerlin v. Fronteriza, etc. Co.*, 41 Fed. Rep. 249 (1890). As to promoters' suits to enforce their right to stock, see also §§ 320, 334, *supra*. For an agreement to take effect when a certain corporation should be formed, see *Childs v. Smith*, 46 N. Y. 34 (1871). Where for \$1,300 a person was to have a ten per cent. commission on the price for which a mine is sold, and is to have all stock received over and above the sum of \$225,000 net to the vendor, and the mine is sold by the vendor, a complaint by the holder of the contract is subject to demurrer where the negotiations and agreements are not fully set forth. *Sipes v. Seymour*, 44 Fed. Rep. 326 (1890). Where a promoter conveys property to a different corporation from the one agreed upon by him with a co-promoter, the latter may make the promoter account for the consideration on the basis of the contract. *Sims v. Tyrer*, 26 S. E. Rep. 508 (Va. 1897). A promoter's contract that he should receive a certain percentage of all stock received by the interested parties was enforced in the case of *Hix v. Edison, etc. Co.*, 10 N. Y. App. Div. 75 (1896), and 27 N. Y. App. Div. 248; *aff'd*, 163 N. Y. 573. Where two persons, each being interested in different street railways, make a contract to form a new corporation to which such street railways are to be transferred, and one of the parties afterwards turns his street railways over to a different corporation, the other party cannot hold him liable in

an action for an accounting for profits. A breach of contract must be set up. *Schantz v. Oakman*, 10 N. Y. App. Div. 151 (1896); *aff'd*, 163 N. Y. 148. Where the statute authorizes incorporation for producing and selling electricity, and the certificate of incorporation includes this as well as manufacturing and selling electrical appliances, apparatus, and supplies, the corporation is not a *de jure* corporation, and hence insufficient to support an action by one promoter against another on a contract of the latter to convey land to a corporation to be formed and to take stock in payment, especially where the full capital stock of such corporation had not been subscribed for. *Burk v. Mead*, 159 Ind. 252 (1902). A person who pays for stock by transferring worthless mining stock is not a *bona fide* purchaser. *Sewell v. Nelson*, 113 Ky. 171 (1902). A suit to obtain stock, which the defendant had contracted to obtain and deliver, does not fail, even though it appears that the defendant has not obtained it, inasmuch as the complaint would sustain a judgment for damages for breach of contract. *Grant v. Walsh*, 36 Wash. 190 (1904). An oral agreement between parties, to locate and develop mining claims, was sustained in a suit by one against the other for stock received for a mining claim, which the latter transferred, and the statute of frauds was held to be no bar. *Mack v. Mack*, 39 Wash. 190 (1905). A mining expert who was to select properties to be paid for by his associate, two-thirds of the profit to go to the latter and one-third to the former, may maintain a suit in equity for one-third of the capital stock of a company organized to take over the property so purchased, less the cost thereof. *Rutan v. Huck*, 30 Utah 217 (1906). A promoter who is entitled

sum of money and were to receive certain stock of the corporation therefor, the stock not having been issued and the money not having been paid in full.¹ But specific performance is not readily granted, especially where the remedy at law is adequate or the contract itself difficult of performance.² An agreement between a

to a portion of the stock may have specific performance and an injunction where the defendant is not responsible and there have not been enough sales of stock to fix its value sufficient to constitute a market value. *Rau v. Seidenberg*, 53 N. Y. Misc. Rep. 386 (1907). A suit between promoters relative to the division of stock received for promoting, was sustained in *Boice v. McCormick*, 106 N. Y. App. Div. 539 (1905). A promoter may have specific performance of a contract by which he interested capital in a company formed to take over and work a patent, for which he was to receive one-half the stock. *Butler v. Murphy*, 106 Mo. App. 287 (1904).

¹ *Macklem v. Fales*, 130 Mich. 66 (1902). Where a promoter's contract is personally carried out by the parties and the corporation becomes insolvent, the court has power to compel complete performance in a suit by one promoter against the other. *Hunt v. Davis*, 135 Cal. 31 (1901). Where by contract between two persons one was to convey mining claims to a corporation for stock, part of which was to go to the second person, and the stock is issued to the first person for the mining claims, but he does not convey the same to the corporation, an assignee of a part of the stock to which the second party is entitled may bring suit to compel the first named party to convey the mining claims to the corporation. *Rogers v. Penobscot, etc. Co.*, 154 Fed. Rep. 606 (1907).

² A contract between the owner of patents and a promoter by which the latter was to furnish the capital and the former the patents, and the latter was to have three-fourths of the stock, will not be specifically en-

forced by a court of equity where no company has been formed and there is no provision for determining how much capital would be required. *Brown v. Swarthout*, 134 Mich. 585 (1903). A contract giving a person one-third of the profits of a mining venture does not give him one-third of stock in a corporation to which the mine was transferred, but does give him the right to one-third of the profits from such stock. *Simmons v. Lima Oil Co.*, 65 Atl. Rep. 258 (N. J. 1906). An oral proposition made by a promoter to a capitalist and accepted by the latter, if on examination the facts were as stated, cannot be enforced in equity where the latter utilizes the information, but does not carry out the agreement, there being but a mere agreement to enter into a definite agreement. The remedy is at law for wrongful appropriation of the plan. *Haskins v. Ryan*, 64 Atl. Rep. 436 (N. J. 1906). A person having an option on bonds, which the vendor is to use in foreclosing and buying in and reorganizing the property, cannot maintain a suit against the vendor for stock issued by the reorganized company to represent such bonds, where the agreement is not sufficiently explicit for specific performance. *Patterson v. Farmington, etc. Ry.*, 76 Conn. 628 (1904). Delay in instituting a suit to compel the delivery of stock which parties had earned in common, is not fatal, short of the statute of limitations. *Eno v. Sanders*, 39 Wash. 238 (1905). A mere statement by an owner of mining claims that he will give to another person a half interest, does not sustain an action for one-half of stock issued for such claims, even though such other person contributed money and

promoter and patentee by which the promoter is to have one-third of cash, stock, or other profits obtained from the patent rights may create a trust relationship entitling the promoter to file a bill in equity to obtain his one-third.¹ Where the owner of patents agrees with a

services. *Griffin v. Knoblock*, 20 Colo. App. 153 (1904). An agreement transferring a portion of the stock in a mining corporation cannot be enforced in a court of equity eight years after the complainant had made a demand for the stock, the statute of limitations at law being a bar. *Moore v. Nickey*, 133 Fed. Rep. 289 (1904). A promoter cannot maintain a suit in equity to have specific performance of an agreement to deliver to him certain stock, the complaint asking for the par value of the stock if specific performance is not granted, unless it is alleged that the stock had a peculiar value or that it was difficult or impossible to ascertain the value of the stock or other facts are alleged showing that there is no adequate remedy at law. *Bateman v. Straus*, 86 N. Y. App. Div. 540 (1903). A promoter who has brought about the sale of a large plant to new parties, who have agreed to organize a new corporation and give the promoter a certain amount of stock therein, cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he get specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties. The value of the stock can be estimated in damages. There was no allegation of defendant's insolvency. The promoter has ample remedy at law for damages. *Avery v. Ryan*, 74 Wis. 591 (1889). Specific performance of a contract to form a corporation will not be granted. *Avery v. Ryan*, 74 Wis. 591 (1889). An agreement of several parties to sell their property to a corporation in exchange for stock of the latter, the amount of

stock going to each to be determined by arbitrators, will not be specifically enforced where the arbitrators have fixed the value in an illegal way. Any party may withdraw from such a contract prior to the time when it has been signed by all. *Consolidated, etc. Co. v. Nash*, 109 Wis. 490 (1901). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. *Brehm v. Sperry*, 92 Md. 378 (1901). A bill in equity does not lie to compel an underwriting syndicate to assign to plaintiff an interest therein, which they had contracted to sell to him, even though he alleges that the value is uncertain and that specific performance is the only full and adequate relief. *Gilbert v. Bunnell*, 92 N. Y. App. Div. 284 (1904). An agreement of a stockholder to divide his profits on a very liberal basis is too vague and uncertain to be enforced. *Butler v. Kemmerer*, 67 Atl. Rep. 332 (Pa. 1907).

¹ *Harvey v. Sellers*, 115 Fed. Rep. 757 (1902). A bill in equity for an accounting does not lie at the instance of a party who claims that in consideration of newspaper work the defendants agreed to carry five hundred shares of stock for him in connection with a pool which had been

person to give him a certain amount of stock and interest in certain profits, if he would sell certain other stock in a corporation to be organized to take over the patents, and the second person arranges to do so, and then the inventor transfers the patent to another corporation, a court of equity may compel the vendor to carry out his agreement.¹ The ordinary promoter's contract does not create a copartnership.² Where a person contracts to give to another person a

formed. *Black v. Vanderbilt*, 70 N. Y. App. Div. 16 (1902). A promoter cannot maintain a suit in equity to collect from an inventor one-half of what the latter received in stock and cash, even though the contract between the two gave the former such one-half. His remedy is at law. *Everett v. De Fontaine*, 78 N. Y. App. Div. 219 (1903). A contract whereby a party who is about to sell his business to a corporation to be organized agrees secretly to give \$5,000 of stock to a party who agrees to subscribe openly for \$5,000 of the stock is not enforceable, it appearing that the party who was thus to get the extra stock objected to the amount of stock to be issued to the vendor, and withdrew his objection only upon this agreement, and it appearing also that he afterwards became a director and voted to purchase the property at the price demanded by the vendor. *Koster v. Pain*, 41 N. Y. App. Div. 443 (1899).

1 *Hills v. McMunn*, 83 N. E. Rep. 963 (Ill. 1908).

2 A contract between a patentee and a person by which the latter puts money into a corporation and receives stock in payment, and thereafter the corporation is sold to another corporation, each party turning in individual property in addition, does not constitute a partnership entitling one to claim a part of the price received by the other. *Volney v. Nixon*, 67 N. J. Eq. 457 (1904). An agreement between promoters by which one person was to have thirty per cent. of the profits does not make him a partner or joint adventurer. It was merely an agreement to pay a compensation. *Boice v. Jones*, 106 N.

Y. App. Div. 547 (1905). Where one promoter sues another on the theory of partnership, he cannot on the trial prove a joint adventure instead of partnership. *Boice v. Jones*, 106 N. Y. App. Div. 547 (1905). Where a person who obtains options and purchases stock for another is to have an interest in the profits on the sale of the same, it is immaterial whether it is a technical partnership or a mere joint venture, inasmuch as the same legal rules apply, in a suit by the former for an accounting by the latter. *Spier v. Hyde*, 92 N. Y. App. Div. 467 (1904). Where on a consolidation the president of a constituent company receives for the benefit of all the stockholders the stock in the new company and also certain assets of the old company, a stockholder in a suit to compel him to account must join the constituent company and also other stockholders. *Knickerbocker v. Conger*, 110 N. Y. App. Div. 125 (1905). A promoter who has merely an option to purchase stock which he then sells to a new corporation is merely an agent of the vendor and a dividend declared on the stock of the new corporation before the option is exercised belongs to the vendor. *Rowe v. White*, 112 N. Y. App. Div. 688 (1906); *aff'd*, 189 N. Y. 523. Where in a partnership dissolution it is adjudged that one of the partners is entitled to certain stock, and in the event of the others failing to transfer it, he shall have its value, he is entitled to a transfer unless the others are unable to transfer it. *Reilly v. Freeman*, 109 N. Y. App. Div. 4 (1905); *aff'd*, 184 N. Y. 610. A contributor to a fund to be invested by syndicate managers in

fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company.¹ And where the promoters, who are also stockholders, agree that the profits are to be divided in a certain way under a construction contract, and a part of them make a secret profit, the others may compel a complete division.² Where two promoters form a partnership and acquire stocks and bonds, one cannot deny the rights of the other on the ground that the stock and bonds were issued by a railroad company in excess of the cost of construction.³ Where in a special act of incorporation thirteen incorporators are named and they organize and elect directors, and the latter accept subscriptions, and all the incorporators are given opportunity to subscribe, those who do subscribe may sell all their stock and thereby transfer the entire corporation, and those incorporators who do not subscribe are not entitled to any part of the price.⁴

The liability of promoters to persons who have been induced by fraudulent prospectuses to subscribe for stock,⁵ and the liability of promoters to the corporation itself to account for fraudulent profits which the promoter has secretly made out of contracts which he caused the corporation to enter into,⁶ have already been considered. The subject of the character, rights and liabilities of an underwriter is considered elsewhere.⁷

stocks and other property has not such an interest in the stocks as enable him to maintain a suit in the state where the corporations are organized as against the non-resident syndicate managers. *Jones v. Gould*, 141 Fed. Rep. 698 (1905); *aff'd*, 149 Fed. Rep. 153. Even though an agent has a half interest in the profits of the sale of stock, this is not a copartnership, and the owner may sell at private sale and without notifying the agent. *Hays v. Colonial Trust Co.*, 66 Atl. Rep. 143 (Penn. 1907).

¹ *Dennison v. Chapman*, 105 Cal. 447 (1895).

² *Krohn v. Williamson*, 62 Fed. Rep. 869 (1894); affirmed in *Williamson v. Krohn*, 66 Fed. Rep. 655 (1895). One of the vendors who was secretly to have a higher price than the others may recover the higher price, even though he may possibly be under legal obligation to divide it with the other vendors. *Boice v. Jones*, 106 N. Y. App. Div. 547 (1905). Where in a

contract between a number of manufacturers and bankers as promoters for the organization of a corporation to take over the plants, the bankers secretly gave a larger price to some of the vendors than was specified in the agreement, one of the vendors who did not receive such secret price may file a bill for an accounting of the secret profits, and may join as parties defendant the corporation, and the parties taking the secret profit, and the promoters. *Shutts v. United, etc. Co.*, 67 N. J. Eq. 225 (1904). See also § 320, *supra*.

³ *Leeds v. Townsend*, 81 N. E. Rep. 1069 (Ill. 1907).

⁴ *Roosevelt v. Hamblin*, 85 N. E. Rep. 98 (Mass. 1908). The same rule applies to promoters who assist in obtaining the charter. *Dobbins v. Peabody*, 85 N. E. Rep. 102 (Mass. 1908).

⁵ See chs. IX and XX, *supra*.

⁶ See § 651, *supra*.

⁷ See § 14, *supra*. An underwriter is a guarantor, and if the agreement

§ 706. The question sometimes arises whether a subscriber for stock in a projected corporation is liable to its creditors in case the enterprise is abandoned before incorporation; and also whether the promoters of the abortive corporation are liable to the subscribers for deposits made by the latter. The former question is decided in the negative. "The subscribers to the stock or articles of association are not partners with those who assume the risk of acting for a corporation not yet legally established."² As to the latter question the rule has become well established in England that a subscriber for stock in a corporation that never comes into existence, who has paid a part of his subscription, may recover back from the promoters of the enterprise the amount so paid, and is not liable

which he underwrites is modified without his consent he is thereby released. *Guardian T. Co. v. Peabody*, 122 N. Y. App. Div. 648 (1907).

² *Ward v. Brigham*, 127 Mass. 24 (1879), the court saying also: "Those who acted as agents for the inchoate corporation acted without a principal behind them, because there was no body corporate capable of appointing agents, and so became principals in the transaction." See also *Duke v. Andrews*, 2 Exch. 290 (1848); *Hutton v. Thompson*, 3 H. L. Cas. 161 (1857); *Duke v. Diver*, 1 Exch. 36 (1847), where the stockholder had promised to pay on a certain day, and was held to his promise. To same effect, *Duke v. Forbes*, 1 Exch. 356 (1847); *Aldham v. Brown*, 7 El. & Bl. 164 (1857); 2 El. & Bl. 398, on appeal; *Woolmer v. Toby*, 10 Q. B. 691 (1847). However, in the case of *Lake v. Duke of Argyle*, 6 Q. B. 477 (1844), the court held that attendance at a meeting, announcement of intention of being president and of taking stock, and concurrence in measures for incorporation, may be strong evidence that defendant "held himself out as a paymaster to all who executed the orders." The question, then, is for the jury. Subscriptions paid in and partly consumed by losses before the incorporation was completed are not to be credited on the subscription itself as against corpo-

rate creditors. *Bank of De Soto v. Reed*, 109 S. W. Rep. 256 (Tex. 1908). Persons who lease premises in behalf of a proposed corporation are liable for the rent if the corporation is not formed, but persons who subsequently subscribe for stock in the proposed corporation are not liable on such lease. *Kennedy v. Fulton, etc. Co.*, 108 S. W. Rep. 948 (Ky. 1908). Where a proposed corporation, never incorporated, contracts to purchase certain property of a subscriber, he cannot bring a suit *at law* against other subscribers for damage caused by non-fulfillment of contract. *Crow v. Green*, 111 Pa. St. 637 (1886). Subscribers are not liable. *Bourne v. Freeth*, 9 B. & C. 632 (1829). Unless they allow themselves to be held out as partners in the enterprise. *Fox v. Clifton*, 9 Bing. 115 (1832), granting a new trial in 6 Bing. 776. *Cf. Heraud v. Leaf*, 5 C. & B. 157 (1847); *Dickinson v. Valpy*, 10 B. & C. 128 (1829). *Ex parte Hirschel*, 15 Jur. 924 (1851), held that a subscriber for stock in an abortive company was not liable for debts incurred. The vice-chancellor said: "Where courts have been contradicting each other for years, this court can do no otherwise than follow the last decision." A note given to pay for stock in a corporation to be organized cannot be enforced by the payee where the corporation has not been

even for the preliminary expenses.¹ His remedy may be by bill in equity.² If, however, the subscriber expressly or by implication authorizes expenditures, he cannot recover back his deposit.³ The subscriber need not submit to the deduction of any part of

formed. *Northwestern, etc. Co. v. Lanning*, 83 Minn. 19 (1901).

¹ *Ashpitel v. Sercombe*, 5 Exch. 147 (1850), where the court said: "There seems to be no doubt that the plaintiff, having paid his money for shares in the concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to its use, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made." See also *Thompson, Liabilities of Officers*, 210; *Nockels v. Crosby*, 3 B. & C. 814 (1825), the leading case; 1 *Lindley, Companies*, p. 31, citing *Walstab v. Spottiswoode*, 15 M. & W. 501 (1846); *Moore v. Garwood*, 4 Exch. 681 (1849); *Coupland v. Challis*, 2 Exch. 682 (1848); *Owen v. Challis*, 5 C. B. 115 (1848); *Ward v. Londesborough*, 12 C. B. 252 (1852); *Mowatt v. Londesborough*, 3 El. & Bl. 307 (1854), and 4 El. & Bl. 1. See also *Vollans v. Fletcher*, 1 Exch. 20 (1847); *Chaplin v. Clarke*, 4 Exch. 402 (1849). Where a contract is made in the corporate name after the articles have been filed, but before any subscriptions have been obtained, and before an organization meeting has been held or officers elected, the incorporators are liable on the contract as partners. *McVicker v. Cone*, 21 Oreg. 353 (1891). A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not

limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription, if he would pay that, is without consideration and void. Any subscriber could expressly limit his liability to his subscription. *Davis v. Shafer*, 50 Fed. Rep. 764 (1892). See also § 76, *supra*.

² 2 *Lindley, Companies*, p. 568. "A bill in equity lies to recover back money paid in a bubble." *Colt v. Woollaston*, 2 P. Wms. 154 (1723), where there was fraud; *Green v. Barrett*, 1 Sim. 45 (1826); *Blain v. Agar*, 1 Sim. 37 (1826); s. c., 2 Sim. 289 (1828); *Cridland v. DeMauley*, 1 De G. & S. 459 (1847), before the Judicature Acts; and *Cooper v. Webb*, 15 Sim. 454 (1846); *Wilson v. Stanhope*, 2 Coll. 627 (1846); *Apperly v. Page*, 1 Phillips, 775 (1847); *Clements v. Bowes*, 17 Sim. 167 (1852); s. c., 1 Drew. 684; *Sheppard v. Oxenford*, 1 K. & J. 491 (1855); *Butt v. Monteaux*, 1 K. & J. 98 (1854), since such acts. In these latter cases the demurrers were overruled. See also *Williams v. Page*, 24 Beav. 654 (1857), and "The Bubble Act," 9 Geo. I. ch. 18.

³ 1 *Lindley, Companies*, p. 33, citing *Baird v. Ross*, 2 Macq. 61, 68 (1856); *Garwood v. Ede*, 1 Exch. 264 (1847); *Watts v. Salter*, 10 C. B. 477 (1850); *Vane v. Cobbold*, 1 Exch. 798 (1848); *Atkinson v. Pocock*, 1 Exch. 796 (1848); *Wiley v. Parratt*, 3 Exch. 211 (1848); *Clements v. Todd*, 1 Exch. 268 (1847); *Jones v. Harrison*, 2 Exch. 52 (1848); *Aldham v. Brown*, 7 El. & B. 164 (1857); s. c., 2 El. & Bl. 398 (1859); *Burnside v. Dayrell*, 3 Exch. 224 (1849).

his subscriptions to be applied to the payment of the expenses incurred by the promoters in attempting the incorporation.¹ An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred stock issued also.²

§ 707. Great difficulty has arisen in determining whether a corporation is liable on contracts made in its behalf by its promoters before the incorporation took place. The decided weight of authority holds that the corporation is not bound thereby.³

¹ *Nockels v. Crosby*, 3 B. & C. 814 (1825). *Contra*, *Williams v. Salmond*, 2 Kay & J. 463 (1856).

² *McIlquham v. Taylor*, [1895] 1 Ch. 53.

³ *Munson v. Syracuse, etc. R. R.*, 103 N. Y. 58, 75 (1886). The agreement of the promoters of a bank that a person will be paid for obtaining subscriptions to its stock does not bind the bank itself. *Tift v. Quaker City Nat. Bank*, 141 Pa. St. 550 (1891). The contract of the directors of a mutual life insurance association that it will locate the chief office in a certain city, if the city will pay certain expenses, is not binding on the society after incorporation unless ratified by it. *Park v. Modern, etc. of America*, 181 Ill. 214 (1899). A corporation is not liable on a contract of its promoters to pay for drawings, plans, etc. Hence, although by statute stockholders are personally liable on corporate contracts, if the corporation commences business before one-half of its capital is subscribed and twenty per cent. paid in, they are not liable on such a contract made before incorporation. *Buffington v. Bardon*, 80 Wis. 635 (1891). The company is not bound to issue stock in payment for services of a claim which the promoters agreed should be paid for by the company. *Carey v. Des Moines, etc. Co.*, 81 Iowa, 674 (1891). The corporation is not liable for the breach of an agreement among its organizers as to the distribution of stock. *Summerlin v. Fronteriza, etc. Co.*, 41 Fed. Rep.

249 (1890). A corporation is not bound by the contracts of its promoters, where it has not ratified the same nor accepted the benefit of the same. *Moore, etc. Co. v. Towers Hardware Co.*, 87 Ala. 206 (1889). The correspondence of one who afterwards becomes president of a corporation which is afterwards incorporated does not bind such corporation. *First Nat. Bank v. Armstrong*, 42 Fed. Rep. 193 (1890). A corporation is not liable for the contracts of its promoters unless it clearly ratifies or adopts the same by express resolution or some act showing such intent. *Tuttle v. Tuttle Co.*, 101 Me. 287 (1906). Even though applications for a certain amount of insurance must be obtained before organizing a corporation, yet the promoters have no power to agree that the corporation will accept the insurance. *Montgomery v. Whitbeck*, 12 N. Dak. 385 (1903). A corporation is not liable for purchases of one of its promoters in its behalf where it never accepted the articles and the promoter canceled the order. *Bank of Forest v. Orgill Bros. & Co.*, 82 Miss. 81 (1903). A promoter cannot enjoin the corporation from increasing its stock, even though he claims that such increase will defeat a contract made prior to incorporation, by which he was to have a one-sixth interest, the corporation not having ratified such contract. *Martin v. Remington, etc. Co.*, 95 N. Y. App. Div. 18 (1904). An agreement of the promoters that one of them should have lumber from

Any other rule would be dangerous in the extreme, inasmuch as promoters are proverbially profuse in their promises, and if the

the company at cost, is not binding on the company. *Shreveport Nat. Bank v. Maples*, 43 S. Rep. 905 (La. 1907). A subscription for stock before incorporation, payment to be in property, need not be accepted by the corporation. *Morrell v. Consumers' etc. Co.*, 111 Ill. App. Rep. 453 (1902). A promoter's contract is not binding on the company, even though it obtains the benefits thereof. *Wilbur v. New York, etc. Co.*, 58 N. Y. Super. Ct. 539 (1891). The parliamentary agent was held bound to look to the promoters for his pay, and not to the company, in *Re Skogness, etc. Co.*, L. R. 41 Ch. D. 215 (1888). Promoters have no power to bind the corporation, even though they afterwards become trustees. *Berridge v. Abernethy*, 21 N. Y. Week. Dig. 513 (1886). An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It was not a party to the agreement. *Thompson Co. v. Brook*, 14 N. Y. Supp. 370 (1891). A contract of promoters to sell to a corporation to be formed cannot be enforced by a stockholder suing in behalf of himself and other stockholders, when the company has not performed or endeavored to perform its part of the agreement. *Negley v. McWood*, N. Y. L. J., May 2, 1890. An assignment of patents by one of several parties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked, even though the party was by agreement to have a salary of \$6,000 per year, and this salary has not been paid. *Bracher v. Hat Sweat Mfg. Co.*, 49 Fed. Rep. 921 (1892). The company is not liable for goods ordered and received before it was incorporated, even though it used them. *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. Supp. 587 (1892). An agreement of promoters that a corporation should be formed

to pay \$5,000 to a factory does not bind such corporation. *Davis, etc. Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 42 (1894). A corporation is not bound by a contract made in its name before it was organized. *Winters v. Hub Min. Co.*, 57 Fed. Rep. 287 (1893). An agreement by promoters that certain stock need not be paid for is not binding on the corporation, and it may collect. *York, etc. Assoc. v. Barnes*, 30 Neb. 834 (1894). The corporation is not liable for moneys expended by its promoters in developing or purchasing property, nor is it liable on their contracts. *Bash v. Culver Gold Min. Co.*, 7 Wash. 122 (1893). A corporation may be liable on a contract made before incorporation by a party who afterwards becomes a director and president, even though the contract was to perform services after incorporation. *Oaks v. Cattanogus Water Co.*, 143 N. Y. 430 (1894). The corporation is not liable for the services and expenses of its promoters. *Security Co. v. Bennington, etc. Assoc.*, 70 Vt. 201 (1897). The agreement of the promoters of a corporation that a certain claim of a person would be paid, provided he gave to the corporation certain business, may be binding upon the corporation. *Durkin v. Smith*, 115 Mich. 239 (1897). An insurance company may refuse to pay a loss incurred after its incorporation, but growing out of a policy taken by its promoters before incorporation. *Gent v. Manufacturers', etc. Ins. Co.*, 107 Ill. 652 (1883); s. c., 106 Ill. 252. The corporation is not liable for the debts of an old partnership, and not even the parol promise of its president makes it liable. *Georgia Co. v. Castleberry*, 43 Ga. 187 (1871). An agreement among the donors to an academy that the money should be repaid does not bind the academy after incorporation.

corporation were to be bound by them, it would be subject to many unknown, unjust and heavy obligations. The only protection of the

Bluehill Academy v. Witham, 13 Me. 403 (1836). An agreement of promoters to pay a person for obtaining subscriptions is not binding on the corporation. *New York, etc. R. R. v. Ketchum*, 27 Conn. 169 (1858), the court saying: "Can a few persons combine for their own interest to get up a railroad—agree with one of their number to give him a large commission or bonus for every stockholder he can allure into the company—and privately make this commission or bonus a charge on the corporation when formed? This would be a breach of faith towards the honest and unsuspecting stockholders who pay the charter price for their stock, and expect to take it clear of all incumbrance." In Illinois the rule is favored that the corporation is never liable on contracts made by its promoters, unless it expressly agreed to perform. So held as regards preliminary surveys. *Rockford, etc. R. R. v. Sage*, 65 Ill. 328 (1872); and book-keeping for one of the promoters. *Safety, etc. Co. v. Smith*, 65 Ill. 309 (1872); and the liability of a new company for the services of the superintendent of an abortive company by the same parties. *Western, etc. Co. v. Cousley*, 72 Ill. 531 (1874).

An agreement of promoters that a certain person shall have a certain part of the stock upon incorporation, upon his paying therefor, does not bind the corporation. *Morrison v. Gold, etc. Co.*, 52 Cal. 306 (1877). An agreement with a vendor before formation of the company provided that he should not be removed from the directorate until a certain date. The memorandum and articles provided that this agreement should be adopted, and the articles "confirmed" and incorporated it. The agreement was acted on, but no contract was made between the vendor and the company.

Held, the articles did not form a contract between them, and the vendor could be removed. *Eley v. Positive, etc. Co.*, L. R. 1 Exch. D. 88 (1876), followed; *Browne v. La Trinidad*, L. R. 37 Ch. D. 1 (1886). See *Lindley, Companies*, p. 146, etc.; *Chadwyck, Healey*, 36. Where the bondholders, in order to procure a government land grant, contracted with plaintiff to complete the road, and subsequently the bondholders foreclosed and reorganized, the court held that the new company was not liable on such contract merely from having accepted the complete road. The court said: "From all the authorities it seems clear that, in order to recover in an action at law, the plaintiff must show either an express promise of the new company, or that the contract was made with persons then engaged in its formation and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of the plaintiff and with the assurance on the part of the projectors that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it." *Little Rock, etc. R. R. v. Perry*, 37 Ark. 164, 191 (1881); *aff'd in Perry v. Little Rock, etc. R. R.*, 44 Ark. 383 (1884). See also *Re Empress, etc. Co.*, L. R. 16 Ch. D. 125 (1881), where the agreement of the promoters on behalf of the company, that it would pay the costs and charges of the solicitors, for services and disbursements in perfecting the organization thereof, was dismissed, but without prejudice to any equitable claim on a *quantum meruit*; *Sully's Case*, L. R. 33 Ch. D. 16 (1886), holding that, in the absence of a new contract made by a company after its incorporation, a contract made before its incorporation by a

stockholders and of subsequent corporate creditors against such a result lies in the rule that the corporation is not bound by the con-

person purporting to contract as trustee for the company is not binding on the company, though the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. A provision in the by-laws, which in England are filed, that a certain person shall be the attorney for the company, is not binding on the company. *Eley v. Positive, etc. Co.*, L. R. 1 Exch. D. 20, 88 (1876). See also *Re Skegness, etc. Co.*, L. R. 41 Ch. D. 215 (1888), holding that a parliamentary agent or lobbyist could not hold the company liable. An agreement of promoters with a turnpike company that the proposed railway company will make a certain grade crossing with the former is not binding on the railway company. *Aldred v. North Midland Ry.*, 1 Ry. Cas. 404 (1839). An attorney cannot collect his fees from the corporation for services previous to incorporation, even though the by-laws provided for payment, and the directors in meeting assembled said that he would be paid. *Re Rotherham, etc. Co.*, L. R. 25 Ch. D. 103 (1883). The corporation is not liable for services in obtaining street permits and franchises prior to its incorporation. *Hutchinson v. Surrey, etc. Assoc.*, 11 C. B. 689 (1851). A railway company is not bound by the agreement of its promoters that it will purchase the canal of a canal company if the latter will not oppose the grant of its charter. *Leominster, etc. Co. v. Shrewsbury, etc. Ry.*, 3 K. & J. 654 (1857). A railway company is not bound by the contract of its promoters for it with a town that the company would build certain wharves, etc. "If such secret or unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative

incorporation." *Caledonian, etc. Ry. v. Magistrates, etc.*, 2 Macq. 391 (1855), questioning *Edwards v. Grand Junction Ry.*, 1 Myl. & C. 650 (1836); *Stanley v. Chester, etc. Ry.*, 1 Ry. Cas. 58; s. c., 9 Sim. 264; aff'd in 3 Myl. & C. 773 (1838), and *Petre v. Eastern, etc. Ry.*, 1 Ry. Cas. 462 (1838). Where, by the articles of incorporation, the subscribers are not to be bound until a certain amount of the stock is subscribed, the corporation is not liable for the salary of an engineer employed before such full subscription. *Pierce v. Jersey, etc. Co.*, L. R. 5 Exch. 209 (1870).

A corporation is not liable on the contracts of its promoters to employ plaintiff as a broker, nor does an express ratification of the contract bind it unless a consideration is alleged. *Payne v. New South, etc. Co.*, 10 Exch. 283 (1854). An agreement of promoters that the company shall pay an attorney a certain sum for services is not binding on the company—not even by ratification and agreement between the company and the promoters. *Re Empress, etc. Co.*, L. R. 16 Ch. D. 125 (1880). It has been held that equity will enforce an agreement of the promoters that, if opposition to the grant of its charter is withdrawn, the company will contract to do certain things which the opposition desired to put into the charter. *Edwards v. Grand, etc. Ry.*, 1 Myl. & Cr. 650 (1836), aff'g 7 Sim. 337; questioned in *Caledonian, etc. Ry. v. Helensburg, etc.*, 2 Macq. 391 (1855), and held overruled in *Earl of Shrewsbury v. North, etc. Ry.*, L. R. 1 Eq. 593 (1865). An agreement to pay a large price for land owned by the opposition party is not so enforceable. *Preston v. Liverpool, etc. Ry.*, 5 H. L. Cas. 605 (1856), aff'g 17 Beav. 114; s. c., before amendment of the bill, 1 Sim. (N. S.) 586 (1851). Cf. *Stanley v. Chester*,

tracts of its promoters. The rule is just and should not be weakened.¹ Thus, even though a corporation transfers all its property to another corporation on a contract made prior to incorporation of the latter, yet the latter is not liable unless it accepted the property with knowledge of the contract and upon express or implied undertaking to carry it out.² A secret agreement that a subscriber for stock prior to incorporation shall not be required to take the stock is no defense as against the corporation.³ A license granted to a person with the right to him to assign it to a corporation does not create any contract between the licensor and the corporation, no assignment having been made, even though the corporation has acted upon it.⁴

It is entirely legal, however, for the corporation to ratify, confirm, or adopt the contracts of its promoters. A promoter's contract may be adopted by the corporation in any way in which a contract may be made by the corporation.⁵ A corporation may assume an obligation

etc. Ry., 3 Myl. & C. 773 (1838); and *Eastern, etc. Ry. v. Hawkes*, 5 H. L. Cas. 331 (1855); *Earl of Lindsey v. Great Northern Ry.*, 10 Hare, 664 (1853), in an inferior court. This doctrine is sustained in *Earl of Shrewsbury v. North, etc. Ry.*, L. R. 1 Eq. 593 (1865), disapproving *Edwards v. Grand, etc. Ry.*, 1 Myl. & Cr. 650 (1836), and *Petre v. Eastern, etc. Co.*, 1 Ry. Cas. 462 (1838), and is sustained also in *Gooday v. Colchester, etc. Ry.*, 17 Beav. 135 (1852). The articles of association may provide for the payment of promoters' contracts. *Terrell v. Hutton*, 4 H. L. Cas. 1091 (1854). Cf. *Gunn v. London, etc. Ins. Co.*, 12 C. B. (N. S.) 694 (1862). *Contra, Mulhade v. Porto, etc. Ry.*, L. R. 9 C. P. 503 (1874); *Re Empress, etc. Co.*, L. R. 16 Ch. D. 125 (1880). Under a charter provision that the company shall be liable, see *Re Brampton, etc. Ry.*, L. R. 10 Ch. App. 177 (1875), where an attorney was allowed to collect, although he had assured subscribers that they would not be liable; distinguishing *Savin v. Hoylake Ry.*, L. R. 1 Exch. 9 (1865). Where the articles of incorporation expressly provide for the payment of a specified amount to a person who had contracted with the promoters to sell

the company certain facilities for business, the company is liable. *Touche v. Metropolitan, etc. Co.*, L. R. 6 Ch. 671 (1871), rev'g 4 De G., M. & G. 465. A judgment against the company, entered by consent on a claim of a land-owner that the promoters agreed that the company would take his land at a certain price, is binding. *Williams v. St. George, etc. Co.*, 2 De G. & J. 547 (1858).

¹ Quoted and approved in *Park v. Modern, etc. of America*, 181 Ill. 214 (1899).

² *Holyoke, etc. Co. v. United States, etc. Co.*, 182 Mass. 171 (1902).

³ *Greater, etc. Co. v. Riley*, 210 Pa. St. 283 (1904). A corporation is not liable on the agreement of two of its promoters that in case a certain plant was not built within a certain time a subscription would be repaid, even though the promoters were also commissioners to open books and take subscriptions. *Russell v. Broadus, etc. Mills*, 39 S. Rep. 712 (Ala. 1905). See also § 191, *supra*.

⁴ *Bagot, etc. Co. v. Clipper, etc. Co.*, [1902] 1 Ch. 146.

⁵ *McArthur v. Times Printing Co.*, 48 Minn. 319 (1892), the court holding also that the contract begins only from its adoption, and on that basis

made before its organization or may make a new contract with the same parties to the same effect.¹

A corporation accepting the benefits of the contract of its incorporators must accept the burden, and a promoter's contract which has been ratified or adopted by the corporation, or the benefits of which have been accepted by the corporation with knowledge of such contract, may be enforced against it.²

the statute of frauds is applicable. A corporation may adopt the contract of its promoters in any way in which it could make such a contract originally, namely, by the express act of its board of directors or by acquiescing in the carrying out of such a contract. *Bond v. Pike*, 111 N. W. Rep. 916 (Minn. 1907). Where the charter authorizes the company to pay liabilities incurred for property before incorporation, such payment may legally be made. *Hawkeye, etc. Co. v. State Bank, etc.*, 157 Fed. Rep. 253 (1907). Under the California statute a person holding the obligation of promoters may hold the company liable therefor if the company has assumed it. *Northrup v. Altadena, etc.*, 91 Pac. Rep. 422 (Cal. 1907).

¹ *Wasser v. Western, etc. Co.*, 57 Minn. 460 (1906). Certificates of stock issued in contemplation of incorporation may be accepted and adopted by the corporation after organization and will be good. *Thorp v. Pennock, etc. Co.*, 93 Minn. 22 (1906).

² *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333 (1895); s. c., 157 N. Y. 697; *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197, 211 (1892), the court saying: "While it could have refused, when it came into existence, to accept the one or to be bound by the other, it could not accept the advantages and then refuse to assume the obligations." In *Oakes v. Catarangus Water Co.*, 143 N. Y. 430 (1894), prior to incorporation a written agreement was made in the name of the company with a party who agreed to secure the right of way, hydrant rental, and to place invest-

ments, etc., and was to receive pay from the corporation. He was also to abandon a rival water-works scheme and to aid generally. The president and general manager of the corporation after the incorporation acknowledged the debt and contract, and promised payment. The court held that the fact that the president called upon the party for performance constituted ratification. The whole question was for the jury. Although the promoters have no authority to bind the company by their agreements as to the construction contract, yet where the company receives a benefit from such agreement, and in its records and minutes recognizes it, the company will be liable in damages for letting the contract to others. *Wilson v. King's, etc. R. R.*, 114 N. Y. 487 (1889).

"A corporation has power, when fully organized, to ratify a contract made by the promoters when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes." *Stanton v. New York, etc. R. R.*, 59 Conn. 272 (1891). A company by adopting and receiving the benefit of a contract made for it by its promoter is bound thereby. *Chilcott v. Washington, etc. Co.*, 88 Pac. Rep. 113 (Wash. 1906). Even though a promoter by agreement made with a foreign corporation, before the incorporation of a mining company, was to have one share of stock for his services for every ten shares which he obtained subscriptions for, and the company accepted the subscriptions, yet he cannot hold it liable for the value of the stock to

Where persons contracting with promoters build a telephone plant

be received by him as commissions where he merely demanded it by letter and the company offered to deliver it after suit was brought. *Teeples v. Hawkeye, etc. Co.*, 114 N. W. Rep. 906 (Iowa, 1908). The corporation may accept and ratify a contract of its promoters. *Davis v. Montgomery, etc. Co.*, 101 Ala. 127 (1890). Where promoters agree to employ a person, and the company actually does employ him afterwards, the company thereby ratifies the contract. *Pittsburg, etc. Co. v. Quintrell*, 91 Tenn. 693 (1892). Bonds and mortgages executed by corporate officers in pursuance of a resolution made by promoters, previous to incorporation, are valid where the directors ordered the issue of the bonds after their execution. *Wood v. Whelen*, 93 Ill. 153 (1879). A bank, after incorporation, may ratify and become liable on the contract of its promoters to the effect that the bank would give stock and a certain sum of money to a person for his services. *McDonough v. Bank*, 34 Tex. 309 (1870). Where a corporation is organized before its articles are filed and a contract of purchase is made, the contract price is collectible, the company having received the property after incorporation. *Paxton, etc. Co. v. First Nat. Bank*, 21 Neb. 621 (1887). A corporation is liable for machinery which is accepted by it on a contract made by its organizers for it before incorporation. *Whitney v. Wyman*, 101 U. S. 392 (1879). An agreement by corporate organizers that the corporation will pay royalties on a patent is enforceable against the corporation when it has acted on the contract and for a time paid the royalties. *Bommer v. American, etc. Co.*, 81 N. Y. 468 (1880). See also *Lorillard v. Clyde*, 86 N. Y. 384 (1881). A preliminary agreement that a person may turn in property for stock is valid where the corporation has afterwards accepted the property and issued the stock therefor.

Reichwald v. Commercial Hotel Co., 106 Ill. 439 (1883). A contract made by the president, as such, after the certificate of incorporation was signed, but before it was filed, binds the corporation where it has adopted the contract by carrying it out. *Grape, etc. Co. v. Small*, 40 Md. 395 (1874). A corporation is not bound by the contracts of its promoters, but it may adopt them after incorporation. Adoption may be in any way in which it might make the contract *de novo*. *Battelle v. Northwestern, etc. Co.*, 37 Minn. 89 (1887), and note. The company may of course employ and be liable to a superintendent whom the promoters agreed should be employed. *Browning v. Great, etc. Co.*, 5 H. & N. 856 (1860). A grant of a license to use a patent made to an individual with the privilege to assign to a contemplated corporation may, as to royalties, be enforced against the corporation when the corporation expressly adopted the contract and acted on it. *Spiller v. Paris, etc. Co.*, L. R. 7 Ch. D. 368 (1878), distinguishing *Melhado v. Porto Alegre, etc. Ry.*, L. R. 9 C. P. 503 (1874), as being a case at law. Money paid by a town after its incorporation to a person for bribing the legislature to grant the charter may be recovered back by a bill in equity. *Frost v. Inhabitants, etc.*, 88 Mass. 152 (1863). Where persons who give their notes in payment for property deed the property to a corporation, the latter is not bound to reimburse them for amounts paid by them on the notes. *Ruby, etc. Co. v. Gurley*, 17 Colo. 199 (1892). The offer of a party to take such stock as may not be taken by the public when offered to the public may be accepted after the public subscriptions are closed. Especially is this the case where the underwriter afterwards practically accepted the stock. *Re Hemp, etc. Co.*, [1896] 2 Ch. 121. Where promoters are entitled to certain stock from the

and after the company is organized turn its plant over to it, the corporation, but such obligation is canceled by mutual agreement, one of them cannot afterwards revive the obligation on the ground that the other promoter, who dominated the corporation, had agreed that it would all be made right. *Dillon v. Commercial Cable Co.*, 87 Hun, 444 (1895). Where a promoter agrees to pay a commission for obtaining a bonus for a corporation, the corporation is liable for the commission if it accepts the bonus with knowledge of the contract. *Weatherford, etc. R. R. v. Granger*, 86 Tex. 350 (1894). Promoters are liable on a contract made before incorporation, but are not liable on the contract if it was made for the company and the company adopts it. *Ennis, etc. Co. v. Burks*, 39 S. W. Rep. 966 (Tex. 1897).

A corporation may be liable on a contract entered into by its promoters where such contract was accepted and carried out by the corporation. *Chicago, etc. Co. v. Talbotton, etc. Co.*, 106 Ga. 84 (1898). A promoter's contract for the benefit of the company is an open offer to be accepted or rejected by the company when organized, and if the company accepts and retains the benefit thereof it is bound by the contract, and hence a corporation which accepts land and mining claims on a director's contract which called for certain payments to them in stock and cash is bound to make such payments, even though no formal action is taken by the board of directors. *Wall v. Niagara, etc. Co.*, 20 Utah, 474 (1899). An agreement between two promoters that certain stock should be assigned to them jointly for the general promotion of the interests of the company, and if not disposed of within three months to be divided between them in a certain way, does not establish a trust in favor of the corporation and does not make the stock treasury stock for the benefit of the corporation. *Bren-*

nan v. Vogler, 174 Mass. 272 (1899). Misrepresentations made to promoters in the purchase of property by them, which property they sell to the corporation, do not give a cause of action to the corporation against the parties selling to the promoters. *Lebanon, etc. v. Dyckman*, 57 S. W. Rep. 227 (Ky. 1900). A corporation which with knowledge uses machinery purchased for it by its promoters is liable for the price of the same. *Lancaster, etc. Co. v. Murray, etc. Co.*, 19 Tex. Civ. App. 110 (1898). In the case of *Mesinger v. Mesinger, etc. Co.*, 44 N. Y. App. Div. 26 (1899), the court held that a promoter's contract that the corporation would employ a person at a certain salary was ratified by the corporation where such promoter became its president and did not as president disavow the contract. It may be for the jury to decide whether the corporation by accepting the benefit of a promoter's contract is bound by it. *McKenzie v. Poorman, etc.*, 88 Fed. Rep. 111 (1898). Where a corporation accepts lumber purchased for it before incorporation it must pay therefor. *Kaeppeler v. Redfield, etc. Co.*, 12 S. D. 483 (1900). A promoter's contract that the corporation will pay certain back rent for premises to be occupied by it binds the corporation if the corporation has occupied the premises knowing of such agreement. The president's knowledge is notice to the corporation, even though he was the promoter. *Chase v. Redfield, etc. Co.*, 12 S. D. 529 (1900). Where one of the organizers of the corporation, who is also its president, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. *Wyeth v. Renz-Bowles Co.*, 66 S. W. Rep. 825 (Ky.

poration is liable for the value thereof.¹ The corporation alone is liable where its note is given in fulfillment of a contract entered into in its name, although such contract was prior to its incorporation.²

Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it.³

A consolidation agreement between individuals, whereby the consolidated company is to assume a lease owned by another company, cannot be enforced by such other company. It is not a party to the agreement.⁴ A contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.⁵ Where by agreement between promoters, patents are transferred to one of them to be transferred by him to a corporation for stock, the stock to be divided in a certain way, and he transfers it to the corporation without receiving the stock, the title does not vest in the corporation, it having notice of the facts, and hence the corporation may be sued for an infringe-

1902). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all the stock to other parties who took with notice. It is unnecessary to bring into the suit the other parties who actually have the stock, the stock having been held by the company as collateral security. *Morey v. Fish, etc. Co.*, 108 Wis. 520 (1901). See also § 58, *supra*. If the corporation accepts the benefits of the promoters' contracts in its behalf made before organization it must pay therefor. *Pitts v. Steele, etc. Co.*, 75 Mo. App. 221 (1898). See § 712, *infra*. A deed dated before incorporation, but actually delivered after incorporation, is good. *San Diego, etc. Co. v. Frame*, 137 Cal. 441 (1902). A corporation is not liable for the contracts of its promoters, even though the corporation takes property produced by such contracts, where the contracts did not contemplate corporate liability. *Tryber v. Girard, etc. Co.*, 67 Kan. 489 (1903). See 70 Atl. Rep. 216.

¹ *Streator, etc. Co. v. Continental, etc. Co.*, 217 Ill. 577 (1905). Where the promoters purchase an air compressor, payment to be made thereafter, and they become directors of the company which takes over the property and uses the compressor, it is bound to pay therefor. *Possell v. Smith*, 88 Pac. Rep. 1064 (Colo. 1907).

² *Case Mfg. Co. v. Soxman*, 138 U. S. 431 (1891); *Shields v. Clifton, etc. Co.*, 94 Tenn. 123 (1894).

³ *Rathbun v. Snow*, 123 N. Y. 343 (1890).

⁴ *Lorillard v. Clyde*, 122 N. Y. 498 (1890). A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence, the corporation cannot refuse to transfer the stock. *Ireland v. Globe, etc. Co.*, 20 R. I. 190 (1897); s. c., 21 R. I. 9 (1898).

⁵ *Slide, etc. Mines v. Seymour*, 153 U. S. 509, 520 (1894). A corporation

ment on the patents and the promoter so making the conveyances to the corporation may be joined as defendant in the same suit and held liable.¹ A contract by promoters to form a corporation to purchase patents and pay therefor in stock is not illegal as depriving the directors of the new corporation of their discretionary power, inasmuch as they may refuse to carry out the agreement. Neither will it be assumed that the price placed upon the patent is excessive.² A secret agreement between the promoters by which the corporation is to pay a royalty to one of the promoters is not binding upon the corporation and such agreement at the instance of a stockholder may be set aside by a court of equity.³

Not only may a ratified contract be enforced against a corporation, but it may be enforced by such a corporation.⁴

In Missouri and Massachusetts, however, it is held that a corpora-

formed to take over a mining claim at a nominal price is bound by a pre-existing contract, which showed that a portion of the mine was owned by another party, the parties to such contract being incorporators and officers of the company. *Carter v. Gray*, 79 Ark. 273 (1906). A deed by one of the promoters to the corporation for stock cannot be set aside on account of other promoters not carrying out their agreement with him. *Miser, etc. Co. v. Moody*, 37 Colo. 310 (1906).

1 *Harrington v. Atlantic, etc. Co.*, 143 Fed. Rep. 329 (1906).

2 *Electric, etc. Co. v. Smith*, 113 N. Y. App. Div. 615 (1906).

3 *Fred. Macey Co. v. Macey*, 143 Mich. 138 (1906).

4 Where a promoter takes a lease for the benefit of the company and it ratifies his acts, it is entitled to the lease. *Central T. Co. v. Lappe*, 216 Pa. St. 549 (1907). A corporation may hold a promoter liable for not selling its treasury stock in accordance with a contract made by the promoters. *Cummings v. Brown*, 122 N. Y. App. Div. 505 (1907). A corporation itself cannot enforce the agreement of the promoters that a certain amount of the bonds and stock should be donated to the company. *Flanagan v. Lyon*, 54 N. Y. Misc. Rep. 372 (1907). An

agreement of land-owners with a promoter that they will sell to the contemplated railway a right of way at a specified price may be enforced by the railway. *Bedford, etc. Ry. v. Stanley*, 2 J. & H. 746 (1862). But in Massachusetts the company cannot enforce it where no formal ratification has been made. *Penn Match Co. v. Hapgood*, 141 Mass. 145 (1886). A corporation cannot ratify a contract made for it before it was incorporated, but it may adopt the contract expressly. See 3 *Ry. & Corp.*, L. J. 482 (English cases). The mortgagor to a corporation cannot set up usury on the ground that the promoters required him to subscribe for stock in order to obtain the loan, *Central, etc. Ins. Co. v. Callaghan*, 41 Barb. 448 (1864). And see many cases in ch. IV, *supra*, holding that a corporation may enforce subscriptions taken before its incorporation. Where a contract with an individual is fulfilled by a corporation, the latter cannot collect on the contract unless the other party to the contract knew or had reason to know that the corporation was fulfilling, or unless the consideration has been assigned to the corporation. *Holmes, etc. Co. v. United, etc. Co.*, 33 N. Y. App. Div. 62 (1898).

tion is not bound by its ratification of a promoter's contract,¹ but that a new contract to the same effect must be made by the corporation. In Massachusetts it is held that the mere fact that a corporation takes property which was purchased by one of its promoters prior to incorporation does not render it liable for the price thereof.² In England the privy council has held that even though the board of directors adopt and confirm a contract made before incorporation by persons purporting to act for the company, yet this does not create any contractual relation between the company and the other party to the contract, or impose any obligation on the company towards that party.³ The privy council has also held that even though the promoters in a contract which they make provide that they may assign the contract to a corporation to be formed, yet the company cannot claim the benefits of such contract by adoption or ratification, but the facts may show that a new contract was made on the terms of the old contract.⁴

The corporation is not liable to the promoters for their services and expenses.⁵ But a contract by which a person who has promoted

1 There is no such thing as a "ratification" of a promoter's contract. It is the making of an original contract by the corporation and does not release the promoters. *Queen City, etc. Co. v. Crawford*, 127 Mo. 356 (1895). "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." *Abbott v. Hapgood*, 150 Mass. 248 (1889), citing cases.

2 *Koppel v. Massachusetts, etc. Co.*, 192 Mass. 223 (1906).

3 *North, etc. Co. v. Higgins*, [1899] A. C. 263. In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence, a contract as to the secretary's salary is unenforceable. He can recover only on a *quantum meruit*. *Re Dale*, 61 L. T. Rep. 206 (1889).

4 *Natal, etc. Co. v. Pauline, etc.*, [1904] A. C. 120.

5 Promoters cannot recover on a *quantum meruit* where they have not

furnished money as called for by their contract. *Fry v. Miles*, 71 N. J. L. 293 (1904). Advances made by one of the promoters to the company may be shown to be in performance of his contract with his associates and substantially as payments for his stock, and that the company is not liable to repay the same. *Hollins v. American, etc. Co.*, 66 N. J. Eq. 457 (1905). The agreement of promoters and incorporators that their services shall be paid for by certain stock applies to services before incorporation and to services as directors, but not to special services after incorporation. *Wiltbank v. Automatic, etc. Co.*, 69 N. J. L. 236 (1903). Even though promoters agree that dividends shall be paid before they receive salaries as directors, and such salaries shall be paid only from profits, and even though the corporation adopted a resolution to that effect as specified in the agreement, yet a receiver cannot recover back the salaries paid from the capital with the consent of the stockholders. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

Where promoters agree that they will not charge the corporation anything

the organization of a company is to have a certain percentage of the capital stock and five per cent. of any increase of the capital stock,

for their services, they cannot afterwards collect from the corporation. *Powell v. Georgia, etc. Ry.*, 121 Ga. 803 (1905). A promoter cannot have a receiver of the corporation appointed on the ground that the other directors have not dealt with him according to agreement, and that the company has failed to carry out its objects and that the property should be vested in the promoters. *State v. Dearing*, 184 Mo. 647 (1904). In the case *Bank of De Soto v. Reed*, 109 S. W. Rep. 256 (Tex. 1908), it was held that the directors were liable to corporate creditors for using the corporate funds to pay losses in the business before incorporation. Where, prior to the incorporation, property is conveyed to a trustee to be conveyed by him to the corporation, he cannot claim from the corporation compensation for his services, although the promoters agreed that he should have pay. The corporation can compel a conveyance of the property without paying the compensation. *Hecla, etc. Min. Co. v. O'Neill*, 19 N. Y. Supp. 592 (1892). A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret commission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. *Smith v. Seattle, etc. Ry.*, 72 Hun, 202 (1893). Where two street railways are consolidated, and the stockholders in one are to receive share for share, and the stockholders in the other company are to receive fourteen shares of consolidated stock for one share of the old stock, the stockholders so turning in their stock for new stock cannot also claim from the consolidated company the amount of money which they expended in buying the stock of one of

the constituent companies. *Wilson v. Trenton, etc. R. R.*, 56 N. J. Eq. 783 (1898). A person who, at the request of a minority of the promoters, attends meetings of the promoters, lobbies for the charter, makes a preliminary survey, and pays some expenses, cannot recover from the subsequently incorporated company. The court said that in all the cases to the contrary "the services were either performed after the charter had been obtained, and there was therefore an inchoate corporation, or there was an informal organization preparatory to obtaining a charter, and the employment was authorized by the organization as such, and was not the mere employment by individuals having no authority, express or implied, to contract for any one." *Bell's, etc. R. R. v. Christy*, 79 Pa. St. 54 (1875). For a case where one of the promoters of a consolidation used his stock to bring it about, but failed to hold the consolidated company liable therefor, see *Eldred v. Bell Tel. Co.*, 119 U. S. 513 (1886). The company on winding up is not liable for the promoter's expenses. *Terrell's Case*, 2 Sim. (N. S.) 126 (1851); *Ex Parte Lloyd*, 1 Sim. (N. S.) 248 (1851). A promoter cannot recover from the corporation money which he expended before its incorporation in bribing the legislature to grant the charter. *Marchand v. Loan, etc. Assoc.*, 26 La. Ann. 389 (1874). The statute may provide that the corporation shall pay the promoters' expense of obtaining the charter. *Hitchins v. Kilkenny Ry.*, 9 C. B. 536 (1850). Where a corporation was not to exist until a certain amount of stock was subscribed, the secretary cannot recover from the corporation any compensation for his services prior to the obtaining of that amount of subscriptions. *Franklin, etc. Ins. Co. v. Hart*, 31 Md. 59 (1869).

such contract being with the corporation itself, is legal and may be enforced as to such increase.¹ A corporation is liable for the fees and disbursements of the attorney who drew the articles of incorporation and organized it.² One promoter is not entitled to compensa-

¹ *Hix v. Edison El. L. Co.*, 10 N. Y. App. Div. 75 (1896), and 27 N. Y. App. Div. 248; *aff'd*, 163 N. Y. 573. A corporation may legally agree to pay to a person a commission of ten per cent. in stock on all subscriptions to stock which he obtains. *Zabel v. New State, etc. Co.*, 127 Mich. 402 (1901). A corporation may give a note in payment, for services rendered in incorporating the company even though such note is given to the president, who is also a director. *Smith v. New Hartford Waterworks*, 73 Conn. 626 (1901). Expenses and debts incurred by the promoters for and in behalf of a corporation may be collected from the corporation after it is organized, if the corporation assumes such debts. *Schreyer v. Turner Flouring Co.*, 29 Oreg. 1 (1896). Compare *Weatherford, etc. Ry. v. Granger*, 86 Tex. 350 (1894). Where a promoter contracts to obtain subscriptions and take his pay in stock, and the company, when organized, adopts the contract, and he obtains the subscription, but the company is unable to get legislative authority to cross a river, and so abandons the enterprise, he may collect damages. *Stanton v. New York, etc. R. R.*, 59 Conn. 272 (1891). A corporation is liable for the expenses of its promoters in procuring a subscription, where, after its organization, it accepts the subscription with the knowledge of such expenses. *Weatherford, etc. R. R. v. Granger*, 22 S. W. Rep. 70 (Tex. 1893). In *Low v. Connecticut, etc. R. R.*, 45 N. H. 370 (1864); *s. c.*, 46 N. H. 284, a suit at law by a promoter against the company for services rendered in procuring subscriptions was sustained on the ground that "a corporation is liable at law, upon an implied assumption, for services rendered before it came

in esse, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed." *Affirmed*, 46 N. H. 284 (1865). To same effect, *Hall v. Vermont, etc. Co.*, 28 Vt. 401 (1856). Where work has been carried on by the president for his company, he is allowed in his accounting credit for work done, materials furnished, and money advanced before as well as after the full incorporation. *Grand River Bridge Co. v. Rollins*, 13 Colo. 4 (1889). A promoter cannot enjoin the corporation from increasing its stock, even though he claims that such increase will defeat a contract made prior to incorporation, by which he was to have a one-sixth interest, the corporation not having ratified such contract. *Martin v. Remington, etc. Co.*, 95 N. Y. App. Div. 18 (1904).

² *Freeman, etc. Co. v. Osborn*, 14 Colo. App. 488 (1900). An attorney may recover from the corporation his fees for incorporating the company. *Taussig v. St. Louis, etc. Ry.*, 166 Mo. 28 (1901). In the case of *Merchants', etc. Bank v. Eckels*, 191 Pa. St. 372 (1899), where a lawyer sued a corporation for his services in organizing the same, the court held that it was a case for the jury. A promoter who obtains all the subscriptions, lets the contracts, superintends the construction of the building, and draws the articles of incorporation, is entitled to pay from the corporation after it is formed, and in this case was allowed \$350. *Farmers' Bank, etc. v. Smith*, 49 S. W. Rep. 810 (Ky. 1899). A corporation is not liable for a lawyer's services in drawing the charter, by-laws, etc., even though one of the promoters agreed that the corporation would pay therefor. *Jones v. Smith*,

tion for services as against the other, unless there was an agreement to that effect.¹

The question whether a person who has contracted with a corporation as an existing corporation may repudiate his contract on the ground that it was never incorporated is discussed elsewhere.²

§ 708. *Acts which must be authorized by stockholders' meetings instead of by directors' meetings—Stockholders make the by-laws.*—

The functions of stockholders are exceedingly limited. The theory of a corporation is that stockholders shall have all the profits, but shall turn over the complete management of the enterprise to their representatives and agents, called directors. Accordingly there is little for the stockholders to do beyond electing directors, making by-laws, increasing or decreasing the capital stock, authorizing amendments to the charter, and dissolving the corporation.³ A board of directors has no power to postpone a stockholders' meeting by sending out notices to that effect.⁴ Of the functions of the stockholders the most important, perhaps, is that of making by-laws. The law is clear that stockholders in meeting assembled have the power to make the by-laws of the corporation.⁵ Where a statute provides for by-laws being adopted by directors this may take the power away from the stockholders.⁶ A company cannot contract not to alter a by-law which provides that a certain vendor of property to the corporation shall be governing director and shall have the power to appoint other directors and to remove them at any time, even though such contract is contained in the by-laws themselves.⁷ Where the statute authorizes the stockholders to change the number of directors by a vote of a majority in interest, a by-law requiring ninety per cent. in interest is illegal.⁸ The stockholders by their by-laws may vary the number of directors, even though by statute the number of the

87 S. W. Rep. 210 (Tex. 1905). A company is not liable for the fees of the attorney who organized it. *Re English, etc. Co., Ltd.*, 95 L. T. Rep. 85 (1906); *aff'd*, 95 L. T. Rep. 580. A lawyer may recover for his services to a corporation, even though he is president and a director thereof. *Kenner v. Whitelock*, 152 Ind. 635 (1899). See also § 657, *supra*.

¹ *Baily v. Burgess*, 48 N. J. Eq. 411 (1891).

² See § 637, *supra*.

³ See *Eidman v. Bowman*, 58 Ill. 444 (1871); *Metropolitan, etc. Ry. v. Man-*

hattan, etc. Ry., 11 Daly (N. Y.), 377 (1884). As to increasing or reducing the capital stock, see § 285, *supra*; amending charter, ch. XXVIII, *supra*; dissolution, ch. XXXVIII, *supra*.

⁴ *Paringa Mines, Ltd. v. Blair*, [1906] 2 Ch. 193.

⁵ For a full discussion of the subject of by-laws, see § 4a, *supra*.

⁶ *Manufacturers', etc. Co. v. Landay*, 219 Ill. 168 (1905).

⁷ *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506.

⁸ *Katz v. The H. & H., etc. Co.*, 183 N. Y. 578 (1905)..

first directors must be stated in their certificate of incorporation.¹ The stockholders have the power to accept resignations of directors and fill vacancies in the board.² The stockholders and not the directors in a national bank are to decide whether the stock shall be assessed in order to restore the impaired capital stock.³

§ 709. *Stockholders cannot carry on the business or enter into contracts for the corporation — These are the functions of the directors — One person owning all the stock — “Dummy” corporations.* — The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf.⁴ The ratification by

¹ *Renn v. United States, etc. Co.*, 36 Ind. App. 149 (1905).

² See §§ 603, 624, *supra*.

³ *Commercial, etc. Bank v. Weinhard*, 192 U. S. 243 (1904), the court saying: “It would be going far beyond the usual powers conferred upon directors to permit them to thus control the corporation. . . . The origin and continuation of the association would seem to be matters in which the owners and not the managers of the bank are primarily interested. Action upon the comptroller’s order involves extraordinary action of the association, and determines its future operations or liquidation, and is not found within the powers conferred upon the directors for the management of the business of the bank. If this were not so, then the decision of a question of such vital importance is left to the directors, who may or may not be large holders of stock. As it is a matter foreign to the powers of such boards and not conferred by statute or required for the transaction of the business of the bank, we think it was intended to be vested in the shareholders. Whether a given power is to be exercised by the directors or the

shareholders depends upon its nature and the terms of the enabling act.”

⁴ Quoted and approved in *Sellers v. Greer*, 172 Ill. 549 (1898), rev’g *Greer v. Sellers*, 64 Ill. App. 505, and holding that the court will not grant specific performance of a contract of one of the stockholders to sell all the property of the corporation to another stockholder, even though these two stockholders owned nine hundred and ninety-eight shares of the one thousand shares of the capital stock, and even though the holders of the remaining two shares of stock were merely nominal holders thereof. Also quoted and approved in *Manufacturers’, etc. Co. v. Landay*, 219 Ill. 168 (1905). “When a charter invests a board with the power to manage the concerns of a corporation the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment. The stockholders as such in their collective capacity could do no corporate act. The directors were their representatives and alone authorized to act.” *McCullough v. Moss*, 5 Denio, 567, 575 (1846). The stock-

the stockholders of an invalid mortgage made by the directors does not validate such mortgage.¹ The stockholders have no power to elect the president. Their action is a nullity.² Stockholders cannot elect a committee and compel the directors to act with that committee in corporate matters.³ It is not for the stockholders to direct how money received on the issue of new stock shall be used.⁴ A resolution of the stockholders fixing the rates of mileage to be paid to the directors is not binding on the directors, although if enacted into a by-law it would be binding.⁵ A committee appointed

holders do not make the contracts. *Solomon Co. v. Barber*, 58 Kan. 419 (1897). Stockholders cannot make contracts for a corporation, except, possibly, in meetings at which every stockholder is present. *Colorado, etc. Co. v. American, etc. Co.*, 97 Fed. Rep. 843 (1899). Where a corporation is authorized to issue preferred stock it may attach such conditions thereto as it deems best. One of the conditions may be that the corporation may retire the stock at par within a certain time. In retiring such preferred stock the corporation may issue additional common stock to the holders of the old common stock without giving any rights to the holders of preferred stock. Such stock may be retired by a vote of the directors without a vote of the stockholders. *Hackett v. Northern, etc. R. R.*, 36 N. Y. Misc. Rep. 583 (1901). In *Conro v. Port Henry, etc. Co.*, 12 Barb. 27 (1851), a lease of iron works was declared void because it was the act of the stockholders and not of the directors. In *McCullough v. Moss*, 5 Denio, 567 (1846), a promissory note signed by the president and secretary of the corporation was held invalid because authorized only by the stockholders and not by the directors; *Dana v. Bank of United States*, 5 Watts & S. (Pa.) 223, 245 (1843); *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565 (1875); aff'd, 96 U. S. 640, holding that it is for the directors and not the stockholders to repudiate corporate contracts made by an authorized agent; *Gashwiler v. Willis*,

33 Cal. 11 (1867), holding that the stockholders have no power to authorize a sale of corporate property. Such authority must come from the directors. The stockholders do not authorize contracts. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). Where a guaranty authorized by statute is to be by the company, it may be by the directors without any action of the stockholders. *Louisville Trust Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896). The stockholders have no power to authorize a mortgage. Only the board of directors can do so. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). See also § 808, *infra*. A contract made by the executive officers and ratified by a stockholders' meeting is binding without action by the directors, where the directors as stockholders voted for the same. *Kirwin v. Washington, etc. Co.*, 37 Wash. 285 (1905).

¹ *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). Resolutions passed at which a legal quorum of the directors is not present cannot be validated by action of the stockholders. *Bassett v. Fairchild*, 132 Cal. 637 (1901).

² *Walsenberg Water Co. v. Moore*, 5 Colo. App. 144 (1894).

³ *Charlestown, etc. Co. v. Dunsmore*, 60 N. H. 85 (1880).

⁴ *Jones v. Concord, etc. R. R.*, 67 N. H. 119 (1891); s. c., 67 N. H. 234.

⁵ *Mutual F. Ins. Co. v. Farquhar*, 86 Md. 668 (1898). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to

by the stockholders to arrange to meet the obligations of the company has no power to make contracts.¹ An assignment for the benefit of creditors is authorized by the directors, and not the stockholders.² The stockholders have no power to sell the property of the corporation, either separately or collectively.³ It is legal for the directors in selling property of the company to make it a condition of the sale that the stockholders shall ratify it.⁴ Even though the stockholders in meeting assembled pass a resolution that the entire assets shall be sold to another company, the board of directors need not carry out such resolution, the management and control of the business being in their hands.⁵

The law seems to be clear that all corporate contracts are to be made by the directors. This includes the original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders nor follow their wishes, even though the latter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts. Thus, a lease of the corporate property is authorized, not by the stockholders, but by the directors.⁶ Even though the holders of a

an assignment for the benefit of creditors. *Goetz v. Knie*, 103 Wis. 366 (1899).

1 *Augsburg Land, etc. Co. v. Pepper*, 95 Va. 92 (1897).

2 *Rogers v. Pell*, 154 N. Y. 518 (1898).

3 *Rough v. Breitung*, 117 Mich. 48 (1898). An assignment of all the company's property would not be within the power of the stockholders, even though all signed it, without formal action at a meeting held for that purpose. *De La Vergne, etc. Co. v. German, etc. Inst.*, 175 U. S. 40 (1899), citing the above section.

4 *Kelsey v. New England, etc. Ry.*, 60 N. J. Eq. 230 (1900); s. c., 62 N. J. Eq. 742.

5 *Automatic, etc. Co. v. Cunningham*, [1906] 2 Ch. 34.

6 Quoted and approved in *Mosher v. Sinnott*, 20 Colo. App. 454 (1905). *Beveridge v. New York Elev. Ry.*, 112 N. Y. 1 (1889); *Flagg v. Manhattan, etc. Ry.*, 20 Blatchf. 142 (1881); *People v. Metropolitan Ry.*, 26 Hun. 82 (1881); *Nashua, etc. R. R. v. Bos-*

ton, etc. R. R., 27 Fed. Rep. 821 (1886). *Contra*, *Metropolitan Ry. v. Manhattan Ry.*, 15 Am. & Eng. Ry. Cas. 1 (1884). *Cf. Harkness v. Manhattan Ry.*, 54 N. Y. Super. Ct. 174 (1886); *Cass v. Manchester, etc. Co.*, 9 Fed. Rep. 649 (1881); also § 712, *infra*. Where a corporation is given power to lease its property without the mode of making the lease being prescribed, it may be by a vote of the majority of the stockholders. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902); *aff'd*, 119 id. 871. A statute requiring leases by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. *Coal, etc. Co. v. Tennessee, etc. Co.*, 106 Tenn. 651 (1901). Directors are never obliged to consult the stockholders in meeting assembled, nor as a majority, as regards corporate con-

majority of the stock are opposed to the board of directors, yet the former cannot obtain an injunction against the board of directors selling treasury stock.¹ Although a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, although a purchaser with notice cannot enforce it.² However, if the contract is beyond the express and implied powers of the corporation, then any stockholder may have the contract enjoined or set aside. He can do so even though a majority of the stockholders approve the act and ratify it in meeting assembled. He may resort to the courts.³ A general resolution at a stockholders' meeting approving all acts of the directors and officers, such acts not being specified nor the minutes thereof read to the meeting, is not a ratification of the same.⁴

A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption by the corporation in the regular manner.⁵ A stockholder may of course be appointed the agent of the corporation.⁶

tracts. The stockholders cannot, by suit in equity, compel the directors to enter into a contract of lease. *Ives v. Smith*, 8 N. Y. Supp. 46 (1889). Stockholders cannot control the direction of the directors when the latter direct an assignment to be made for the benefit of creditors. So held though the directors were to go out of office in four days. *Hutchinson v. Green*, 91 Mo. 367 (1886). An extension of a railway cannot be enjoined merely because a majority of stockholders oppose it. *Ultra vires* must be alleged. *Moses v. Tompkins*, 84 Ala. 613 (1888).

¹ *Gillette v. Noyes*, 92 N. Y. App. Div. 313 (1904).

² *Louisville, etc. Ry. v. Louisville*

Trust Co., 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

³ See ch. XL, *supra*, and ch. XLIV, *infra*. As regards the relation and rights of stockholders towards suits and compromises of suits by or against the corporation, see § 750, *infra*.

⁴ *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). See also ch. XLIV, *infra*.

⁵ *Morelock v. Westminster Water*

⁶ *Stoddard v. Port Tobacco Parish*, 2 Gill & J. (Md.) 227 (1830), where a religious corporation employed a member of its vestry to make sale of pews; *Spear v. Ladd*, 11 Mass. 94 (1814), where the president of a

bank was appointed its agent to indorse a note; *Northampton Bank v. Pepoon*, 11 Mass. 288 (1814); *Bank Commissioners v. Bank of Brest, Harr. Ch. (Mich.)* 106 (1840).

A company is not liable on the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation.¹ A deed of corporate property by a person who owns all the stock does not convey good title.² Although one person owns

Co., 4 Atl. Rep. 404 (Md. 1886); Mays v. Foster, 13 Oreg. 214 (1886); Rice v. Peninsular Club, 52 Mich. 87 (1883); Berford v. New York Iron Mine, 4 N. Y. Supp. 836 (1888). See also § 625, *supra*. A stockholder cannot bind the corporation. National, etc. Co. v. Chicago Ry., etc., 226 Ill. 28 (1907). A stockholder has no power to contract for the corporation. Lawson v. Black, etc. Co., 44 Wash. 26 (1906). A stockholder has no authority to employ an attorney for the company. Tabor v. Bank of Leadville, 35 Col. 1 (1905). The misrepresentations of a stockholder inducing a person to purchase stock of the corporation are not binding on the corporation. Burnes v. Pennell, 2 H. L. Cas. 497, 519 (1849). The circumstances that a person is a member of an incorporated company gives him no authority to release a debt due to the corporation. Harris v. Muskingum, etc. Co., 4 Blackf. (Ind.) 267 (1836). A stockholder cannot bind the corporation. Jones v. Williams, 139 Mo. 1 (1897). Where all the individuals composing a corporation covenanted in behalf of such corporation for themselves and their heirs that the corporation should do certain acts, they were held to be bound personally. Tileston v. Newell, 13 Mass. 406 (1816). In a suit to recover damages of a corporation for flooding the plaintiff's land, it was held error to ask a witness whether individual members of the company had employed him to deprive the plaintiffs of their claim. Shay v. Tuolumne, etc. Co., 6 Cal. 74 (1856). Where the plaintiff claims the amount of his disbursements for work on the defendant corporation's road, but the evidence does not prove a request to the plain-

tiff by the corporation, its directors, or authorized agent, or any stipulation, expressed or implied, to authorize a charge against the corporation for such disbursements, no act of an individual member can be held to bind the corporation. Hayden v. Middlesex, etc. Corp., 10 Mass. 397 (1813). The intention of a corporation can only be learned by the language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation are for this purpose to be inquired after. Thus, a plaintiff resisting a tax may not establish its legality by evidence as to the intent of those voting the levy. Bartlett v. Kingsley, 15 Conn. 327 (1843). Stockholders' contracts do not bind the corporation. American Preservers' Co. v. Norris, 43 Fed. Rep. 711 (1890); Wright v. Lee, 2 S. D. 596 (1892); s. c., 4 S. D. 237. Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc. Co. v. Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891).

¹ Central Trust Co. v. Bridges, 57 Fed. Rep. 753 (1893).

² Parker v. Bethel Hotel Co., 96 Tenn. 252 (1896). In this case some of the stock had been pledged. The stockholders, as such, cannot convey the real estate of the corporation, though they all join in the deed, unless the execution is in pursuance of some vote of the corporation. Isham v. Bennington Iron Co., 19 Vt. 230 (1847); Wheelock v. Moulton, etc., 15 Vt. 519 (1843). Even though a person owns all but two shares of the

a majority of the stock,¹ or all of it,² or all but two shares,³ he does

capital stock, yet a transfer of corporate property by him is ineffective to convey title. *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). Even though the president and a director own all the stock, yet they cannot execute a mortgage in behalf of the corporation where there are four other directors, who are nominal stockholders. *Union, etc. Bank v. State, etc. Bank*, 155 Mo. 95 (1900).

¹ *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373 (1874). He cannot sell the corporate property. The person owning a majority of the stock cannot contract for the corporation, and a contract in its name made by him is not binding on it. *Allemong v. Simmons*, 124 Ind. 199 (1890). Where a construction contract is signed by an individual in his own name, the corporation is not liable on it, although he owned nearly all the stock and the work was for its benefit. *Donoghue v. Indiana, etc. Ry.*, 87 Mich. 13 (1891). Where, however, a part of the stockholders contract to sell the corporate property to a third person, they are liable in damages for breach of the contract. *Curtis v. Watson*, 64 Vt. 536 (1892).

² "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." *Humphreys v. McKissock*, 140 U. S. 304 (1891). On this subject, see §§ 663, 664, *supra*. A railroad company owning all the stock and bonds of another company

does not own the property of the latter, and cannot sue on a cause of action belonging to the latter. *Fitzgerald v. Missouri Pac. Ry.*, 45 Fed. Rep. 812 (1891). Stockholders who transfer the corporate property are jointly and severally liable to corporate creditors. *Graham v. Hoy*, 38 N. Y. Super. Ct. 506 (1875). The fact that the manager of a corporation and his brothers own all the capital stock does not make their acts the acts of the corporation. *Bank of Monroe v. Gifford*, 72 Iowa, 750 (1887). Stockholders owning all the stock and bonds of a road cannot destroy the same and then sell the road to another company. *Gulf, etc. Ry. v. Morris*, 67 Tex. 692 (1887). See also *Button v. Hoffman*, 61 Wis. 20 (1884), where it is held that such a stockholder is not the corporation. *Contra*, *Swift v. Smith*, 65 Md. 428 (1886). A railroad company owning practically all of the stock of another company may lease the line of the latter company to another company. *Chicago, etc. Ry. v. Union Pac. Ry.*, 47 Fed. Rep. 15 (1891). A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation, and the bridge itself leased to the latter. *St. Louis, etc. Ry. v. Williams*, 53 Ark. 58 (1890). Where a corporation or person owns all the stock and bonds of another corporation, and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892). The sole owner of the entire capital stock cannot collect a corporate debt by a suit

³ *England v. Dearborn*, 141 Mass. 590 (1886), holding that such a stockholder cannot mortgage the corporate property.

not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue.¹ Although one water-

in his own name. *Randall v. Dudley*, 111 Mich. 437 (1897). The corporate entity is distinct, although one party owns the whole stock. *Exchange Bank v. Macon Constr. Co.*, 97 Tenn. 1 (1895). The fact that one person owns all the stock does not dissolve the corporation. *Harrington v. Connor*, 51 Neb. 214 (1897). See also § 631, *supra*. Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate—a brewery—and the real transaction is a sale of the entire property. *Megibben v. Perin*, 49 Fed. Rep. 183 (1892); *rev'd* on another point in *Perin v. Megibben*, 53 Fed. Rep. 86 (1892).

1 *Newton Mfg. Co. v. White*, 42 Ga. 148 (1871). See also *Sharp v. Dawes*, 2 Q. B. D. 26 (1876); *Button v. Hoffman*, 61 Wis. 20 (1884); *Swift v. Smith*, 65 Md. 428 (1886); *England v. Dearborn*, 141 Mass. 590 (1886); *Hopkins v. Roseclare Lead Co.*, 72 Ill. 383 (1874); *Bellona Co.'s Case*, 3 Bland (Md.), 442, 446 (1831); *Farmers', etc. T. Co. v. Chicago, etc. Ry.*, 39 Fed. Rep. 143 (1889); *rev'd* on another point in 151 U. S. 1. The rule is the same where two persons buy all the stock. *Russell v. McLellan*, 31 Mass. 63 (1833). The corporation still subsists, and the two purchasers do not become partners, or joint tenants, or tenants in common of the corporate property. *Cf. Commonwealth v. Cullen*, 13 Pa. St. 133 (1850). Although one person owns all or nearly all the stock he cannot act as though he was the corporation. *Chase v. Michigan, etc. Co.*, 121 Mich. 631 (1899). The employment of a person as general manager is not proved by proving that the person who owned all the stock of the corporation so employed him. *Hammond*

v. Hammond, etc. Co., 72 Conn. 130 (1899). Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. *Saranac, etc. Co. R. R. v. Arnold*, 167 N. Y. 368 (1901). For an interesting discussion of the question as to why an artificial existence of the corporation, as distinguished from that of stockholders, should be ignored, see *Cincinnati, etc. Co. v. Hoffmeister*, 62 Ohio St. 189 (1900); and *Andres v. Morgan*, 62 Ohio St. 236 (1900). In the case of *First National Bank, etc. v. Winchester*, 119 Ala. 168 (1898), where a private corporation had but four stockholders, and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation and secured by mortgage on the corporate property, the court held that the notes were not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving *Swift v. Smith*, 65 Md. 428 (1886). A state cannot have a bridge company's franchise forfeited on the ground that the city owns the entire stock and charges no tolls and manages the property as its own. *Commonwealth v. Monongahela, etc. Co.*, 216 Pa. St. 108 (1906). It is legal for a corporation to purchase property from a woman who owns the majority of the stock, even though she is the wife of the manager. *Figge v. Bergenthal*, 130 Wis. 594 (1906). A city tax applies to the

works company owns all the stock of another water-works company, a mortgage given by the former company on all its property does not cover the property of the latter company as against *bona fide* purchasers of bonds of the latter company.¹

A railroad company owning all the stock and bonds of another company does not own the property of the latter, and cannot sue on a cause of action belonging to the latter;² and ordinarily is not liable for its debts.³

property of a water-works company, even though the entire capital stock of the company is owned by the city itself. *City of Louisville v. McAteer*, 81 S. W. Rep. 698 (Ky. 1904). Even though an English corporation owns nearly all the stock of an American corporation, yet the income of the latter is not subject to the income tax of England. *Kodak Limited v. Clark*, [1903] 1 K. B. 505. A railroad company which acquires all the stock of another railroad company and then files a certificate with the secretary of state under the New York statute, which prescribes that thereupon the former succeeds to the property of the latter, is practically dissolved. *Rochester Railway v. Rochester*, 205 U. S. 236 (1907), aff'g 182 N. Y. 116. The owner of the entire capital stock does not in any legal sense own the property of the company. *Coal, etc. Ry. v. Peabody Coal Co.*, 82 N. E. Rep. 627 (Ill. 1907). A creditor of the stockholders who own practically the entire capital stock cannot attach the property of the corporation for their debt, even though he alleges

that the corporation intends to dispose of its assets to defraud creditors. *Schoeneman v. Sowle*, 113 N. W. Rep. 1061 (Minn. 1907). Ownership of all the stock by one person does not dissolve the corporation. *Louisville, etc. Co. v. Kaufman*, 105 Ky. 131 (1898). Even though one man owns a majority of the stock of two corporations, and they have dealings with each other, yet upon the insolvency of the one a claim of the other is to be allowed the same as the debt of any other creditor. *Lange v. Burke*, 69 Ark. 85 (1901). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. *East St. Louis, etc. Ry. v. Jarvis*, 92 Fed. Rep. 735 (1899). In a suit by a corporation to obtain property, in accordance with a contract, a trustee who is holding all the stock for the benefit of the stockholders is not a proper party. *Havana, etc. Ry. v. Ceballos*, 49 N. Y.

1 *National Water-works Co. v. Kansas City*, 78 Fed. Rep. 428 (1896). See also §§ 663, 664, *supra*.

2 *Fitzgerald v. Missouri Pac. Ry.*, 45 Fed. Rep. 812 (1891). See also §§ 663, 664, *supra*. An owner of all the stock is not the owner of the property. *City of Louisville v. McAteer*, 81 S. W. Rep. 698 (Ky. 1904).

3 Although one railroad owns or controls all the stock of another railroad, yet the former is not personally

liable for the negligence, debts, etc., of the latter. *Atchison, etc. R. R. v. Cochran*, 43 Kan. 225 (1890). When a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892). See *Standard Oil Co. v. U. S.*, — Fed. Rep. — (1908).

There are, however, two exceptions to the rules given above. The first is that corporate action may arise in other ways than by the formal action of its board of directors or meeting of stockholders or of its agents. It may arise by a long course of dealing which estops the corporation from denying the legality of that mode of dealing,¹ or by the corporation acquiescing, or by its accepting the benefits of the transaction.² It may arise by passively allowing

App. Div. 263 (1900). Even though one person owns all the stock except two shares, in a suit by the corporation such stockholder should not be joined. *Fox v. Robbins*, 62 S. W. Rep. 815 (Tex. 1901). Even though a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, yet it cannot ignore the corporate existence and convey, incur, or deal with the property as its own. *Watson v. Bonfils*, 116 Fed. Rep. 157 (1902). The fact that one person owns all the stock of a corporation does not make him and the corporation one and the same person. The corporation continues to exist. *State v. Morgan's, etc. Co.*, 106 La. 513 (1901).

1 See many cases in the succeeding sections relative to the authority of various officers.

2 Even though an assignment by an insolvent corporation may be only by vote of the stockholders, yet if made on a vote of the directors and the stockholders acquiesce for a considerable time it is legal. *Young v. Improvement, etc. Assoc.*, 48 W. Va. 512 (1900). A contract between two street railway companies, whereby one is given the right to run its cars over the tracks of the other, is valid, even though it has not been authorized by the board of directors or a meeting of the stockholders, it being shown, however, that the officers made the contract and that it was approved by a majority of the stockholders, and was reported at the next meeting of the stockholders and was

not objected to, and has been carried into effect and payments made and operation carried on in accordance therewith. *South, etc. Ry. v. Second Ave. etc. Ry.*, 191 Pa. St. 492 (1899). A person owning practically all the stock of a company and attending to all its affairs, and mingling its bank account with his own, may bind it by a contract to sell its land. *Roberts v. Hilton Land Co.*, 88 Pac. Rep. 946 (Wash. 1907). Where a corporation allows one of the stockholders to transact all the business without any directors' meetings, the corporation is bound by a contract made by him in its behalf. *Groh's Sons v. Groh*, 80 N. Y. App. Div. 85 (1903); rev'd on another point in 177 N. Y. 8. Even though stockholders sell their stock to one person and he takes charge of the property as his own, yet if he continues to do business in the corporate name and the stock is not paid for and is finally turned back the company is liable for the debts which he has incurred. *Albany Mill Co. v. Huff Bros.*, 72 S. W. Rep. 820 (Ky. 1903). A contract made by a majority stockholder is binding on the corporation if the corporation with full knowledge ratifies the contract by accepting the benefits of it. *Dupignac v. Bernstrom*, 37 N. Y. Misc. Rep. 678 (1902); aff'd, 76 N. Y. App. Div. 105. Even though the directors have not especially authorized a mortgage, yet, if the person who owns practically all the stock takes part in the transaction and the corporation receives the benefit of it, the mortgage is good. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). A record of a

itself to be used as an instrument of wrong or illegal acts.¹ It is to be borne in mind also that by unanimous consent a corporation may do many acts which ordinarily would be *ultra vires* of the corporation.² It is also a principle of law that a person buying the securities of a company is not bound always to inquire whether regular corporate action has been taken. The supreme court of the United States says: "One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."³ Where a man sells land to a company relying on a resolution certified to by the officers to the effect that the purchase had been duly authorized, the company cannot afterwards repudiate the purchase on the ground that the directors' meeting was irregular and no quorum present.⁴

The second exception is that, where a corporation is merely a "dummy," the court has power to ignore its corporate existence and to hold that the acts of the stockholder are the acts of the corporation itself.⁵ Thus, where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the

stockholders' meeting showing acceptance of an auditor's report is an admission of his employment. *Clarke v. Warwick, etc. Co.*, 174 Mass. 434 (1899).

¹ *People v. North River Co.*, 121 N. Y. 582, 619 (1890). But an agreement of the stockholders of a corporation that they will not compete with a "trust" into which they have entered will not bind the corporation itself. It may revive its business, even though its stockholders are the ones who entered into the "trust." *American Preservers' Co. v. Norris*, 43 Fed. Rep. 711 (1890).

² See § 3, *supra*. Where two parties own all the stock, and by agreement one of them takes some of the corporate assets and thereafter the matter

is settled satisfactorily and the stock sold, the purchasers knowing of the facts cannot complain. *Peterson v. Elholm*, 130 Wis. 1 (1906).

³ *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

⁴ *Montreal, etc. Co. v. Robert*, [1906] A. C. 196. The secretary's record as to the amount of stock voted in favor of a mortgage may be contradicted by proof taken from the stock book. *Middleton v. Arastraville, etc. Co.*, 146 Cal. 219 (1905).

⁵ See §§ 663, 664, *supra*. Although

faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of law that a principal is liable on the contracts of its agents.¹

Where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.²

Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.³

§ 710. *The expulsion of stockholders.*—The law forbids the directors or stockholders of a corporation having a capital stock from depriving him of his rights as a stockholder. He certainly cannot be deprived of his right to dividends equally with other stockholders.⁴ He cannot be deprived of his right to vote.⁵ And it is clear that his various rights as a stockholder cannot be taken from him by any or all of the other stockholders. In this respect a corporation having a capital stock is clearly different from a corporation formed for religious, social, charitable, and similar purposes. The former is for purposes of gain, and the property which is represented by stock cannot be taken from a stockholder by expelling him from the corporation.⁶ It is doubtful whether a stock corporation can impose a fine upon the stockholder for a violation of its by-laws.⁷

§ 711. *Stockholders cannot change the directors except at elections.*—The term of office of directors is usually fixed by the charter of the corporation or the statutes applying to it. Such being the case, a director having been elected is entitled to hold his position until the expiration of his term of office. He cannot be turned out either by the stockholders,⁸ or the directors, or by a

a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. *Southern Kansas, etc. R. R. v. Towner*, 41 Kan. 72 (1889).

¹ *Interstate Tel. Co. v. Baltimore, etc. Tel. Co.*, 51 Fed. Rep. 49 (1892).

² *Day v. Postal Tel. Co.*, 66 Md. 354 (1887).

³ See § 694, *supra*.

⁴ See § 540, *supra*.

⁵ See § 622, *supra*.

⁶ The right to forfeit stock for non-

payment of calls may possibly be called an "expulsion," but is a misuse of that term. See ch. VIII, *supra*. Brokers' associations frequently have by-laws authorizing the expulsion of members. Concerning expulsion in general, see § 504, *supra*.

⁷ *Monroe, etc. Assoc. v. Webb*, 40 N. Y. App. Div. 49 (1899).

⁸ *Imperial, etc. Hotel Co. v. Hampson*, L. R. 23 Ch. D. 1 (1882); *Powers v. Blue, etc. Assoc.*, 86 Fed. Rep. 705 (1898); *Nathan v. Tompkins*, 82 Ala. 437 (1886), holding also that an election is wholly void where part of those elected are to fill the place of

court.¹ Sometimes, however, the charter, statutes, or by-laws authorize and empower the stockholders to remove directors at any time.² And where the stockholders have power by charter or statute to remove directors for cause, the exercise of their discretion therein will not be reviewed in equity.³ So, likewise, where such a power is given to the stockholders, a court of chancery will not enjoin the holding of a meeting called by the stockholders to consider, among other matters, the removal of the directors.⁴ The president of the corporation, duly elected by the board of directors, does not hold his position at the pleasure of the board.⁵ Where a by-law allows the removal of a

officers illegally removed, there being no particular persons designated to fill the legal vacancies. See also *Berry v. Cross*, 3 Sandf. Ch. 1 (1845); *Gorman v. Guardian Sav. Bank*, 4 Mo. App. 180 (1877). *Cf. dicta in State v. Brice*, 7 Ohio (pt. 2d), 82 (1836); *Adamantine Brick Co. v. Woodruff*, 4 MacArthur, 318 (1880); *Burr v. McDonald*, 3 Gratt. (Va.) 215 (1846); *Bayless v. Orme, Freem. Ch. (Miss.)* 161 (1841). A director, however, may resign, and in such a case the corporation may accept the resignation. *Cloutman v. Pike*, 7 N. H. 209 (1834), a municipal corporation case. In England the by-laws generally give the stockholders the power to remove directors. See *Browne v. La Trinidad*, L. R. 37 Ch. D. 1 (1887); *Isle of Wight Ry. v. Tahourdin*, L. R. 25 Ch. D. 320 (1883). Where in a corporation the state itself is represented by a certain number of directors, the state may remove those directors at any time, and appoint others in their place. *Tucker v. Russell*, 82 Fed. Rep. 263 (1897).

¹ *Johnston v. Jones*, 23 N. J. Eq. 216 (1872). See also § 624, *supra*, and § 746, *infra*. In the case of *State v. Boston, etc. Co.*, 22 Mont. 220 (1899), a question was raised, but not decided, as to the right of a court to remove directors. A director cannot be excluded from his duties as such, nor can his election be declared invalid, merely because of what he may contemplate doing as a director. *Ohio, etc. Co. v. State*, 49 Ohio St. 668

(1892). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. *Stanley v. Luse*, 36 Ore. 25 (1899).

² Such is the law in Ohio, West Virginia, and many other states. Such, also, is the law applicable to national banks. See U. S. Rev. St., § 5136; also *Taylor v. Hutton*, 43 Barb. 195 (1864). Where by statute "two-thirds of the stockholders" may remove any director from office, this means holders of two-thirds of the stock, the statute further providing that each share of stock shall have one vote. *State v. Horan*, 22 Wash. 197 (1900). The fact that a secretary's salary is annual does not prevent the company from discharging him at any time, where the by-laws provide for removal at any time. *Douglass v. Merchants' Ins. Co.*, 118 N. Y. 484 (1890). The president may remove the teller. *Harrington v. First Nat. Bank*, Thompson's N. B. Cas. 760 (1873). A director cannot have an injunction against stockholders calling and holding a meeting to remove him, there being no allegation that the stockholders have no such right. *Shulman v. Star, etc. Co.*, 113 N. Y. App. Div. 759 (1906).

³ *Inderwick v. Snell*, 2 Macn. & G. 216 (1850).

⁴ *Isle of Wight Ry. v. Tahourdin*, L. R. 25 Ch. D. 320 (1883).

⁵ *Archer v. People's Sav. Bank*, 88 Ala. 249 (1889). Where three out of

director on a two-thirds vote of the whole board, he cannot be removed on a vote of four out of seven, even though one refuses to vote.¹

The stockholders of a corporation at a special meeting duly called may amend the by-laws so as to authorize the board of directors to remove the president and treasurer, and the board of directors may subsequently make such removal under the amended by-laws.² A voluntary unincorporated association without articles, constitution, or rules may remove its president or other officer at any time and without notice, except that the meeting held for that purpose must be duly held, and such meeting cannot expel a member without notice.³ Stockholders may amend the by-laws so as to increase the number of directors, and may at the same meeting elect the additional directors.⁴ In New York, under the statute authorizing the attorney-general to bring suit to remove directors and other corporate officers for misconduct, he may commence suit to remove them as directors and also as officers for issuing stock without consideration.⁵

§ 712. *Directors—Their power as a board and as individuals to contract for the corporation—Ratification by the directors.*—All contracts of a corporation are to be made by or under the direction of its board of directors. The board of directors make corporate contracts by a regular vote of the board; or by authorizing an agent to make them; or by allowing an agent to assume and exercise that power; or by accepting a contract or its benefits after it has been made by an unauthorized agent. And in all cases the board of directors and not the stockholders, nor the president, secretary, treas-

five directors met without notice to the other two, and deposed the president and authorized a mortgage, their acts are void. *Hatch v. Johnson L. & T. Co.*, 79 Fed. Rep. 828 (1895). Where a treasurer was elected in June at an annual salary and the by-laws provide that the directors should elect officers in September, which, however, they fail to do, they may remove him in January of the following year, especially where the statutes authorize the corporation to remove officers at any time. *O'Neal v. F. A. Neider Co.*, 118 Ky. 62 (1904).

¹ *Stephany v. Liberty Cut Glass Works*, 69 Atl. Rep. 967 (N. J. 1908).

² *In re Griffing Iron Co.*, 63 N. J. L. 168 (1898); *aff'd*, 63 N. J. L. 357

(1899). Where a directors' by-law, confirmed by the stockholders, fixes their term of office at one year, the stockholders cannot, by amending the by-law, turn the directors out during the year. *Stephenson v. Vokes*, 27 Ont. (Can.) 691 (1896).

³ *Ostrom v. Greene*, 161 N. Y. 353 (1900), the court saying: "The holding of an office unprotected by rules is not an individual right, but is subject to change at the pleasure of the association."

⁴ *Gold Bluff, etc. Co. v. Whitlock*, 75 Conn. 669 (1903). See also § 624, *supra*.

⁵ *People v. Lyon*, 119 N. Y. App. Div. 361 (1907).

urer, or other agent, is the original and supreme power in corporations to make corporate contracts. The stockholders, indeed, have very few functions.¹ The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into² are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation. The directors elect the officers, and in this connection it may be added that "at common law there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other."³ They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it.⁴

But there are limitations on their powers. If the board of directors attempt to do an act or make a contract which the corporate charter does not give the corporation the power to do or enter into, then any stockholder may enjoin that act or contract.⁵ Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting and thereby bind the corporation.⁶ Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation.⁷

A single director has no power to contract for the corporation.⁸

¹ See §§ 708-711, *supra*.

² See ch. XLI, *supra*, and in fact most of the preceding chapters of this book. There being nothing in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers. *Re Bulwayo, etc. Co., Ltd.*, 97 L. T. Rep. 752 (1907).

³ Throop on Public Officers, § 30; *People v. Green*, 58 N. Y. 295 (1874). *Cf. Atty.-Gen. v. Detroit*, 112 Mich. 145 (1897).

⁴ Quoted and approved in *Taylor v. Sutherland, etc. Co.*, 60 S. E. Rep. 132 (Va. 1908). See § 750, *infra*.

⁵ See ch. XL, *supra*. As to ratifica-

tion of such acts by the stockholders, see ch. XLIV, *infra*.

⁶ See § 713a, *infra*.

⁷ See § 713a, *infra*.

⁸ Quoted and approved in *Alabama, etc. Bank v. O'Neil*, 128 Ala. 192, 195 (1901). See the cases under § 716, *infra*, where the president even, who is always a director, was held not to have power to contract. A director has no power to bind the corporation. *Gaynor v. Williamsport, etc. R. R.*, 189 Pa. St. 5 (1899). A director has no authority to employ an attorney for the company. *Gulf & I. Ry., etc. v. Campbell*, 108 S. W. Rep. 972 (Tex. 1908). A director has no power to make a contract for the corporation. *Wagner v. St. Peter's Hospital*, 32 Mont. 206 (1905). A watchman em-

It is perfectly legal, however, for a board of directors to delegate to an agent the power to make a contract,¹ and this agent may, of course, be a director as well as a third person.² The board of directors and the corporation are bound also by the contracts of a director or other person who has assumed to contract for the com-

ployed by a director without authority cannot recover for his services. *Brown v. Valley, etc. Co.*, 127 Cal. 630 (1900). A director has no power, unless specially authorized, to bind the company by a representation. *Milwaukee, etc. Co. v. Schoknecht*, 108 Wis. 457 (1901). A director has no power to employ a physician to attend an employee who has been injured. *Sias v. Consolidated, etc. Co.*, 73 Vt. 35 (1901). Misrepresentations by a director of a manufacturing corporation do not affect claims held against it by a bank although such director is cashier of the bank. *Hadden v. Dooley*, 92 Fed. Rep. 274 (1899). A director has no authority to contract for the corporation. *Noblesville, etc. Co. v. Loehr*, 124 Ind. 79 (1890); *Allemon v. Simmons*, 124 Ind. 199 (1890); *Goodyear Rubber Co. v. Scott Co.*, 96 Ala. 439 (1892); *New, etc. Co. v. Upton*, 67 N. H. 469 (1893). See also *Chicago, etc. R. R. v. James*, 22 Wis. 194 (1867); s. c., 24 Wis. 388; *Trundy v. Hartford, etc. Co.*, 6 Rob. (N. Y.) 312 (1868), where a director employed a broker; *New Haven, etc. Co. v. Hayden*, 107 Mass. 525 (1871), where a director, stockholder, and overseer contracted to extend the business; *Titus v. Cairo, etc. R. R.*, 37 N. J. L. 98 (1874), where a director sold bonds; *Lockwood v. Thunder, etc. Co.*, 42 Mich. 536 (1880); *Bramah v. Roberts*, 3 Bing. N. Cas. 963 (1837), where a director accepted a bill; *Rice v. Peninsular Club*, 52 Mich. 87 (1883), where a director said that a purchase was all right. But in *Bradstreet v. Bank of Rutland*, 42 Vt. 128 (1869), it was held that an employee who was employed by three directors might recover. If the corporation is only an intermediary of title, such as

payee and indorser, the indorsee may recover against the maker without making strict proof as to the authority of the directors to indorse. *Smith v. Johnson*, 3 H. & N. 222 (1858). Where a director causes work to be done on the corporate property on an agreement that he will pay for the same, the corporation is not liable therefor. *Ayers v. Green, etc. Co.*, 48 Pac. Rep. 221 (Cal. 1897). He is not an agent to discount paper. *Washington Bank v. Lewis*, 39 Mass. 24 (1839). Nor to agree to give extra pay. *Stoystown, etc. Turnp. Co. v. Craver*, 45 Pa. St. 386 (1863). A director has no inherent authority to lease property belonging to the corporation, even though he owns a majority of the stock. *Clement v. Young-McShea, etc. Co.*, 67 Atl. Rep. 82 (N. J. 1906). *Lindley, Companies*, p. 155. See also § 726, *infra*.

¹ *Spear v. Ladd*, 11 Mass. 94 (1814); *Northampton Bank v. Pepoon*, 11 Mass. 288 (1814), where a director was authorized to indorse a note; *Bank Commissioner v. Bank of Brest*, Harr. Ch. (Mich.) 106 (1840); *Stevens v. Hill*, 29 Me. 133 (1848); *Lester v. Webb*, 83 Mass. 34 (1861); *Abbot v. American Hard Rubber Co.*, 33 Barb. 578 (1861); *U. S. Bank v. Dana*, 6 Pet. 51 (1832); *Metropolis Bank v. Jones*, 8 Pet. 12, 16 (1834); *Percy v. Millaudon*, 3 La. 568 (1833); *Pennsylvania Bank v. Reed*, 1 Watts & S. (Pa.) 101 (1841); *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256 (1825); *Leavitt v. Yates*, 4 Edw. Ch. 134 (1843). As to delegation of discretionary powers, see § 715, *infra*; *Sheridan, etc. Co. v. Chatham Nat. Bank*, 52 Hun, 575 (1889); *aff'd*, 127 N. Y. 517.

² A director who is authorized to

pany, and for some time has been allowed by the board to so act and contract.¹ So also the board of directors and the corporation are bound by an unauthorized agent's contract when the contract is acquiesced in or the benefits of that contract are accepted;² or when the corporation expressly ratifies and confirms the contract.³

It is an important principle of law that a corporation may be liable on a contract, the benefit of which it accepts, even though such contract was not authorized by the board of directors. Thus, a contract signed in the corporate name, but without the authority of the board of directors, may be validated by the corporation acting under it for a year.⁴ Where the president of a railroad renders ser-

purchase and pay in stock cannot agree to pay in cash. *Hayden v. Middlesex, etc. Co.*, 10 Mass. 403 (1813). Authority to a director to make contract for the sale of land does not authorize him to convey the land. *Green v. Hugo*, 81 Tex. 452 (1891).

¹ A director by being allowed for many years to do all the business of a bank, binds the bank by his acts the same as though he were a regular officer of the bank. *Pottsville Bank v. Minersville, etc. Co.*, 211 Pa. St. 566 (1905). No officers are necessary other than directors where the stockholders acquiesce in the directors transacting all the business. *Buck v. Troy, etc. Co.*, 76 Vt. 75 (1903). Where a director conducts all the business of a corporation as though it was his own business, the corporation is bound by his acts. *Clement v. Young-McShea, etc. Co.*, 69 N. J. Eq. 347 (1905). Where the board of directors allow one of their number to manage the company and conduct and transact its business, he is the same as an executive committee or general manager or managing director, and his acts bind the company, even though there was no formal vote giving him authority. *York v. Mathis*, 68 Atl. Rep. 746 (Me. 1907). See many cases in the following sections. Also *Beers v. Phoenix, etc. Co.*, 14 Barb. 358 (1852), where a director and secretary borrowed money as he was accustomed to do. But unless

the custom is known to the directors the corporation is not bound. *Lawrence v. Gebhard*, 41 Barb. 575 (1864). And the act must be *intra vires*. *Women's, etc. Union v. Taylor*, 8 Colo. 75 (1884).

² See many cases in subsequent sections herein. Also *New Hope, etc. Co. v. Phenix Bank*, 3 N. Y. 156 (1849), where loans of the company's money were made by a director. Where a director has employed an attorney, but such employment is with the knowledge and assent of the board of directors and executive committee, the company is liable for his fees. *Germania, etc. Co. v. Hargis*, 64 S. W. Rep. 516 (Ky. 1901). Where a corporation has accepted work done on the order of a director and a majority stockholder, it must pay therefor. *Huntington Fuel Co. v. McIlwaine*, 82 N. E. Rep. 1001 (Ind. 1907).

³ See § 707, *supra*, on promoters' contracts; also §§ 716-720, *infra*. The ratification of an unauthorized mortgage may be by express resolutions. *Purser v. Eagle Lake, etc. Co.*, 111 Cal. 139 (1896). An unauthorized note issued by a corporation may be ratified by the board of directors. *Nebraska, etc. Co. v. Bell*, 58 Fed. Rep. 326 (1893).

⁴ *Jourdan v. Long Island R. R.*, 115 N. Y. 380 (1889). Although a sale of property is not authorized by the board of directors, yet if they accept the pay the sale is valid. *Beach v. Miller*, 130 Ill. 162 (1889). Where a

VICES in litigations and in obtaining loans on the agreement of the board of directors to pay him therefor, he may recover payment

contractor does extra work upon the assurance of a director that the company will pay for it, and had agreed so to do at a meeting, and a majority of the directors knew of the extra work, the company is liable therefor. *Tryon v. White, etc. Co.*, 62 Conn. 161 (1892). Where by resolution of the stockholders all the property of an embarrassed corporation is transferred to trustees to sell and pay the debts and reconvey the remainder to the corporation, and the trustees proceed to do so, the transaction is legal, even though the stockholders' meeting is not held at its principal office, and proxies were irregular and unauthorized, and the directors took no action, and the conveyances were irregular. *Kessler & Co. v. Ensley Co.*, 141 Fed. Rep. 130 (1905); *aff'd*, 148 Fed. Rep. 1019. In New York it is the rule that a business corporation is not liable on commercial paper issued in its name, unless it is shown not only that it was issued by the corporate officers, but that it was authorized by a resolution of the board of directors, or by the by-laws, or by a course of dealing by which the corporation held out that the officers were authorized to issue such paper, or by a ratification of the corporation by accepting and retaining the benefits of the paper. *Miners', etc. Bank v. Ardsley Hall Co.*, 113 N. Y. App. Div. 194 (1906). Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital stock into preferred stock and thereafter divide the profits among themselves without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, cor-

porate creditors not being injured. *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274 (1904). The court said: "In the present case we apply this doctrine to the non-observance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante*, were the assent of his fellow stockholders and of the company to be now withdrawn." A mortgage executed by the president is legal, even though not authorized by the board of directors, it appearing that all the officers and stockholders knew of it and accepted the benefit of it. *Fourth Nat. Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905). Ratification in the case of a land contract may have to be in writing to satisfy the statute of frauds. *Salfield v. Sutter, etc. Co.*, 94 Cal. 546 (1892). It may be a question of fact for the jury as to whether the company accepted the contract or not. *Chapin v. Cambria, etc. Co.*, 145 Pa. St. 478 (1891). Although mortgage bonds are issued by corporate officers without authority, yet if for several years they are used as a pledge to secure corporate debts, and in the meantime directors and stockholders know of their issue, they are valid. *Stainback v. Junk, etc. Co.*, 98 Tenn. 306 (1897). Even though the officers in executing a deed in behalf of the corporation omit a covenant

for the same, even though there was no formal resolution of the directors, and even though the by-laws were silent as to the duties

that the grantee assumes a mortgage on the property, as required by the resolutions of the board of directors authorizing such deed, yet if the corporation accepts a consideration for the deed other corporate directors cannot object thereto. *White v. Shepara*, 41 N. Y. App. Div. 113 (1899). An assessment by the directors to pay a mortgage does not legalize such mortgage if it was not properly authorized, even though signed by the president, secretary, and two-thirds of the stockholders. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). An unauthorized purchase of real estate and a mortgage thereon by a corporation may be ratified, but only by the same formalities as if original authority were being given. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). An unauthorized alteration in a mortgage may be ratified by the subsequent acts of the parties. *Woodbury v. Allegheny, etc. R. R.*, 72 Fed. Rep. 371 (1895). Bonds issued by a cemetery corporation, and signed and sealed and recognized at many meetings of the directors, are legal. *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333 (1895); s. c., 157 N. Y. 697. Where the corporation has occupied premises under an unauthorized lease, the court may submit to the jury the question of whether it ratified the lease. *Hayden v. Wheeler, etc. Co.*, 20 N. Y. Supp. 902 (1892). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage, where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. *Warren v. Bigelow Blue Stone Co.*, 74 Hun, 304 (1893). Where all the directors and all the stock except one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. *Witter v. Grand Rapids, etc. Co.*, 78 Wis. 543 (1891). A board of directors may ratify and thereby validate a mortgage which may have been executed without authority. *Allis v. Jones*, 45 Fed. Rep. 148 (1891). A corporation is liable for work done, although the officer employing plaintiff had himself contracted to do the work for the corporation. Plaintiff had no notice of this agreement. *Salt Lake, etc. Co. v. Mammoth Min. Co.*, 6 Utah, 351 (1890). If the corporation admits in its pleading that a contract was entered into, a judgment for plaintiff will not be disturbed although the pleading was not put in evidence. *Teall v. Consolidated, etc. Co.*, 119 N. Y. 654 (1890). A reorganized company may, by accepting the benefits of a contract and liability of the old company, become liable therefor, although the meeting of the directors authorizing the contract was informal. *Baker v. Harpster*, 42 Kan. 511 (1889). That the corporation is liable if the work was ordered and done for its benefit, see *Grier v. Hazard*, 13 N. Y. Supp. 583 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract were insufficient; nor can he set up in such a case that the directors had not authorized the contract. *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892). Although a mortgage was not authorized, yet where the board of directors subsequently provide for payment of part of it, and do pay part of it, they ratify it. *Seal v. Puget Sound, etc. Co.*, 5 Wash. St. 422 (1892). It is a ratification of a contract for the corporation to admit its

of the president and as to his salary.¹ Where a corporation borrows money and gives its note, it is immaterial that one director was absent from the meeting authorizing the note, where the directors subsequently knew about the note and did not object.² Even though an original note was not authorized, yet if the renewal was authorized the note is valid.³

A purchase-money mortgage given by a corporation is binding, even though not authorized by the board of directors, where the company used the property for two years.⁴ Where the directors vote at the stockholders' meeting in favor of amending the charter, this removes an objection that as directors they should have voted for the change in the first instance at a directors' meeting.⁵

A corporation may be liable for an accident on a ferry operated in its name, where it knew of the operation and received the benefits of the same.⁶ Where a corporation is a mere "dummy," the courts sometimes hold that the corporation is liable for the acts and on the contracts of its stockholders.⁷ An express vote of the directors authorizing a note need not be proved where the corporation whose obligation is in question is engaged in a business the nature of which and the duties in relation to which require or justify the giving of negotiable instruments without the officers being authorized thereto by a special vote to that effect.⁸ Where a mortgage recites that it was duly executed by authority of the corporation, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed.⁹ In California it is held that an unauthorized mortgage

execution in a pleading. *Tingley v. Bellingham, etc. Co.*, 5 Wash. St. 644 (1893). Ratification by a company of an agent's contract is not binding on the other party, if the ratification rejected one provision of the contract. Subsequent ratification of the contract *in toto* is not sufficient unless the other party assents. *Crabtree v. St. Paul, etc. Co.*, 39 Fed. Rep. 746 (1889).

¹ *Bagley v. Carthage, etc. R. R.*, 165 N. Y. 179 (1900), *aff'g* 25 N. Y. App. Div. 475.

² *Mills v. Boyle, etc. Co.*, 132 Cal. 95 (1901).

³ *Smith v. New Hartford Waterworks*, 73 Conn. 626 (1901).

⁴ *Blood v. La Serena, etc. Co.*, 134 Cal. 361 (1901). An irregular meet-

ing of the board of directors authorizing the borrowing of money and the giving of a mortgage may be made legal by the company subsequently accepting and using the money. *Murray v. Beal*, 23 Utah, 548 (1901). Even though a note is signed by two directors as individuals, yet the corporation may be held liable if the loan was to the corporation. *McGarry v. Tanner, etc. Co.*, 21 Utah, 16 (1899).

⁵ *Bernstein v. Kaplan*, 43 S. Rep. 581 (Ala. 1907).

⁶ *Nims v. Mount Hermon Boys' School*, 160 Mass. 177 (1893).

⁷ See §§ 663, 664, *supra*.

⁸ *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890).

⁹ *Sioux City, etc. Co. v. Trust Co.*,

is not ratified nor is it made valid by estoppel *in pais* except in a manner in writing sufficient to authorize the mortgage.¹ Corporate creditors' rights by attachments which are obtained between the time of the execution of an illegal mortgage and the ratification of the same may have priority over the mortgage.²

§ 713. *De facto directors and officers of a corporation—The validity of their contracts.*—A *de facto* officer is one who has the reputation and position of the officer he assumes to be, and yet is not entitled to the office in point of law.³ A *de jure* officer is one

82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899); *Baggott v. Turner*, 21 Wash. 339 (1899). See also § 725, *infra*. Where the seal of the company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. "None but the corporation and its stockholders or creditors can impeach a transfer of property by the corporation for the want of the previous action of the board of directors; and then only by a direct action brought for that purpose." *Castle v. Lewis*, 78 N. Y. 131 (1879); *Eno v. Crooke*, 10 N. Y. 60 (1854). See also § 808, *infra*.

¹ *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896).

² *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897).

³ "To constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such length of time, without interference, as to justify the presumption of a due election or appointment. The mere exercise of the functions of the office is in itself insufficient." *Moses v. Tompkins*, 84 Ala. 613 (1888). See also *Rex v. Bedford Level*, 6 East, 356 (1805); *Mechanics', etc. Bank v. Bur-*

lett, etc. Co., 32 N. J. Eq. 236 (1880); *Hamlin v. Kassafer*, 15 Oreg. 456 (1887). *Contra*, *Litchfield Iron Co. v. Bennett*, 7 Cow. 234 (1827); *Clark v. Farmers' Mfg. Co.*, 15 Wend. 256 (1836); *Waite v. Mining Co.*, 36 Vt. 18 (1863). See also *Wait, Insolv. Corp.*, § 23. Officers are still *de facto* after judgment of ouster is rendered, but before its entry, even though they acted with knowledge of the decision. *Mining Co. v. Anglo, etc. Bank*, 104 U. S. 192 (1881). *Cf.* *Walker v. Fleming*, 70 N. C. 483 (1874). In *McCall v. Byram, etc. Co.*, 6 Conn. 428 (1827), it is held that a secretary is *de facto* only where there is at least a pretended election. See *Hamlin v. Kassafer*, 15 Oreg. 456 (1887). A demand on a corporation for certain property is not proved by showing a demand on those who afterwards became its incorporators and officers. *McCallum v. Purcell Mfg. Co.*, 1 N. Y. Supp. 428 (1888). Directors whose title is contested are not *de facto* officers as against the old officers holding over. *Ellsworth, etc. Co. v. Faunce*, 79 Me. 440 (1887).

The following definitions have been given of an officer *de facto*: "One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Parker v. Kett*, 1 Ld. Raym. 658; *Rex v. Bedford Level*, 6 East, 368 (1805). "One who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election." *Brown v. Lunt*, 37 Me. 428 (1854). "One who has the

who has the lawful right to the office, but who has either been ousted from it or has never actually taken possession of it. An officer is *de facto* when the statute under which he holds office is unconstitutional;¹ or when he was elected but was ineligible,² or was irregularly or illegally elected.³ An officer who holds over by reason of the failure of the corporation to elect his successor is not only a *de facto* but a *de jure* officer.⁴ A director as a *de facto* director may bind the company by his acts, if allowed to continue in his position.⁵ And, in general, the contracts of all officers *de facto*, acting within the sphere of their office, are binding upon the corporation.⁶

color of right or title to the office he exercises; one who has the apparent title of an officer *de jure*." *Brown v. O'Connell*, 36 Conn. 451 (1870). "On the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*." *Mallett v. Uncle Sam*, etc. Min. Co., 1 Nev. 197 (1865); *Plymouth v. Painter*, 17 Conn. 588 (1846). In *State v. Curtis*, 9 Nev. 325 (1874), the court held that in order to make a person an officer *de facto* he should in some way have been put into the office and have secured such a holding thereof as to be considered in peaceable possession and actually exercising the functions of an officer; an intrusion by force is not sufficient.

¹ *Leach v. People*, 122 Ill. 420 (1887).

² *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841). Cf. ch. XXXVII, *supra*.

³ *Baird v. Bank of Washington*, 11 Serg. & R. 411 (1824), where a minority of the directors elected him; *Delaware, etc. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131 (1853), where the president was not a resident as required by statute.

⁴ See § 624, *supra*; *Thorington v. Gould*, 59 Ala. 461 (1877). *Contra*, *Curling v. Chalklen*, 3 M. & S. 496, 510 (1833); *Peppin v. Cooper*, 2 B. & Ald. 431 (1819); *People v. Twaddell*, 18 Hun, 427 (1879).

⁵ A director who sells his stock ceases to be a *de jure* director. If he continues and is permitted to act he is

a director *de facto*. *Beardsley v. Johnson*, 121 N. Y. 224 (1890).

⁶ *St Luke's Church v. Matthews*, 4 Dessaus. (S. C.) 578 (1815); *Vernon Soc. v. Hills*, 6 Cow. 23 (1826); *All Saints Church v. Lovett*, 1 Hall, 191 (1828); *Lovett v. German Ref. Church*, 12 Barb. 67 (1852); *Riddle v. Bedford*, 7 Serg. & R. (Pa.) 392 (1821); *York County v. Small*, 1 Watts & S. (Pa.) 315 (1841); *Kingsbury v. Ledyard*, 2 Watts & S. (Pa.) 41 (1841); *Smith v. Erb*, 4 Gill (Md.), 437 (1846); *Burr v. McDonald*, 3 Gratt. (Va.) 215 (1846); *Granville Charitable Assoc. v. Baldwin*, 42 Mass. 359 (1840); *Green v. Cady*, 9 Wend. 414 (1832); *Elizabeth City Acad. v. Lindsey*, 6 Ired. L. (N. C.) 476 (1846); *McCall v. Byram Mfg. Co.*, 6 Conn. 428 (1827); *Lathrop v. Scioto Bank*, 8 Dana (Ky.), 115 (1839); *Delaware, etc. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131 (1853); *St. Mary's Bank v. St. John*, 25 Ala. 566 (1854); *Baird v. Washington Bank*, 11 Serg. & R. 411 (1824); *Ex parte Rogers*, 7 Cow. 530, n. (1827); *Re Mohawk, etc. R. R.*, 19 Wend. 135 (1838); *Re Chenango Ins. Co.*, 19 Wend. 635 (1838); *Blandford School District v. Gibbs*, 56 Mass. 39 (1848); *Sampson v. Bowdoinham Co.*, 36 Me. 78 (1853); *Penobscot v. Dunn*, 39 Me. 587 (1855); *Fairfield, etc. Co. v. Thorp*, 13 Conn. 173 (1839); *Rex v. Bedford Level*, 6 East, 356, 368 (1805); *Parker v. Kett*, 1 Ld. Raym. 658 (1701); *Wild v. Bank*, 3 Mason,

"Where persons have to deal for the first time with an established company, and with those who have been and are acting openly

505 (1825); s. c., 29 Fed. Cas. 1215; *Barrington v. Washington Bank*, 14 Serg. & R. (Pa.) 405 (1826); *Minor v. Mechanics' Bank*, 1 Pet. 46 (1828); *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124 (1845); *M'Gargell v. Hazleton Coal Co.*, 4 Watts & S. (Pa.) 424 (1842), an action for a penalty, in which evidence was admitted to show that the person representing the company was an officer *de facto*; *Re County, etc. Co.*, L. R. 5 Ch. 288 (1870); *Mahoney v. East, etc. Co.*, L. R. 7 H. L. 869 (1875); *Partridge v. Badger*, 25 Barb. 146 (1857), where the treasurer was only *de facto*; *Doremus v. Dutch, etc. Co.*, 3 N. J. Eq. 332 (1835), where seceding trustees made a mortgage; *Mechanics', etc. Bank v. Burnet, etc. Co.*, 32 N. J. Eq. 236 (1880), and *Charitable Assoc. v. Baldwin*, 42 Mass. 359 (1840), where *de facto* directors brought suits; *Clark v. Easton*, 146 Mass. 43 (1888); *Cooper v. Curtis*, 30 Me. 488 (1849), holding that debtors to the corporation cannot set this up; *Susquehanna, etc. Co. v. General Ins. Co.*, 3 Md. 305 (1852), holding that a president who executes an instrument is presumed to be president; *Hackensack, etc. Co. v. De Kay*, 36 N. J. Eq. 548 (1883), where *de facto* directors gave a mortgage. The title of the president to his office cannot be questioned in a suit brought by a corporate creditor against the corporation on a contract made by him, the board of directors having acquiesced in his acting as president. *Heinze v. South, etc. Co.*, 109 Wis. 99 (1901). Payments of claims by insurance directors, who have been allowed to serve, cannot be questioned on the ground that they were irregularly elected. *Gleason v. Canterbury, etc. Co.*, 73 N. H. 583 (1906). It is no defense to an action by an employee that he was employed by a resolution of a dummy board of directors who had no real interest in the company, and that there was a contest in the company and the president had informed the party that the contract was no good. *Collier v. Consolidated, etc. Co.*, 70 N. J. L. 313 (1904). Even though an amendment to the charter whereby the number of directors is increased is not for several months recorded in a public office, as required by statute, yet if the increased number of directors is elected their acts bind the corporation. *Werle v. Northwestern, etc. Co.*, 125 Wis. 534 (1905). The board of directors by allowing a director to act as treasurer may bind the corporation by his acts. *Jack v. Nat. Bank, etc.* 89 Pac. Rep. 219 (Okla. 1907). A lessee of a corporation who knows that the officers executing the lease had doubtful title to their office, and that their title was in litigation, cannot enforce the lease, if the officers are afterwards ousted. *Groveland, etc. Co. v. Farmers', etc. Co.*, 25 Wash. 344 (1901). Directors who are elected at a stockholders' meeting not properly called cannot make and enforce calls. *Hawbeach, etc. Co. v. Teague*, 5 H. & N. 151 (1860). A board of directors who are ineligible cannot revoke an agreement to arbitrate a suit. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187 (1889). See also § 624, *supra*. An exhibition corporation is liable for premiums, although the exhibition was conducted by *de facto* officers whose title to office was held to be bad a month prior to the exhibition. *Richards v. Farmers', etc. Inst.*, 154 Pa. St. 449 (1893). Although a director is not qualified according to the by-laws, yet, if he is elected and permitted to act, his election is valid so far as his acts as director affect third persons. *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841). The eligibility of

and without challenge as directors of that company, and whom they honestly believe to be directors, they certainly are not bound to inquire into the qualifications or validity of appointment of those *de facto* directors."¹

It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced.² The

a director who has acted with the consent of all cannot be questioned on an application to have the company dissolved under the statute. *Re Santa, etc. Co.*, 4 N. Y. Supp. 173 (1889). The qualifications of a director cannot be questioned by a creditor who is seeking to enforce a statutory liability of officers. *Wallace v. Walsh*, 125 N. Y. 26 (1890). The principle of law that the acts of an ineligible but *de facto* officer may bind the corporation arises often in municipal corporation cases. *State v. Farrier*, 47 N. J. L. 383 (1885); *aff'd*, 48 N. J. L. 613. Although the directors are not qualified, nevertheless the company cannot repudiate stock issued to a contractor in payment for work, where such work has been received, such contract being authorized by the disqualified directors. The company cannot accept the subscription, and at the same time repudiate the contract mode of payment. *Re Staffordshire Gas, etc. Co.*, 66 L. T. Rep. 413 (1892). See also on the general principle that where a corporation allows persons to act publicly as its officers, it is bound by their contracts made in its behalf with third persons; *U. S. Bank v. Dandridge*, 12 Wheat. 64 (1829); *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 392 (1827); *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (1825); *Troy Turnp. Co. v. M'Chesney*, 21 Wend. 296 (1839); *Warren v. Ocean Ins. Co.*, 16 Me. 439 (1839); *Badger v. Cumberland Bank*, 26 Me. 428 (1846); *Davidson v. Bridgeport*, 8 Conn. 472 (1831); *Selma, etc. R. R. v. Tipton*, 5 Ala. 787 (1843); *Detroit v. Jackson*, 1 Doug. (Mich.) 106 (1843); *Farmers' Bank v. Chester*, 6 Humph. (Tenn.) 458

(1846); *Hall v. Carey*, 5 Ga. 259 (1848); *Conover v. Albany Ins. Co.*, 1 Comst. 290 (1848); *Lohman v. New York, etc. R. R.*, 2 Sandf. 39 (1848); *Beers v. Phoenix Glass Co.*, 14 Barb. 358 (1852); *Alabama Bank v. Comegys*, 12 Ala. 772 (1848); *Mead v. Keeler*, 24 Barb. 20 (1857); *Fryeburg Canal v. Frye*, 5 Me. 38 (1827); *Northern Liberties Bank v. Cresson*, 12 Serg. & R. (Pa.) 306 (1824). Directors may act as such before they acquire qualification shares. *Re International Cable Co.*, 66 L. T. Rep. 253 (1892).

¹ *Webb v. Shropshire Rys.*, [1893] 3 Ch. 307; also holding such to be the rule where a quorum was not present when they were elected or where they were not qualified. The acts of *de facto* directors bind the corporation. *Lord v. Equitable, etc. Society*, 57 N. Y. Misc. Rep. 417 (1908). See also § 725, *infra*.

² *Savage v. Miller*, 56 N. J. Eq. 432 (1898). Although the statutes require three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee having no knowledge of these facts is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), reversing *Wright v. First Nat. Bank*, 52 N. J. Eq. 392. Where the statute requires directors to be stockholders, and two of the directors are not stockholders, but a directors' meeting is regularly called, a mortgage authorized at such a meeting is legal, even though one of the directors who held stock and was qualified was not present, especially where he had agreed to the mortgage and the mort-

fact that some of the directors are not residents of the state, as required by statute, does not invalidate a mortgage authorized by them.¹ And although the statutes require the directors to be residents of the state, nevertheless, even though the directors are non-residents, the incorporation is valid, and the corporation is not dissolved, nor are the stockholders liable as partners.² But the acts of *de facto* directors cannot be invoked in behalf of themselves or stockholders. Only strangers can rely thereon.³ The *de facto* director cannot avoid a liability by setting up that he was not a *de jure* director;⁴ nor collect a salary as a *de facto* officer;⁵ nor make a note to himself and claim that his office gave him the authority.⁶ A *de facto* officer is ousted by a *quo warranto* proceeding,⁷ and not by a

gagagee took possession and held it for thirteen months and the corporation did not object. *Silsby v. Strong*, 38 Oreg. 36 (1900). Even though the statutes require directors to be stockholders and a director has parted with his stock, yet if he continues to act, his acts are not void as to third persons. *Robinson v. Blood*, 91 Pac. Rep. 258 (Cal. 1907).

¹ *Wheelwright v. St. Louis, etc. Transp. Co.*, 56 Fed. Rep. 164 (1893). The fact that a contract of a Pennsylvania company is made by its president and managers, who are non-residents and not residents as required by statute, does not enable the other party to the contract to raise that objection. *Delaware, etc. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131 (1853).

² *Demarest v. Flack*, 128 N. Y. 205 (1891).

³ *Shellenberger v. Patterson*, 168 Pa. St. 30 (1895). In a suit brought by a stockholder to set aside a sale of the stock for non-payment of an assessment, the court may investigate the legality of the title of the directors to their office, and if they have not taken an oath as required by statute the assessment made by them is illegal. *Schwab v. Frisco, etc. Co.*, 21 Utah 258 (1900).

⁴ *Keyser v. McKissam*, 2 Rawle (Pa.), 139 (1828), involving a bond; *Bank of St. Mary's v. St. John*, 25 Ala.

566 (1854). In a suit for a breach of trust this is no defense. *West Bank of Scotland v. Baird and Others*, 11 Ct. of Sess. Cas. (3d series), pp. 96-121 (1872); *Easterly v. Barber*, 65 N. Y. 252 (1875). *Cf. Craw v. Easterly*, 54 N. Y. 679 (1873). A director who has acted as such cannot claim that the election was irregular. *Hall v. West, etc. Pub. Co.*, 180 Pa. St. 561 (1897). A *de facto* director cannot defend against a statutory liability of directors on the ground that he did not hold sufficient stock to qualify himself to be a director. *Donnelly v. Pancoast*, 15 N. Y. App. Div. 323 (1897). One who assumes the duties of a director cannot say that he never was a director. *McDowall v. Sheehan*, 129 N. Y. 200 (1891). A director who acts, even though not qualified, is subject to the rule disqualifying him from selling property to the company. *Stetson v. Northern Inv. Co.*, 104 Iowa, 393 (1898).

⁵ *Riddle v. Bedford County*, 7 Serg. & R. (Pa.) 386 (1821).

⁶ *Lebanon, etc. Co. v. Adair*, 85 Ind. 244 (1882).

⁷ See § 617, *supra*. A superintendent elected by *de facto* directors may be ousted. *State v. Curtis*, 9 Nev. 325 (1874). After the courts have decided that certain persons are directors, *mandamus* will be granted that the defeated parties turn over the books and papers to the former. *Mat-*

suit in equity,¹ nor by an action in trespass,² nor a writ of prohibition.³ *De facto* officers are not personally liable on a corporate note issued by their authority.⁴

§ 713a. *Meetings of directors—Place—Notice—Action without meeting—Quorum.*—A meeting of the directors of a corporation may be held outside of the state creating the corporation, unless the charter or a statute expressly forbids such a meeting. The acts, proceedings, and contracts of a meeting of the board of directors held outside of the state are valid and enforceable.⁵ Under the

ter of Journal Pub. Club, 30 N. Y. Misc. Rep. 326 (1900).

1 See § 618, *supra*.

2 *Kingsbury v. Ledyard*, 2 Watts & S. (Pa.) 37 (1842).

3 *San Jose, etc. Bank v. Sierra, etc.* Co., 63 Cal. 179 (1883).

4 *Potwin v. Greenwald*, 123 Ill. App. Rep. 34 (1905).

5 The first or organization meeting of the directors may be held out of the state. *Glymont Imp. etc. Co. v. Toler*, 80 Md. 278 (1894). A by-law that regular directors' meetings shall be held in the state does not prevent special meetings outside of the state. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896); *Wright v. Bundy*, 11 Ind. 398, 404 (1858), where a mortgage of a railway incorporated by Indiana was held valid though executed in Ohio; *Bassett v. Monte Christo, etc. Co.*, 15 Nev. 293 (1880), where power to issue bonds and mortgage real property in Nevada was conferred at a meeting of directors held in New York, the corporation having been chartered by Pennsylvania—but here the charter authorized the corporation to meet and act at any place in the United States; *Ohio, etc. R. R. v. McPherson*, 35 Mo. 13 (1864), where calls for payment of subscriptions to stock made by a board of directors at meetings held outside of the state creating the corporation were held to be valid; *Wood Hydraulic, etc. v. King*, 45 Ga. 34 (1872), in which the minutes of a meeting of directors held out of the state chartering their company were held to be

evidence of the acts of the board in making contracts in other states. A directors' meeting out of the state may authorize a mortgage on real estate. *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888); *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439 (1883); *Galveston, etc. R. R. v. Cowdrey*, 11 Wall. 459, 476 (1870), in which it was held that *bona fide* holders of railroad bonds could not be prejudiced by the fact that the mortgage by which they were secured was executed by virtue of a resolution of directors at a meeting held out of the state which chartered the road; *Bellows v. Todd*, 39 Iowa, 209, 217 (1874), where a conveyance of real estate was authorized; *Arms v. Conant*, 36 Vt. 744 (1864); *McCall v. Byram Mfg. Co.*, 6 Conn. 428 (1827); *Smith v. Alvord*, 63 Barb. 415 (1866); *Singer v. Salt Lake City, etc. Co.*, 17 Utah, 143 (1898). *Cf. Ormsby v. Vermont, etc. Co.*, 56 N. Y. 623 (1874); *Aspinwall v. Ohio, etc. R. R.*, 20 Ind. 492, 497 (1863). Corporations incorporated in New Jersey were formerly required by statute to hold their directors' meetings within that state. *Hilles v. Parrish*, 14 N. J. Eq. 380 (1862). The president may call a meeting of the directors at a place other than the chief place of business. *Corbett v. Woodward*, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. A person who participates in a directors' meeting held out of the state cannot object to it on that ground. *Wood v. Boney*, 21 Atl. Rep. 574 (N. J. 1891). The directors may hold their meeting outside of the

Illinois statute a mortgage authorized by a directors' meeting held outside of the state is illegal, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors at a regular meeting in the state in accordance with the statute.¹

There has been some controversy and doubt as to the necessity of giving notice of directors' meetings. Many cases apply to directors' meetings the same rules that apply to stockholders' meetings. Other cases hold that less formality and strictness are required in calling a directors' meeting. The decisions are quite uniform, however, in holding that as to all special meetings of the board of directors notice must be given.²

state. *Missouri, etc. Co. v. Reinhard*, 114 Mo. 218 (1893). An assignment of a corporate mortgage may be executed in another state. *Gray v. Waldron*, 101 Mich. 612 (1894). In *Brockway v. Gadsen, etc. Co.*, 102 Ala. 620 (1894), a meeting of the board of directors outside of the state was held to be illegal under the Alabama statute which regulates such meetings. A foreign corporation is not necessarily doing business in the state, sufficient to authorize service upon one of its directors under the New York statute, merely because its transfers of stock are registered in the state and its directors meet there and it keeps a bank account there. *Honeyman v. Colorado, etc. Co.*, 133 Fed. Rep. 96 (1904). A holding company incorporated in South Africa does business in London, within the meaning of the Income Tax Law, where most of its purchases and sales of stock are made in London, and some stockholders' meetings are held there and directors' meetings are held there. *Goerz & Co. Ltd. v. Bell*, [1904] 2 K. B. 136.

¹ *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897). A newly elected president may file a petition to be allowed to file an information in the nature of a *quo warranto* to compel a *de facto* president to surrender the office where the basis of the petition is that the meeting of the board of directors which elected the *de facto*

president was held out of the state in violation of the statutes of Illinois. *Place v. People*, 192 Ill. 160 (1901). Under the Illinois statute which prohibits the directors from holding their meetings outside of the state, unless authorized or ratified by a vote of two-thirds of the directors at a regular meeting, a mortgage on land in Missouri authorized at a meeting held in Missouri is illegal, and a subsequent ratification thereof at a meeting regularly held in Illinois does not validate such mortgage as against an attachment levied before such ratification. *Union, etc. Bank v. State, etc. Bank*, 155 Mo. 95 (1900).

² A mortgage authorized at a special meeting of directors, no notice of which had been given to two directors who were not present, is not enforceable, the minutes not having been approved at any subsequent meeting. *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). A mortgage authorized at a meeting of the board of directors of which no notice was given and some of the directors were absent is not valid, and the declarations of a joint mortgagor that the corporation had authorized the mortgage are inadmissible. *Relley v. Campbell*, 134 Cal. 175 (1901). A chattel mortgage authorized at a directors' meeting at which only half the directors were present, and notice of which had not been given to directors who were not present, is illegal. *Broughton v.*

The law is inclined to tolerate more freedom in the notice and the calling and holding of directors' meetings, inasmuch as the

Jones, 120 Mich. 462 (1899). A director who is not a stockholder cannot complain that a meeting of the directors was held without notice to him. *Anderson, etc. Co. v. Pungs*, 127 Mich. 543 (1901). Notice to all the trustees of a religious corporation is necessary. *Thompson v. West*, 59 Neb. 677 (1900). "That all the directors are entitled to notice, either express or implied, of any meeting at which any business is transacted, in order that the business may be binding upon all the persons concerned, admits of no question. . . . If the meetings held are regular meetings,—that is, such as are provided for by charter or the by-laws, fixing time and place,—then notice thereof is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation is transacted, express notice must be given of the time and place and the object or purpose of the meeting." Hence an assignment of bank accounts by a corporation to its president, as collateral security, is not valid where no notice was given to all the directors of the meeting authorizing the assignment. *Whitehead v. Hamilton Rubber Co.*, 52 N. J. Eq. 78 (1893). A person who is elected a director but does not accept need not be notified of a directors' meeting. *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400 (1894). A meeting of a majority of the directors at an unusual time and place is not valid where the minority had no notice. *First Nat. Bank v. Asheville, etc. Co.*, 116 N. C. 827 (1895). A special meeting of directors is void if no notice is given to absent directors. The fact that a director owns or controls a majority of the stock does not validate such a meeting even though he favored their action. *Hill v. Rich Hill, etc. Co.*, 119 Mo. 9 (1893). Where the directors of a bank are accustomed to hold directors' meetings at the bank whenever a quorum is present, this custom will be upheld, and a meeting is legal although no notice thereof is given, there being no by-law or statute on the subject. *American Nat. Bank v. First Nat. Bank*, 82 Fed. Rep. 961 (1897). Directors are required to take notice of an annual meeting, and no notice need be given of an adjournment thereof. *Western Imp. Co., v. Des Moines Nat. Bank*, 103 Iowa, 455 (1897). Even though no notice is given to a director of a meeting of the board, yet where the matter passed upon by the board is one which he would be disqualified from voting upon, the meeting is legal. *Troy Min. Co. v. White* 10 S. Dak. 475 (1898). An assignment for the benefit of creditors, authorized at a meeting of the board of directors where a part of the directors were absent and had no notice thereof, is not valid. *Simon v. Sevier Assoc.*, 54 Ark. 58 (1890). Notice of a directors' meeting need not be given to a director who resides abroad, nor to another director who is traveling abroad. The court, however, refused to law down the broad rule that no notice in any case need be given to directors who are abroad. *Halifax, etc. Co. v. Francklyn*, 62 L. T. Rep. 563 (1890). Notice of a directors' meeting cannot be waived in advance by a director where the time and purpose of the meeting have not yet been determined upon. *Re Portuguese, etc. Mines*, L. R. 42 Ch. D. 160 (1889). Where three of seven directors are non-residents, one having sold his stock, one traveling, and one inaccessible for immediate notice, the four remaining directors may hold a meeting and authorize an assignment of the corporate property for the benefit of creditors. The assignment was held to be legal, the traveling director

meetings are more frequent, the absences more common, the acts less fundamental, and ratification by acting on the contracts more

and the inaccessible director having subsequently voted in a meeting for the selection of an assignee. *National Bank of Commerce v. Shumway*, 49 Kan. 224 (1892). Where notice of a directors' meeting is given by telephone, and three out of seven could not be reached before the meeting and had no notice of it, and afterwards all seven directors signed a waiver of notice, the action taken at the meeting is valid. *Stafford, etc. Ry. v. Middle, etc. Co.*, 66 Atl. Rep. 775 (Conn. 1907). A mortgage authorized at a directors' meeting at which four were present and the other received no notice is illegal, the giving of notice being possible, and there being no necessity for immediate action. *Bank of Little Rock v. McCarthy*, 55 Ark. 473 (1892). An assignment for the benefit of creditors, made by order of a directors' meeting at which three directors were present and the other two were not notified, is invalid, and no bar to a creditor's action to collect unpaid subscriptions. *Doernbecher v. Columbia, etc. Co.*, 21 Oreg. 573 (1892). Where a directors' meeting, according to the by-laws, may be called by the president, or if there is no president, by two directors, the two directors cannot call it even if the president refuses to do so. The acts of a meeting of a board so called are illegal, a majority of the directors only being present. *Smith v. Dorn*, 96 Cal. 73 (1892). A director is entitled to notice of a meeting to elect a president. Undue haste and failure to give notice will suffice to set the election aside. A subsequent meeting of the board cannot ratify it. The election must be held over again. *State v. Smith*, 15 Oreg. 98 (1887); *Singer v. Salt, etc. Co.*, 17 Utah, 143 (1898).

A notice of a school trustees' meeting need not be given to trustees out of the state who could not have at-

tended anyway. *Porter v. Robinson*, 30 Hun, 209 (1883). In *Harding v. Vandewater*, 40 Cal. 77 (1870), a note given for an assessment upon a subscription which was called at a special meeting of the board of trustees of a mining company, of which two of the trustees had no notice, was held to be void. In *Farwell v. Houghton Copper, etc.*, 8 Fed. Rep. 66 (1881), it was held that one who had been a shareholder and purchased all the property of the company at a meeting of the directors held without notice, at which he was present and knew that one director was absent, was bound to know that notice to such absent director was necessary, and that he was not a *bona fide* purchaser without notice. *Lane v. Brainerd*, 30 Conn. 565 (1862), holding that the corporate record of a meeting at which a quorum was present was presumptive proof that all the directors had been duly notified, whether living in the state or elsewhere. Where the deed of settlement provided for special meetings, the time and place of which were to be fixed by notices countersigned by the secretary, it was held that a meeting of the requisite number of directors without previous agreement to meet on any fixed day or hour was not a meeting duly convened within the charter provision. *Moore v. Hammond*, 6 Barn. & C. 456 (1827). To same effect in municipal corporation cases, *Smyth v. Darley*, 2 H. L. Cas. 789 (1849); *Rex v. Carlisle*, 1 Stra. 385 (1720). An adjourned meeting of directors may act to the same extent that the original meeting might have acted. *Smith v. Law*, 21 N. Y. 296 (1860); *Wills v. Murray*, 4 Exch. 843 (1850). A by-law enacted by the directors in reference to the calling of a directors' meeting, even if not complied with, does not invalidate the meeting. *Samuel v. Holladay*, Woolw. 400

certain and 'easy. A preference given by a meeting of the board of directors at which a quorum is present, notice of which was not

(1869); s. c., 21 Fed. Cas. 306. A quorum of directors may bind the corporation, although the other directors are not notified, there being no by-law or charter provision requiring notice. *Edgerly v. Emerson*, 23 N. H. 555 (1851). *Contra*, *Despatch Line v. Belamy Mfg. Co.*, 12 N. H. 205 (1841). An assessment made at an irregularly-called directors' meeting is void. *Thompson v. Williams*, 76 Cal. 153 (1888). Two out of three directors cannot authorize a chattel mortgage, the third not having been notified of the meeting. The mortgagee was one of the directors. *Doyle v. Mizner*, 42 Mich. 332 (1879). A corporate receiver cannot object to a contract on the ground that the directors' meeting authorizing it was not properly convened, but the receiver may avoid corporate notes issued contrary to express statute. *Leavitt v. Yates*, 4 Edw. Ch. 134 (1843). Bonds issued under authority of a meeting of two commissioners of a town without notice to a third commissioner are not valid. *Pike County v. Rowland*, 94 Pa. St. 238 (1880). In *Kersey, etc. Co. v. Oil, etc. R. R.*, 12 Phila. 374 (1877), a lease was declared void because it was authorized only by a meeting of directors of which part of the directors had no notice and were not present. A special meeting of an executive committee is irregular unless notice is given to each member. *Metropolitan, etc. Co. v. Domestic, etc. Co.*, 44 N. J. Eq. 568 (1888). Where a subsequent meeting of directors expressly ratifies the acts of a preceding meeting, any defect in the notice given of the latter meeting is cured. *County Court v. Baltimore, etc. R. R.*, 35 Fed. Rep. 161 (1888). Acts of a board of directors, no notice having been given to absent directors, may be valid by acquiescence. *Reed v. Hayt*, 51 N. Y. Super. Ct. 121 (1884); *aff'd*, 109 N. Y. 659.

Although an allotment of stock may be illegal by reason of notice not having been given of a directors' meeting, yet the allotment may be confirmed by a subsequent legally-called meeting. *Re Portuguese, etc. Mines*, L. R. 45 Ch. D. 16 (1890). A person who commits a trespass on the property of a corporation cannot question the regularity of a contract of such corporation, so far as such regularity turns on the action of a directors' meeting, or meeting of an executive committee, or assent of three-fifths of the stockholders, as required by statute. *Farnsworth v. Western, etc. Co.*, 6 N. Y. Supp. 735 (1889). "The evidence that a day was fixed by common consent is sufficient to show notice to all of the meetings on that day." "It was wholly immaterial in what way the day of the regular meetings was fixed." *Atlantic, etc. Ins. Co. v. Sanders*, 36 N. H. 252, 269 (1858). In a case where directors were empowered to meet once a week at their office, without notice or summons, but on such day and at such hour as they should from time to time agree upon, it was held that a resolution come to by a quorum assembled without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed. *Moore v. Hammond*, 6 B. & C. 456 (1827). If the board meeting be specially convened, the general rule is that notice must be served upon every member entitled to be present. *Pike County v. Rowland*, 94 Pa. St. 238 (1880). *Mandamus* lies to compel vestrymen to attend a meeting when by reason of dissensions they decline so to do. *People v. Winans*, 9 N. Y. Supp. 249 (1890). Notice to all is necessary, although a quorum is present. *Johnston v. Jones*, 23 N. J. Eq. 216 (1872), where the meeting was for the purpose of calling a stockholders' meet-

given to the other directors, may be valid if no officer or stockholder thereafter objected to the same.¹ No notice need be given of the holding of a regular directors' meeting.² Where five of eight members of the board of an insolvent company meet and authorize the sale of certain personal property, and such sale is carried out, other creditors cannot raise the objection that no notice was given to the remaining three members of the board.³ If all the directors are present at a meeting, it is immaterial that notice was not given, even though the by-laws required it.⁴ Where meetings of the di-

ing. Concerning the differences between the position of municipal corporation officials and the officers of a private corporation, see *Wallace v. Walsh*, 125 N. Y. 26, 36 (1890). A recess may be taken by a board without formal action, and two meetings on the same day may be construed as one meeting with a recess. *State v. Powell*, 101 Iowa, 382 (1897). Where a meeting of the board of directors could not authorize suit to collect assessments because the assessments were not yet due, an adjourned meeting of that meeting cannot authorize such suit, all of the directors not being present at the adjourned meeting and no new notice thereof having been given. *Bank of National City v. Johnston*, 133 Cal. 185 (1901). An assignment by a corporation for the benefit of its creditors, executed by order of a meeting of the board of directors, no notice of which was given to absent directors, is not good as against an execution levied two days after such assignment, although it may be good as to creditors who acquiesce in such assignment. *Vaught v. Ohio, etc. Co.*, 49 S. W. Rep. 426 (Ky. 1899). A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given, and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid, and may be set aside by a judgment creditor of the selling corporation. *Summers v. Glenwood, etc. Co.*, 15 S. D. 20 (1901). A directors' meeting without notice to

a director who is not present is not valid. *Cupit v. Park City Bank*, 20 Utah, 292 (1899). Notice need not be given to a director where it is not practicable, or where he secretes himself or is beyond the reach of notice and it is necessary that immediate action be taken. *Singer v. Salt Lake City, etc. Co.*, 17 Utah, 143 (1898).

¹ *Moller v. Keystone, etc. Co.* 187 Pa. St. 553 (1898). A mortgage may be valid, even though the directors' meeting which authorized it, was without notice to one director, it appearing that he was merely a nominal stockholder and director. *Stiwell v. Webb, etc. Co.*, 79 Ark. 45 (1906). In the case *Buck v. Troy, etc. Co.*, 76 Vt. 75 (1903), it is held that a majority of the board may transact ordinary business without notice to the minority.

² *Gumaer v. Cripple Creek, etc. Co.*, 90 Pac. Rep. 81 (Colo. 1907).

³ *Johnson Co. v. Miller*, 174 Pa. St. 635 (1896).

⁴ *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381 (1893). No notice of a directors' meeting is necessary if all are present. *Bank of National City v. Johnston*, 60 Pac. Rep. 776 (Cal. 1900), rev'd on another point in 133 Cal. 185. Where all the directors are present and authorize a loan, the loan is legal, even though the details are further authorized at a meeting of which no notice was given, but at which all were present, except the president, who afterwards perfected the loan. *Wolf & Bro. v. Erwin, etc. Co.*, 71 Ark. 438 (1903). In Missouri it is held that even though the by-laws provide

rectors can, by the by-laws, be called only by the president or majority of the board, the secretary cannot call one.¹ A party dealing with a corporation is not bound to inquire whether proper notice was given of a directors' meeting.² A notice to directors of a corporation of a meeting, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation.³

that a directors' meeting may be held without notice if all are present, yet two of the three directors cannot thereby go into the presence of the third director and declare the meeting on, as against the objection of such third director. *State v. Manhattan, etc. Co.*, 149 Mo. 181 (1899).

1 *Hill v. Rich Hill, etc. Co.*, 119 Mo. 9 (1893). The vice-president may call a special meeting of the board of directors in the absence of the president where the by-laws provide for the president calling such meeting, and the president is deemed absent, even though he is within four or five hours' travel. *Bell v. Standard, etc. Co.*, 146 Cal. 699 (1905). Where the secretary has power to call a meeting of the directors, but instead of his doing so the president uses a rubber stamp to affix the secretary's name to the call, and it transpires that every director either received the notice or was present at the meeting, the informality is immaterial. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896).

2 Quoted and approved in *In re New York, etc.*, 141 Fed. Rep. 430 (1905). *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), reversing *Wright v. First Nat. Bank*, 52 N. J. Eq. 392. A mortgage authorized by a quorum of directors may be valid, though the other directors were not present and were not notified. *Bank v. Flour Co.*, 41 Ohio St. 552 (1885). See also § 712, *supra*, and § 725, *infra*. "One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of

the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation." *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

3 *Re Argus Co.*, 138 N. Y. 557 (1893); *New Haven Sav. Bank v. Davis*, 8 Conn. 192 (1830), holding that a meeting of bank directors was legal for an ordinary transaction, although the notice did not specify its object, and that mortgaging its real estate to secure a debt was proper at such meeting. Where, a few days before a new board was to go in, a notice of a directors' meeting states that it is to hear the treasurer's report and transact other business that might come before the board, it is illegal for the board, at such meeting, to make a perpetual lease of all the corporate property. *Mercantile Library Hall Co. v. Pittsburgh Library Assoc.*, 173 Pa. St. 30 (1896). Notice of the business to be transacted at a directors' meeting need not be given. *Bell v. Standard, etc. Co.*, 146 Cal. 699 (1905). A notice of a special meeting of the board of directors need not specify the business which is to be

The notice must be given a reasonable time before the hour of the meeting, and the mode of giving or serving the notice must be reasonable. All this turns on the circumstances and facts in each case.¹ Where no special method of serving notice of directors' meetings is prescribed, and the notice is served by mail, upon proof of mailing, the receipt of the notice is presumed, even as against a director's doubt as to his having received it.² Notice to all the di-

considered. *Wills v. Murray*, 4 Exch. 843 (1850). A notice of a special meeting of the trustees of a religious corporation must state the object of the meeting. *Maclaury v. Hart*, 10 N. Y. Supp. 125 (1890). It is not necessary to state in the notice convening a meeting of the directors of a company the business to be transacted at the meeting, even if it is of an extraordinary character; and any decision come to at such meeting cannot afterwards be questioned on the ground that no notice of such business was given. *Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788. Special meetings of the directors may be held, although the by-laws do not provide for such. *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1 (1897).

¹ A notice of a directors' meeting sent out in the afternoon for the evening is sufficient, if delivered to a servant at a director's residence, even though such director was absent from home, his absence not being known to the party calling the meeting until such notice was delivered. *Re Argus Co.*, 138 N. Y. 557 (1893). Notice of a directors' meeting, received on the morning of the day of the meeting, is insufficient although the meeting was to be at four o'clock in the afternoon. The court said: "*Prima facie* this was not a reasonable time. The managers are all reported as business men, who cannot be presumed to be ready to drop their own affairs and attend off-hand on such a notice. One full day in advance of the time fixed is as little as the law could presume to be reasonable, and in many cases that would be too short." The court said, however,

that a by-law or the practice of the board might vary this rule. *Mercantile Library Hall Co. v. Pittsburgh Library Assoc.*, 173 Pa. St. 30 (1896). A meeting of directors called in the morning for two o'clock that day is invalid where one director could not come until three o'clock and another received the notice next morning. A quorum was present. *Re Homer, etc. Mines*, L. R. 39 Ch. D. 546 (1888). Leaving notice of a directors' meeting at a director's business place suffices, even though he is known to be ill. *Corbett v. Woodward*, 5 Sawyer, 403 (1879). Notice to a director is sufficient if given orally to the director's brother at the director's place of business, where a by-law allowed notice to be given by mail or in other ways. *Williams v. German, etc. Ins. Co.*, 68 Ill. 387 (1873). Notice to directors, sent by mail, is sufficient if sent in time so that the director, after receiving it, would have time to reach the place of meeting. *Covert v. Rogers*, 38 Mich. 363 (1878). A meeting of the directors may be valid although two of them, being absent from the state, did not receive the notice. *Chase v. Tuttle*, 55 Conn. 455 (1888). Telegraphic notice to two directors out of the state, of a meeting to make an assignment, is sufficient, though not received by them, a majority having met and ordered the assignment. *Chase v. Tuttle*, 55 Conn. 455 (1888).

² *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896). Where written notices of a special directors' meeting, properly addressed, are sent by mail to them, it is presumed that such notices were received, though

rectors is presumed.¹ There has been a question whether directors could vote and act as a board without coming together. Many attempts have been made to sustain a vote of the directors, which they had separately and singly agreed to. The law, however, is now clear that such separate assent is void. Directors are elected to meet and confer, and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner.² Many of the cases to

there is no by-law that notice may be given by mail. *Stockton, etc. Works v. Houser*, 109 Cal. 1 (1895). Notice by postal card of a directors' meeting suffices where it is customary and all received it. *People v. Albany Med. Coll.*, 26 Hun, 348 (1882); *aff'd*, 89 N. Y. 635.

¹ *Robinson v. Blood*, 91 Pac. Rep. 258 (Cal. 1907); *Ross v. Crockett*, 14 La. Ann. 811 (1859); *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601 (1878). Notice of a meeting of directors is presumed. *Hardin v. Iowa, etc. Co.*, 78 Iowa, 726 (1889); *Stockton, etc. Works v. Houser*, 109 Cal. 1 (1895). Where the corporate record shows that a quorum of the directors was present, this is *prima facie* evidence that all had notice. *Fletcher v. Chicago, etc. Ry.*, 67 Minn. 339 (1897). No proof need be given that the directors were notified of the meeting where the minutes recite that they were so notified, and there was no proof to the contrary. *Turner v. Fidelity, etc.*, 2 Cal. App. 122 (1905). The fact that all the members of a board of directors of a limited partnership are not present does not raise a presumption that the meeting was irregular. *Stradley v. Cargill, etc. Co.*, 135 Mich. 367 (1904). Proof that the secretary, twenty-four hours before a meeting of the directors, sent to each of them a written notice by his office boy raises a presumption that proper notice was given. Where the minutes of a directors' meeting are written out and signed by the secretary it is presumed that all directors had notice of the meeting. *Balfour-Guthrie, etc. Co. v. Woodworth*, 124 Cal. 169 (1899). It

is presumed that directors had notice of a meeting. *Mills v. Boyle, etc. Co.*, 132 Cal. 95 (1901). A corporation defending against its note on the ground that all the directors were not notified of a meeting which authorized the same has the burden of proof of showing that such was the case. *Barrell v. Lake, etc. Co.*, 122 Cal. 129 (1898). Notice to directors is presumed. *Singer v. Salt Lake City, etc. Co.*, 17 Utah, 143 (1898).

² *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634 (1895). *Re Haycraft, etc. Co.*, [1900] 2 Ch. 230; *Hamlin v. Union, etc. Co.*, 68 N. H. 292 (1895); *Peirce v. Morse-Oliver, etc. Co.*, 94 Me. 406 (1900); *Monroe, etc. Co. v. Arnold*, 108 Ga. 449 (1899). Separate action by the directors is illegal. *Brinkerhoff, etc. Co. v. Boyd*, 192 Mo. 597 (1905). Separate consent of the directors is not sufficient. *Demarest v. Spiral, etc. Co.*, 71 N. J. L. 14 (1904). The directors cannot act separately, even though the stockholders consent thereto. *Audenreid v. East, etc. Co.*, 68 N. J. Eq. 450 (1904). Even though under the New Jersey statutes special provisions may be inserted in the certificate of incorporation, yet this will not sustain a special provision which is inserted to the effect that a resolution in writing, signed by all of the directors, shall have the same effect as though they had a meeting and passed a resolution. *Audenreid v. East, etc. Co.*, 68 N. J. Eq. 450 (1904). Where a corporation has issued its mortgage bonds to a trustee to be delivered on order of its board of directors, and it borrows money and three of its board of

the contrary may be reconciled by the principle of law that the acts of a board of directors may be validated by subsequent acquiescence,

directors, including the treasurer, general manager and secretary, request the trustee to deliver certain bonds to the creditor, this is sufficient as against a trustee in bankruptcy. *Presbyterian, etc. v. Gilbee*, 212 Pa. St. 310 (1905). A corporation is not bound by a contract for the sale of its property, even though four or five directors and also the owner of the majority of the stock, write their names on the contract under the word "accepted." Moreover, the statute of frauds applies to the transaction as affecting real estate. *Taylor v. R. D. Scott & Co.*, 113 N. W. Rep. 32 (Mich. 1907). A deed of real estate executed by the directors of a corporation separately and at different times, but not formally authorized by them as a board, is not only ineffectual as a conveyance of real property, but equally so as a contract to convey. *Baldwin v. Canfield*, 26 Minn. 43, 54 (1879). The verbal assent of directors to the execution of a mortgage is not good. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). Where the directors own all the stock of a corporation, they may authorize its president to sell its assets, and the fact that the authority was not given at a regular directors' meeting is immaterial. *Jordan v. Collins*, 107 Ala. 572 (1895). A mere street conversation between the directors, by which they "agree" that subscriptions shall be called, is not a sufficient call. *Branch v. Augusta Glass Works*, 95 Ga. 573 (1895). A separate assent of a township committee to the construction of a street railway is illegal. *West Jersey Traction Co. v. Camden, etc. Co.*, 53 N. J. Eq. 163 (1895). Separate action of the directors without a meeting is not good. *Limer v. Traders' Co.*, 44 W. Va. 175 (1897). Separate acquiescence of the directors is not sufficient. *Sanderson v. Tinkham, etc. Co.*, 83 Iowa, 446 (1891). The directors of a religious corporation cannot act as a board by the separate assents of the members to the act in question. *Columbia Bank v. Gospel Tabernacle*, 127 N. Y. 361 (1891). The separate assent of the directors to a mortgage is not good. *Duke v. Markham*, 105 N. C. 131 (1890). Directors can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only. *Buttrick v. Nashua, etc. R. R.*, 62 N. H. 413 (1882). Directors cannot act except as a board. *North Hudson, etc. Assoc. v. Childs*, 82 Wis. 460 (1892). Directors can act as such in meeting only. Their individual assent is not sufficient. *State v. People's, etc. Assoc.*, 42 Ohio St. 579 (1885); *Junction R. R. v. Reeve*, 15 Ind. 236 (1860); *Stoystown, etc. Turnp. Co. v. Craver*, 45 Pa. St. 386 (1863). A bargain and sale deed of corporate property, authorized and executed separately and singly by all the directors without a board meeting, is void. *Baldwin v. Canfield*, 26 Minn. 43 (1879); *Gashwiler v. Willis*, 33 Cal. 11 (1867). Separate and single consent of a quorum of directors to the secretary's execution of a bond is void. *D'Arcy v. Tamar, etc. Ry.*, L. R. 2 Exch. 158 (1867). The assent of a mere majority of the board, given singly and separately, gives no authority to a cashier to do an act outside of his customary duties. *Elliot v. Abbot*, 12 N. H. 549 (1842). Where a mortgage is executed by order of directors assenting apart and not in a meeting, and is executed by a president and secretary who were elected by the stockholders at a meeting not properly called, the stockholders having no power to elect such officers in any case, the mortgage is not good. *Re St. Helen Mill Co.*, 3 Sawy. 88 (1874); s. c., 21 Fed. Cas. 161. A

even though the board was summoned irregularly or proceeded irregularly. Thus the separate assent of directors to the president

pledge of corporate securities to raise money is legal where six of the eight directors consented, even though no meeting was held. *Hubbard v. Camperdown Mills*, 26 S. C. 581 (1887). Directors may bind the corporation by their separate approval of claims when they have been accustomed so to do. *Longmont, etc. Co. v. Coffman*, 11 Colo. 551 (1888). The separate assent of the board of trustees of a religious corporation to the execution of a note is void. They must meet. *People's Bank v. St. Anthony's, etc. Church*, 109 N. Y. 512 (1888). An assignment for the benefit of creditors authorized by the directors acting separately and not as a board is invalid. *Calumet Paper Co. v. Haskell, etc. Co.*, 144 Mo. 331 (1897).

Where an officer is sued for malfeasance in office, it is no defense that his acts were authorized by directors who did not meet as a board, but separately and singly assented to acts. Directors bind the corporation by their votes only when they meet as a board. "The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members." *National Bank v. Drake*, 35 Kan. 576 (1886). A tax which is assessed by two trustees in meeting assembled, who then obtain the separate and private assent of the third trustee, is void. *Keeler v. Frost*, 22 Barb. 400 (1856); *Schuman v. Seymour*, 24 N. J. Eq. 143 (1873). The members of a board of highway commissioners cannot authorize or ratify a contract by separate approval. A meeting is necessary. *Taymouth v. Koehler*, 35 Mich. 22 (1876). The majority of a school board cannot act separately

and singly, no meeting being held. *Herrington v. District, etc.*, 47 Iowa, 11 (1877). The separate consent of three directors was held not good in *Bosanquet v. Shortridge*, 4 Exch. 699 (1850). A due-bill running from the corporation to a person and signed by the directors cannot be defeated by showing that the directors did not meet, but signed it separately and singly. *Sampson v. Bowdoinham, etc. Corp.*, 36 Me. 78 (1853); *Collins' Claim*, L. R. 12 Eq. 246 (1871). The execution of a replevin bond by the president for the corporation is legal, a majority of the directors singly and separately assenting thereto. *Bank of Middlebury v. Rutland, etc. R. R.*, 30 Vt. 159 (1858), where Redfield, Ch. J., said: "The cases are numerous where the consent of a majority of the directors given separately has been held binding upon the company." Probably in these last cases the contract would have been binding even if the directors had not acted at all. See also *Cammeyer v. United, etc. Churches*, 2 Sandf. Ch. 186, 229 (1844), holding that the trustees must meet in order to act, and that their affirmative vote in a stockholders' or general assemblage is not sufficient. Collective action as a board, and not individual action as members of the board, is necessary to bind the corporation. *Allegheny County Workhouse v. Moore*, 95 Pa. St. 408 (1880); *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 273 (1883). Where there are but two stockholders, and they are directors, and no directors' or stockholders' meeting has been held since the organization meeting, and these two have carried on the business as though it was a partnership concern, a *bona fide* assignment by these two persons in the name of the corporation to secure preferred creditors of the corporation is good, al-

executing a mortgage in the name of the corporation may be equivalent to acquiescence on the part of the directors in his assuming such authority and may bind the corporation.¹ Where a statute provides that the charter may be amended in certain respects upon the directors or a majority of them making and signing a certificate, such making and signing need not be at a meeting of the directors. No meeting is required.²

A director cannot obligate himself to vote in a certain way, even as to the election of president.³ Directors, of course, cannot act or vote by proxy.⁴ The minority directors are entitled to be heard at a directors' meeting.⁵

A majority of the whole board of directors constitute a quorum.

though no corporate seal was used and no meetings were held authorizing the act. *Teitig v. Boesman*, 12 Mont. 404 (1892). When all the officers assent to a money obligation being given in the corporate name by the chief officer, the prioress, the educational corporation is bound. *Louisville, etc. R. R. v. St. Rose Literary Soc.*, 91 Ky. 395 (1891). See also *Re Great Northern, etc. Works*, L. R. 44 Ch. D. 472 (1890), drawing a distinction where *all* of the directors assent. Directors cannot act singly. *Morrison v. Wilder Gas Co.*, 91 Me. 492 (1898). Where some of the directors agree privately among themselves to pay for certain things needed by the corporation, and the latter uses them, they alone are liable for the price thereof. *Lyndon, etc. Co. v. Lyndon, etc. Inst.*, 63 Vt. 581 (1891).

¹ *National, etc. Bank v. Sandford, etc. Co.*, 157 Ind. 10 (1901). Where all the stockholders, being directors, agree informally and without meeting that a certain person shall be the corporate agent and take entire control, he is authorized to bind the corporation by his acts. *Wood v. Wiley, etc. Co.*, 56 Conn. 87 (1888). The separate action of all the directors is legal when all the stockholders acquiesce therein and where such action has been carried out by the corporation. *Morisette v. Howard*, 62 Kan. 463 (1901).

² *Burden v. Burden*, 159 N. Y. 287 (1899). Where the directors vote at the stockholders' meeting in favor of amending the charter, this removes an objection that as directors they should have voted for the change in the first instance at a directors' meeting. *Bernstein v. Kaplan*, 43 S. Rep. 581 (Ala. 1907).

³ *Dulin v. Pacific, etc. Co.*, 103 Cal. 357 (1894).

⁴ *Perry v. Tuskaloosa, etc. Co.*, 93 Ala. 364 (1891); *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561 (1891); *State v. Perkins*, 90 Mo. App. 603 (1901); *Re Portuguese, etc. Co.*, L. R. 42 Ch. D. 160 (1889); *McLaren v. Fiskien*, 28 Grant, Ch. (Can.) 352 (1881); *Attorney-General v. Scott*, 1 Vesey, 413 (1749), where the election of a minister was committed to trustees. It was held that they could not delegate to proxies their right to vote. A vote by letter on a particular question would, of course, be the same as voting separately and singly. Although one of the directors illegally voted by proxy, and his vote was necessary, yet the court in *Dudley v. Kentucky High School*, 9 Bush (Ky.) 576 (1873), refused to set the vote aside, the court saying that only one stockholder objected, and that the majority might ratify.

⁵ *Great Western Ry. v. Rushout*, 5 De G. & Sm. 290, 310 (1852).

When the meeting is properly called and a majority attend, that majority may proceed to transact business. If a majority are present a majority of that majority bind the board and the corporation, although they are a minority of the whole board.¹ The number neces-

1 *Wells v. Rahway, etc. Co.*, 19 N. J. Eq. 402 (1869); *Cram v. Bangor, etc.*, 12 Me. 354 (1835); *Cahill v. Kalamazoo, etc. Ins. Co.*, 2 Doug. (Mich.) 124 (1845); *Ex parte Willcocks*, 7 Cow. 402 (1827); *People v. Walker*, 2 Abb. Pr. 421 (1856); *Sargent v. Webster*, 54 Mass. 497 (1847). If only a minority of the board are present the acts are not valid. *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308 (1869); *Ernest v. Nichols*, 6 H. L. Cas. 401, 417 (1857); *Price v. Grand, etc. R. R.*, 13 Ind. 58 (1859); *Ridley v. Plymouth, etc. Co.*, 2 Exch. 711 (1848). A majority of the board constitutes a quorum, and a majority of that quorum may transact business. *Gumaer v. Cripple Creek, etc. Co.*, 90 Pac. Rep. 81 (Col. 1907). Where a reduction of the number of directors is attempted, but not made in compliance with the statute, an attempt at voluntary dissolution by a majority of the directors as reduced is not legal, they not being a majority of the original number of directors. *Matter of Dolgeville, etc. Co.*, 160 N. Y. 500 (1899). Resolutions passed at a meeting at which a legal quorum of the directors is not present cannot be validated by action of the stockholders. *Bassett v. Fairchild*, 64 Pac. Rep. 1082 (Cal. 1901). Where a director withdraws from the meeting and leaves it without a quorum it cannot act; so also where a director is present but refuses to vote or take any part in the proceedings, he cannot be counted as a part of the quorum. *North, etc. Assoc. v. Milliken*, 110 La. 1002 (1903). A director who is present but does not vote is counted in the negative. *Commonwealth v. Wickersham*, 66 Pa. St. 134 (1870). Where a by-law allows the removal of a director on a two-thirds

vote of the whole board, he cannot be removed on a vote of four out of seven, even though one refuses to vote. *Stephany v. Liberty Cut Glass Works*, 69 Atl. Rep. 967 (N. J. 1908). See also § 608, note *supra*, on this subject. A stockholder who takes part in and assents to the action of a stockholders' meeting which authorizes a sale of the property to another corporation in exchange for stock of the latter to be issued to stockholders of the former cannot afterwards object thereto, and demand cash, even though his assent was only by refraining from voting against the proposition. *Carr v. Rochester, etc. Co.*, 207 Pa. St. 392 (1904). The majority of a board of directors constitute a quorum, and a majority of the quorum decide the action of the board. *Leavitt v. Oxford, etc. Co.*, 3 Utah, 265 (1883). A majority of a quorum of directors bind the corporation. *Buell v. Buckingham*, 16 Iowa, 284 (1864). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. *Holcomb v. Bridge Co.*, 9 N. J. Eq. 457 (1853). A majority of the trustees are necessary to constitute a quorum. *State v. Porter*, 113 Ind. 79 (1888). A by-law cannot authorize less than a majority to act when the charter requires a majority. *State v. Curtis*, 9 Nev. 325 (1874). A by-law of the corporation authorizing a quorum of five directors, with the president, to transact ordinary business, is valid, though there are twenty-three directors. *Hoyt v. Thompson*, 19 N. Y. 207 (1859). Where by resolution of the board four constitute a quorum, an act at a board of three is not binding. *Ducarry v. Gill*, 4 Car. & P. 121 (1830). Where

sary to constitute a quorum remains the same, even though there are there are eight vestrymen and the statute requires five to constitute a quorum, four cannot act, although there are three vacancies in the board. *Moore v. Rector, etc.*, 4 Abb. N. Cas. 51 (1873). When the presence of the president is by law necessary to the meeting of an executive committee, a meeting without him cannot bind the corporation. *Corn Exch. Bank v. Cumberland Coal Co.*, 1 Bosw. 436 (1857). Where two out of six directors have been accustomed to act as a quorum, a forfeiture of stock by two is legal. *Lyster's Case*, L. R. 4 Eq. 233 (1867). The acts of less than a quorum are valid if they are subsequently ratified by a quorum. *Austin's Case*, 24 L. T. Rep. (N. S.) 932 (1871). A lease taken by a meeting of a board of directors at which no quorum was present is ratified by the acquiescence of two boards elected in subsequent years, with knowledge and no objection. *Oregon Ry. v. Oregon Ry. & Nav. Co.*, 28 Fed. Rep. 505 (1886). "Where there is a definite body in a corporation, a majority of that definite body must not only exist at the time when any act is to be done by them, but a majority of that body must attend the assembly where such act is done." *Rex v. Miller*, 6 T. R. 268 (1795), per Lord Kenyon. A custom is legal which allows three to constitute a quorum of a board of nine directors. *Re Regents', etc. Co.*, W. N. 1867, p. 79 (1867). An allotment of shares by a board of two when the charter requires three is void. The subscription is not collectible. *Re British, etc. Co.*, 59 L. T. Rep. 291 (1888). Although a meeting of directors is legally called, yet if a quorum does not attend, those who do attend cannot adjourn to another day. It requires a quorum to adjourn. *McLaren v. Fiskien*, 28 Grant, Ch. (Can.) 352 (1881). A managing committee of eight cannot act at a meeting of six only. *Brown v. Andrew*, 13 Jur. 938 (1849). A quorum of the directors must be present to act, and this quorum consists of a majority. *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561 (1891). In a municipal corporation, if all the board are present and four vote one way, while the other four do not vote at all, the vote prevails. It is a majority of a quorum. *State v. Dillon*, 125 Ind. 65 (1890). If all six members of a city council are present, three may pass a resolution, although the other three do not vote. *Rushville Gas Co. v. Rushville*, 121 Ind. 206 (1889). Where the record shows that two of the four directors present voted aye and one nay, and the other director was in the chair, and the motion was declared carried, the law presumes that the chairman voted aye. *Rollins v. Shaver, etc. Co.*, 80 Iowa, 380 (1890). A meeting of four legally elected and three illegally elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. *Waterman v. Chicago, etc. R. R.*, 139 Ill. 658 (1892). The confirmation by the board of directors of resolutions passed by a meeting not containing a quorum relates back, and is as if the resolutions were regularly passed in the first place. *Re Portuguese, etc. Mines*, L. R. 45 Ch. D. 16 (1890). Two directors cannot transact business when there are four directors. *Re Portuguese, etc. Co.*, L. R. 42 Ch. D. 160 (1889). In an action by an insurance company to collect an assessment, it is no defense that losses were allowed at meetings of the directors where no quorum was present. *Atlantic, etc. Ins. Co. v. Sanders*, 36 N. H. 262, 269 (1858). A majority of the quorum may decide a question, and a plurality may elect any officer, unless otherwise provided by charter or by-laws or by law. *Ex parte Willcocks*, 7 Cow. 410 (1827); *Cooley, Const. Lim.* (4th

vacancies in the body.¹ A minority of the directors cannot adjourn the meeting.²

Difficulty has arisen in determining whether a person taking a mortgage from or executing a contract with a corporation is bound to ascertain whether a quorum of the directors was present at the directors' meeting which authorized the instrument, and whether a majority voted in favor thereof. There are many cases where mortgages and contracts have been held void by reason of defects in the calling, holding, or voting at the directors' meeting.³

The rule sustained by the great weight of authority, however, is that where a corporate mortgage or contract is signed and sealed by the corporation and delivered to the proper person, who takes it in good faith, he may act upon it, and is protected even though the directors' meeting was not regularly called or held.⁴ A quorum of the directors is presumed to have been present.⁵ A quorum is not present in passing upon a matter in which one of the directors

ed.) *141; *Oldknow v. Wainwright*, 2 Burr. 1017 (1760); *Booker v. Young*, 12 Gratt. (Va.) 303 (1855). Where twelve are present, and one candidate receives six votes, another four, and another one, and one blank, there is no election. *People v. Conklin*, 7 Hun, 188 (1876).

¹ *Erie R. R. v. City of Buffalo*, 180 N. Y. 192, 197 (1904). A by-law requiring five directors is deemed to have been amended, where for ten years the corporation has but three directors. *Buck v. Troy, etc. Co.*, 76 Vt. 75 (1903).

² *Raisch v. M. K. & T. Oil Co.*, 95 Pac. Rep. 662 (Cal. 1908).

³ See §§ 709, 712 and cases in this section; also cases in § 808, *infra*; also § 725, *infra*.

⁴ See §§ 725, 808, *infra*. Even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may

enforce such guaranty, although a purchaser with notice cannot enforce such guaranty. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court." A *bona fide* purchaser of corporate bonds is entitled "to presume that all necessary preliminaries not required to be a matter of public record have been properly performed," and hence it is no defense that the directors met out of the state when they authorized the mortgage securing the issue. *Schultze v. Van Doren*, 64 N. J. Eq. 465 (1902). A person making a contract with a corporation relying on its minute book is not affected by the fact that the minutes were passed at a meeting of the directors not duly called. *Wyss-Thalman v. Beaver, etc. Co.*, 68 Atl. Rep. 187 (Penn. 1907).

⁵ *Sargent v. Webster*, 54 Mass. 497 (1847).

is personally interested, where only a bare quorum is present when he is counted.¹

Although a meeting of the board of directors at which a quorum is not present calls a stockholders' meeting, and the stockholders' meeting takes action, yet where no stockholders object until six months thereafter the court will not interfere.² Where the charter makes a majority of directors a quorum, a minority cannot fill a vacancy in the board.³ The president is not entitled to a casting vote, in case of a tie, where he has already voted once.⁴ Although there are less directors than the statute or charter requires, yet the acts of these are sufficient to sustain obligations incurred by the

¹ *Bassett v. Fairchild*, 132 Cal. 637 (1901). In counting a quorum of the board, a director to whom a mortgage is voted at the meeting cannot be counted. *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). Where a board of directors, consisting of six, sell corporate property to two of them, the sale being authorized at a meeting at which five were present, including the two, the remaining three do not constitute a quorum and the sale is illegal. *Leary v. Interstate, etc. Bank*, 63 S. W. Rep. 149 (Tex. 1901). Money received by a director of a co-operative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. *McClure v. Wilson*, 70 N. Y. App. Div. 149 (1902). In Indiana it is held that directors may vote as directors on the question of giving themselves a preference. *Nappanee, etc. Co. v. Reid, etc. Co.*, 159 Ind. 614 (1903).

² *Southern, etc. Bank v. Rider*, 73 L. T. Rep. 374 (1895). Where stock is sold by the corporation for non-payment of an assessment, levied at a meeting of the board of directors where a quorum is not present, the sale may be set aside, unless the stockholders have acquiesced in the sale

and the stock has passed into *bona fide* hands. *Hatch v. Lucky Bill Min. Co.*, 25 Utah, 405 (1903).

³ *State v. Curtis*, 9 Nev. 325 (1874). A director who is chosen by the board when less than a quorum is present may be treated as not a director, even though he has met with the board frequently when a majority was present. His remedy is not *mandamus*. *People v. New York, etc. Asylum*, 7 N. Y. St. Rep. 277 (1887); *aff'd*, 122 N. Y. 190. A purchaser of property at an execution sale cannot contest the right of the corporation to redeem on the ground that such redemption was by a board of directors illegally elected, in that a minority of the board filled vacancies in the board and then proceeded to take action. *Baggott v. Turner*, 21 Wash. 339 (1899). Under the statutes of California, where a bank becomes insolvent the court may appoint directors to fill vacancies. *Braslan v. Superior Court, etc.*, 124 Cal. 123 (1899).

⁴ A by-law cannot give him this right. *State v. Curtis*, 9 Nev. 325 (1874). The president does not have, in addition to his first vote, a casting vote as president. *Toronto, etc. Co. v. Blake*, 2 Ont. (Can.) 175 (1882). A by-law cannot give to the presiding officer a casting vote at an election after he has once voted his stock. *Lamb v. McIntire*, 183 Mass. 367 (1903).

corporation with third persons.¹ A corporate creditor attaching property of the company which has already been assigned to an-

1 *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890); *Wallace v. Walsh*, 125 N. Y. 26 (1890). Where the charter provided that two directors might act, although vacancies existed in the board, it is immaterial that the number of directors is less than the minimum charter number. *Re Scottish Petroleum Co.*, L. R. 23 Ch. D. 413 (1883). Although the statutes require three directors who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), rev'g *Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). Where the charter requires three directors who shall be and continue to be stockholders, and one of them sells his stock, the remaining two cannot act, yet the remaining directors may call a stockholders' meeting to hold an election. *Toronto, etc. Co. v. Blake*, 2 Ont. (Can.) 175 (1882). It is held in *Faure, etc. Co. v. Phillipart*, 58 L. T. Rep. 525 (1888), that where the board of directors was to consist of from three to seven, but the quorum to consist of two, and where by resignation the whole board is reduced to two, these two cannot act; nor can they elect one or more to fill the vacancies. The quorum can act only when the board consists of the requisite number. This objection, however, cannot be raised by one who takes part as director. Where by charter the board of directors is to be from five to seven, and three may act, three cannot act when there are but four directors. The act is not binding on the corporation. *Kirk v. Bell*, 16 Q. B. 290 (1851). See also *Bottomley's Case*, L. R. 16 Ch. D. 681 (1880); *Lindley, Companies*, p. 157. A company whose directors are to be twelve

may act, although by resignation or death the number is less than twelve. *Thames, etc. Ry. v. Rose*, 4 Man. & G. 552 (1842). Where a majority of the directors may fill vacancies, and of seven directors only two remain, they cannot fill the vacancies. *Moses v. Tompkins*, 84 Ala. 613 (1888).

Although there are vacancies in a board consisting of fifteen members, yet action may be taken by eight or more of the directors at a meeting duly called. *New England, etc. Co. v. Haynes*, 71 Vt. 306 (1899). A mortgage made by four directors when the statute required five, there being one vacancy, is legal if the mortgage is ratified by the full board, and such ratification may be by recognition of the mortgage in a second mortgage. *Porter v. Lassen County, etc. Co.*, 127 Cal. 261 (1899). Where there are two vacancies in a board of five, the act of two of the remaining three directors is not legal, under the statutes of California. *Brown v. Valley, etc. Co.*, 127 Cal. 630 (1900). Where the by-laws provide that notwithstanding vacancies, continuing directors may act, two directors may act, they being the only directors, although the by-laws provide that there should be from three to nine directors. Moreover, persons dealing with the corporation in ignorance of defects in the constitution of the board are not bound to take notice of it and may enforce their claims. *Re Bank of Syria*, [1900] 2 Ch. 272; aff'd, [1901] 1 Ch. 115. Where there are vacancies in the board of directors the remaining directors have no power to act unless the charter or by-laws of the company authorize them to act under such circumstances; but as to all matters in the ordinary course of business of the company, persons dealing with the corporation in good faith are protected, even though there are vacancies in the

other creditor cannot attack such assignment on the ground that, while the statute required three directors, only two directors existed, the third one having resigned.¹ The express authority of an officer to execute a contract is not affected by a change in the board of directors.²

A statute that upon an officer in a bank borrowing money of the bank without security, his office shall become vacant and he shall cease to become a director, is self executing.³ A statute authorizing the directors to remove any officer does not authorize them to remove one of the directors.⁴

Even though a director resigns for the sole purpose of avoiding a statutory liability and causes his son to be elected director in his place and continues to be the agent and manager of the business, nevertheless he is not liable under the statute.⁵

The question of whether the directors may delegate their authority to an executive committee has given rise to much controversy. Such a delegation of authority has become very common,

board of directors. Lindley on Companies (5th ed.), p. 157. A committee of arbitration may act by a majority vote unless the agreement provides otherwise. The resignation of one member just before the award is made does not invalidate the award. Republic of Colombia v. Cauca Co., 106 Fed. Rep. 337 (1901).

1 Castle v. Lewis, 78 N. Y. 131 (1879).

2 Kidd v. New Hampshire, etc. Co., 66 Atl. Rep. 127 (N. H. 1907).

3 His continuance in office may bind the corporation by his acts, but does not prevent a creditor attacking an assignment for creditors made by him in behalf of the bank. Cupit v. Park City Bank, 20 Utah, 292 (1899). Where a director, who is also treasurer, sells his stock to the other directors, it being a part of the sale that he give up his offices, the corporation may treat his offices as vacant. Anderson, etc. Co. v. Pungs, 127 Mich. 543 (1901). An injunction suit by a director to restrain the other directors from excluding him from the board fails where the charter provides that any director accepting an office for profit in the company thereby vacated

his directorship, and he had accepted a position of trustee of a corporate mortgage. Astley v. New Tivoli, Ltd., [1899] 1 Ch. 151. Notes issued by directors who are disqualified by having sold their stock and as a scheme to create a liability on the part of the stockholders are not good, especially where the meeting of the directors was not properly called. Close v. Potter, 155 N. Y. 145 (1898). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. Stanley v. Luse, 36 Oreg. 25 (1899).

4 Laughlin v. Geer, 121 Ill. App. Rep. 534 (1905).

5 Brown v. Clow, 158 Ind. 403 (1902). Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and even though one of them resigns, the liability continues for the benefit of past as well as future creditors. Nix v. Miller, 26 Colo. 203 (1899). See also § 624, *supra*.

and is sustained by the courts. This question is discussed elsewhere.¹ There being nothing in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers.²

§ 714. *Minute-book of directors' meetings and other books of the corporation as evidence of acts and contracts of the corporation and authorization of agents.*—The minute-book of the proceedings of the directors' meetings is proper evidence to prove a corporate contract or the authority of a corporate agent to act or contract for it.³

¹ See § 715, *infra*.

² *Re Bulawayo, etc. Co. Ltd.*, 97 L. T. Rep. 752 (1907).

³ Quoted and approved in *Torras v. Raeburn*, 108 Ga. 345 (1899). The statement of the president that the board of directors had passed certain resolutions is not admissible. *Childs v. Ponder*, 117 Ga. 553 (1903). Corporate books may be used to prove a right against the corporation itself or against one of the stockholders, so far as regularity and legality of the corporate proceedings are concerned. They must, however, be identified and this may be done by having an officer swear that he is the proper custodian and that they are the original books. *Lowry Nat. Bank v. Fickett*, 122 Ga. 489 (1905). Parol evidence that a person is treasurer and manager is sufficient without producing the corporate records to that effect. *Empire, etc. Co. v. Gardiner, etc. Co.*, 85 Pac. Rep. 729 (Ariz. 1906). Even though the minute-book is in another state, yet this does not excuse failure to produce the minutes or a certified copy thereof, and hence the statements of officers of the company as to the contents of such minute-book are incompetent. *Central, etc. Co. v. Sprague, etc. Co.*, 120 Fed. Rep. 925 (1902). A mere vote of the directors that a certain party be given the popcorn privilege for a specified time for a specified sum does not in itself make a contract. *Hazard v. Hope Land Co.*, 69 Atl. Rep. 602 (R. I.

1908). See also p. 348, note 2, *supra*, and note 4, p. 2271 *infra*. The authority of a corporate agent to manage the affairs of a company cannot be proved by a question to a witness in the absence of the vote of the directors or proof that the resolution cannot be found. *St. Regis, etc. Co. v. Hotchkiss*, 45 Atl. Rep. 11 (Conn. 1900). The corporate records may be shown to be such by the testimony of a director who is also treasurer at the time. *Illinois, etc. Assoc. v. Plagge*, 177 Ill. 431 (1898). Entries in the minute-book fifty years old are admissible in behalf of the corporation to prove title to land claimed by the corporation by adverse possession. *Hamerslag v. Duryea*, 58 N. Y. App. Div. 288 (1901); *aff'd*, 172 N. Y. 622. Even though the secretary did not sign the minutes of a meeting as copied into the record book, yet such minutes may be used to prove that a resolution was passed at that meeting. *Woodhaven Bank v. Brooklyn, etc. Co.*, 69 N. Y. App. Div. 489 (1902). A party may introduce in evidence a portion of the minutes pertaining to the matter in litigation, leaving it to the opposite side to introduce the remainder if the latter desires. *Fouche v. Merchants', etc. Bank*, 110 Ga. 827 (1900). Where the appointment of an agent is by resolution of the directors, or in any other manner requiring a record of the matter, the entry upon the minutes or books of the corporation may

Where the resolutions of the directors authorize the making of a contract, and the contract is subsequently prepared and executed,

be introduced in evidence of the appointment. *Buncombe Turnp. Co. v. McC arson*, 1 Dev. & B. (N. C.) 306 (1835); *Owings v. Speed*, 5 Wheat. 420, 424 (1820); *Thayer v. Middlesex Ins. Co.*, 27 Mass. 326 (1830); *Narragansett Bank v. Atlantic Silk Co.*, 44 Mass. 282 (1841); *Clark v. Farmers' Mfg. Co.*, 15 Wend. 256 (1836); *Methodist Chapel v. Herrick*, 25 Me. 354 (1845); *Haven v. New Hampshire Asylum*, 13 N. H. 532 (1843). Where a corporate agent is appointed by a resolution, his authority cannot be proved by parol. The extent of the authority in such a case is a question of law for the court. *McCreery v. Garvin*, 39 S. C. 375 (1893). In order to make the corporate books admissible, proof must be given as to who kept them, and that the entries were made at the proper time or by the proper directors, and that the entries were properly made. *Powell v. Conover*, 75 Hun, 11 (1894). A contract duly accepted and agreed to in a directors' meeting and entered on the minutes, which are duly signed, is a contract in writing. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). Directors' minutes are evidence of a contract, though written up after the meeting. *Wells v. Rahway, etc. Co.*, 19 N. J. Eq. 402 (1869). In a suit by an employee of a corporation for pay for services, the defendants' books, properly kept by its proper officers, are admissible in evidence to prove payments to plaintiff on account of services. *Ganther v. Jenks, etc. Co.*, 76 Mich. 510 (1889). A resolution of the board of directors authorizing an assignment for the benefit of creditors is sufficient. *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383 (1891). The minutes of directors' meetings as they appear in a corporate book will not be excluded as evidence merely because the secretary swears that they were written up several years after the meetings and were made partially from the recollection of the president. *McIlhenny v. Binz*, 80 Tex. 1 (1890). In proving a *de facto* corporation, the meetings and the issue of stock and the transaction of business may be proved by parol without producing the books. *Johnson v. Akerstrom*, 70 Minn. 303 (1897). After notice to the corporation to produce its records is given, secondary evidence may be introduced. *Thayer v. Middlesex, etc. Co.*, 27 Mass. 325 (1830); *Elems v. Ogle*, 15 Jur. 180 (1850); *Lohman v. New York, etc. R. R.*, 2 Sandf. 39 (1848), holding that the failure to produce may send the question to the jury. To same effect, *Narragansett Bank v. Atlantic Silk Co.*, 44 Mass. 282 (1841). The presumption is that a suit in the corporate name was authorized by it. *Bangor, etc. R. R. v. Smith*, 47 Me. 34 (1859). In proving employment, notice to produce must be given. *Haven v. New Hampshire Asylum*, 13 N. H. 532 (1843). So also in proving agency. *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836); *Montgomery R. R. v. Hurst*, 9 Ala. 513 (1846). As to proving subscription to stock, see ch. IV, *supra*. Parol evidence cannot explain the minutes. *Gould v. Norfolk, etc. Co.*, 63 Mass. 338 (1852). The rough minutes are evidence if not subsequently written out. *Waters v. Gilbert*, 56 Mass. 27 (1848). It may be shown that the minutes are incorrect. *Van Hook v. Somerville, etc. Co.*, 5 N. J. Eq. 137, 169 (1845). Proof that the book is a corporate record is made by the person having custody of the book. *Smith v. Natchez, etc. Co.*, 2 Miss. 479, 492 (1837). It must be proved that it is a corporate book, kept as such, and by the proper officer. *Highland Turnp. Co. v. McKean*,

its terms being more full than the resolutions of the directors, the contract between the parties is that one which was actually executed.¹ All the resolutions of the directors may be read together in order to ascertain the true nature of a transaction.² A director has a right to examine all the books and papers of the company.³

A corporation may enter into a written contract under seal without a formal vote or written entry of a vote by the directors. Where the directors are present, and all assent to the execution of the contract, this is sufficient. Proof of corporate resolutions or votes, and of votes of the directors, is made by producing the original minutes or record-book of the corporation. If there is no question that the book is the minute-book of a corporation, it is immaterial that it is not in the possession of the regular custodian.⁴ Where the record-book is lost, or no record was ever made, secondary evidence may be resorted to.⁵

10 Johns. 154 (1813); *Whitman v. Granite Church*, 24 Me. 236 (1844). Proof may be by the secretary. *Stebbins v. Merritt*, 64 Mass. 27 (1852). The book-keeper may prove his entries. *Union Bank v. Knapp*, 20 Mass. 96 (1825). Or, if he is dead, his handwriting may be proved. *Union Bank v. Knapp*, 20 Mass. 96 (1825); also *Chenango, etc. Co. v. Lewis*, 63 Barb. 111 (1872). Where a corporation is disproving agency it is held to strict proof. Its records are inadmissible unless proof is given that they were kept by the proper officer, and unless he testifies to them. *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565 (1875); *aff'd*, 96 U. S. 640. See *Gafford v. American, etc. Co.*, 77 Iowa, 736 (1889). For a very full note on the admissibility of corporate books as evidence, see 23 Cent. L. J. 468-473. An examination before trial, to ascertain whether the defendant corporation authorized a person to make a contract for it, was granted in *Bloom v. Pond's Extract Co.*, 18 N. Y. Supp. 179 (1891).

¹ *Keystone, etc. Co. v. Bate*, 196 Pa. St. 566 (1900). Even though the resolution of the board of directors accepting an oral proposition does not contain the entire proposition made

to a corporation, yet the entire oral proposition may be binding on the corporation. *Rochester, etc. Co. v. Browne*, 55 N. Y. App. Div. 444 (1900); *aff'd*, 179 N. Y. 542.

² *Hartley v. Pioneer Iron Works*, 181 N. Y. 73 (1905).

³ See § 511, *supra*.

⁴ *Wyss-Thalman v. Beaver, etc. Co.*, 68 Atl. Rep. 187 (Penn. 1907).

⁵ *Zihlman v. Cumberland Glass Co.*, 74 Md. 303 (1891). The minutes of a meeting at which directors were elected may be proved by parol if the written record has been lost. *Hudson v. J. B. Parker, etc. Co.*, 173 Mass. 242 (1899). A by-law may be proved by oral evidence where there was no written entry of the same in the corporate records. *Masonic, etc. Assoc. v. Severson*, 71 Conn. 719 (1899). A resolution of the board of directors releasing the mortgage may be proved by parol, no record having been made. *In re Bank of West Superior*, 109 Wis. 672 (1901). Reasonable salaries paid to the officers for services rendered cannot be recovered back, although no formal resolution was passed in regard thereto. *McCourt v. Singers-Bigger*, 145 Fed. Rep. 103 (1906). Where the record-book containing the minutes of a stockholders' meeting

A resolution adopted at a stockholders' meeting is valid, although only a pencil memorandum was made of it and no formal

has been lost, the proceedings may be proved by the oral testimony of any witness who was present. *Blanton v. Kentucky, etc. Co.*, 120 Fed. Rep. 318 (1902); *aff'd*, 149 Fed. Rep. 31. A resolution of the directors authorizing the issue of a note and mortgage is valid, even though not recorded and even though the statute requires a two-thirds vote of the directors, and a record that the motion was carried is sufficient if parol evidence is given that two-thirds of the directors voted for it. *Ismon v. Loder*, 135 Mich. 345 (1904). If the minutes contain but a portion of an agreement the balance may be shown by parol. *Grath v. Mound City, etc. Co.*, 98 S. W. Rep. 812 (Mo. 1907). The implied authority of certain officers to make a certain contract may be proved by what was said and done at meetings of the board of directors, even though not recorded. *Smith v. Bank of New England*, 72 N. H. 4 (1903). If the minute-books or stock-books are lost their contents may be proved by parol. *Garmany v. Lawton*, 124 Ga. 876 (1906). Where the minutes of meetings are merely pinned into the record-book, proof must be given that they are the actual minutes. *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). If no minutes of a directors' meeting are kept the proceedings may be proved by parol evidence. *Braxmar v. Stanton*, 110 N. Y. App. Div. 167 (1905). Where a corporation makes a written assignment of a claim and the assignee sues thereon, it is presumed that the assignment was authorized and this is not disproved by the fact that there was no written resolution of the board of directors. *McKee v. Cunningham*, 2 Cal. App. 684 (1906). Where the books have been destroyed by accident their contents may be proved by parol. *Thistlethwaite v. Pierce*, 30 Ind. App. 642 (1903). A president of a trust company has no authority to make a contract by which it guarantees the sale of the securities of a shipbuilding company, and proof that the board of directors authorized such a contract must be very clear to sustain it. *Gause v. Commonwealth T. Co.*, 124 N. Y. App. Div. 438 (1908). The best proof of a corporate act is the record of the board of directors, and other evidence cannot be introduced unless such record does not exist or is inaccessible. *Topeka Co. v. Oklahoma Co.*, 7 Okl. 220 (1898). Although the record does not show that certain stock was voted, yet it may be proved by parol evidence that it was voted. *Franklin T. Co. v. Rutherford, etc. Co.*, 57 N. J. Eq. 42 (1898). Where no written minutes are kept of the proceedings of stockholders, they may be proved by parol. *Birmingham, etc. Co. v. Birmingham Traction Co.*, 128 Ala. 110 (1900). Where no record is kept of directors' resolutions authorizing a mortgage, they may be proved by parol. *Murray v. Beal*, 23 Utah, 548 (1901). If no record is kept, the action of the board of directors may be proved by parol. *Hendrie, etc. Co. v. Collins*, 13 Colo. App. 8 (1899). The fact that a majority of the members of the corporation voted for a loan, as required by statute, may be shown by parol evidence, even though such vote does not appear in the records of the corporation. *Illinois, etc. Assoc. v. Plagge*, 177 Ill. 431 (1898). Where the corporate books are lost, a contract that a certain person should not pay toll, in consideration of closing a private way, may be proved by parol. *Pigg v. Stacey*, 49 S. W. Rep. 1065 (Ky. 1899). Where all the directors are present and assent thereto, a written contract may be made by the corporation without any formal

record made until long afterwards. The proceedings may be proved by parol.¹

vote or entry in the minutes. *Indiana, etc. Co. v. Robinson*, 29 Ind. App. 59 (1902). Where there are but two directors and one of them is general manager and carries on the entire business, and he and the president sell all the property of the company, it is immaterial that they did not hold a formal meeting as directors to authorize such sale. *Magowan v. Groneweg*, 16 S. D. 29 (1902). See s. c., 14 S. D. 543. A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that the transaction was not duly authorized by the board of directors or signed by the proper officers, where he has participated in the results of their action. *Swentzel v. Franklin, etc. Co.*, 168 Mo. 272 (1902). Where a street-railway company employs a person as its agent to purchase a majority of the stock of another street-railway company, and he does so, and the former pays him for the stock and for his services, he cannot refuse to deliver the stock on the ground that the company had no power to purchase or on the ground that it had passed no resolutions authorizing him to purchase, and the former may recover the stock from a transferee with notice from the agent. *Manchester St. Ry. v. Williams*, 71 N. H. 312 (1902). Even though no formal resolutions are passed or record made, yet, if all the stockholders and directors are present, and it is agreed that one stockholder should loan money to the company,

the company must repay the same. *Burke v. Sidra Bay Co.*, 116 Wis. 137 (1902). A mortgage authorized at a stockholders' meeting at which all the directors were present is legally authorized. *Crossette v. Jordan*, 132 Mich. 78 (1902). It may be shown by parol that a resolution gave the vice-president a certain salary, where such resolution was not entered on the record and he performed services other than those pertaining to his office. *Selley v. American, etc. Co.*, 119 Iowa, 591 (1903). "The entry of a resolution in a minute is not essential to the validity of the resolution, which is proved *aliunde*." *Re Great Northern, etc. Works*, L. R. 44 Ch. D. 472 (1890). Although a resolution is not inserted in the minutes of the meeting, it may be proved by other evidence. So held as to a resolution authorizing the secretary to borrow money. *Bank of Yolo v. Weaver*, 31 Pac. Rep. 160 (Cal. 1892). "Parol evidence is admissible to prove the action of the board of directors or stockholders where the record fails to state it." *Allis v. Jones*, 45 Fed. Rep. 148 (1891). "Where a corporation consists of a small number of persons like a partnership, they may transact all their business by conversation, without formal votes; and it would be a violation of the plainest principles of justice to hold those who deal with them to prove all their acts by written votes, which they do not keep or do not produce." *Melledge v. Boston, etc. Co.*, 59 Mass. 158, 179 (1849). Parol evidence may be given to prove a vote of a salary to an offi-

¹ *Handley v. Stutz*, 139 U. S. 417 (1891). The records of the stockholders' meetings may be used to show the purpose of a stockholder's resolution. *Wiley v. Athol*, 150 Mass. 426 (1890). The first draft of min-

utes signed by the secretary and initialed by the president are a proof of the proceedings, where they have not been copied into the minutes. *Chott v. Tivoli Amusement Co.*, 114 Ill. App. Rep. 178 (1904).

But a stockholder cannot prove by parol that a dividend was declared, the records not showing the same. His remedy is by proceedings to correct the corporate record.¹

cer where the secretary is dead and the minute-book does not contain a record of the vote. *Pickett v. Abney*, 84 Tex. 645 (1892). A vote of the directors employing a person is not a contract. It must be known to and accepted by the person employed. It may be shown by parol that the contract was to be binding only in case certain negotiations were carried out. A statement by the treasurer, showing the liabilities and making no mention of his salary, is admissible as evidence. *Sears v. King's, etc. R. R.*, 152 Mass. 151 (1890). See also, on this subject, *U. S. Bank v. Dandridge*, 12 Wheat. 64, 95 (1827); *Union Bank v. Ridgely*, 1 Har. & G. (Md.) 324, 425 (1827); *St. Mary's Church v. Cagger*, 6 Barb. 576 (1849); *Maxwell v. Dulwich College*, 1 Fonbl. Eq. 296 (1834); *Magill v. Kaufman*, 4 Serg. & R. (Pa.) 317 (1818); *Brady v. Brooklyn*, 1 Barb. 584 (1847); *Essex Turnp. Corp. v. Collins*, 8 Mass. 292, 298 (1811); *Marshall v. Queensborough*, 1 Sim. & S. 520 (1823); *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392 (1849); *Garvey v. Colcock*, 1 Nott & McC. (S. C.) 231 (1815); *Bates v. Bank of Alabama*, 2 Ala. 452 (1841). The corporate secretary's letters to a vendor are admissible as evidence. *Scott v. Middletown, etc. R. R.*, 86 N. Y. 200 (1881). The minutes of a directors' meeting may by parol be shown not to include the whole agreement where the party being contracted with was present at the meeting and discussed the matter with the board. *Tibbals v. Mount Olympus Water Co.*, 10 Wash. 329 (1894). A verbal agreement of the directors in meeting assembled to pay the treasurer a certain salary is binding on the company, although no written res-

olution thereof is entered in the minutes. *Outtersen v. Fonda Lake Paper Co.*, 20 N. Y. Supp. 980 (1892). When there are but a few persons interested in a corporation, "ordinary business may be transacted without the formality of resolutions. It may be done by conversation without formal votes." *Hall v. Herter*, 83 Hun, 19 (1894). See s. c., 90 Hun, 280, and 157 N. Y. 694. The resolutions of directors need not be reduced to writing in order to be valid. *Columbia, etc. Co. v. Vancouver, etc. Co.*, 32 Oreg. 532 (1898). Corporate minutes need not be written out by the secretary himself. It is sufficient that he sign them. *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1 (1897). A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. *Rogers v. Pell*, 154 N. Y. 518 (1898). Authority to an agent, given by the board of directors, may be proved by oral evidence, there being no record of the same in the corporate books. There is no law requiring a board of directors to keep a record of their proceedings. *Morrill v. C. T. Segar Mfg. Co.*, 32 Hun, 543 (1884). *Contra*, *Andover, etc. Turnp. Co. v. Hay*, 7 Mass. 102, 107 (1810); *Colcock v. Garvey*, 1 Nott & McC. (S. C.) 231 (1815); *Peek v. Detroit, etc. Works*, 29 Mich. 313 (1874); but see *Taymouth v. Koehler*, 35 Mich. 22 (1876). The acts of the directors need not be formally entered on the corporate minutes. *Nashua, etc. R. R. v. Boston, etc. R. R.*, 27 Fed. Rep. 821 (1886); *Morrill v. Segar, etc. Co.*, 32 Hun, 543 (1884); *Moss v. Averell*, 10 N. Y. 449 (1853). Parol

¹ *Dennis v. Joslin, etc. Co.*, 19 R. I. 666 (1896).

The question of whether the books are evidence against officers, and whether the officers are conclusively presumed to have notice

evidence may show that the corporate records have been burned. *Baptist House v. Webb*, 66 Me. 398 (1877). Or lost. *Wallace v. First Parish, etc.*, 109 Mass. 263 (1872); *Prothro v. Minden Sem.*, 2 La. Ann. 939 (1847). It may be proved by parol that the board of directors authorized an agent to draw a bill of exchange. No corporate seal or record evidence is necessary. *Preston v. Missouri, etc. Co.*, 51 Mo. 43 (1872). The directors' votes may be proved by parol when they were not recorded. *Edgerly v. Emerson*, 23 N. H. 555 (1851); *Wait, Inslv. Corp.*, § 529. It may be for the jury to say whether a subsequent meeting changed the minutes. *Delano v. Smith Charities*, 138 Mass. 63 (1884). The company is not bound by fraudulent insertions, at least where strangers have not relied thereon. *Holden v. Hoyt*, 134 Mass. 181 (1883). See also *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (1825); *Hoag v. Lamont*, 60 N. Y. 96 (1875); *Fleckner v. Bank of U. S.*, 8 Wheat. 338 (1823); *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392 (1849), holding that an appointment need not be entered upon the records of the corporation. Secondary evidence of the records is not admissible unless the officers are first examined and the originals are not to be found. *Mullanphy Sav. Bank v. Schott*, 135 Ill. 635 (1891). In a suit to set aside an alleged illegal sale of stock for non-payment of assessments, the records of the corporation cannot be proved by oral evidence. *Corcoran v. Sonora, etc. Co.*, 8 Idaho, 651 (1902). Entries in the corporate books should be proved by the books themselves, and not by the clerk, unless an excuse is given for their non-production. *National Bank v. Navassa, etc. Co.*, 56 Hun, 136 (1890). Where the original minutes have been destroyed, the minutes as they have been copied into the minute-book are admissible. *Brower v. East, etc. Co.*, 84 Ga. 219 (1890). The books of the company are the best evidence, and not the testimony of officers as to what they had seen on the books. *Dial v. Valley, etc. Assoc.*, 29 S. C. 560 (1888). A copy of a resolution of the directors of an alien corporation is not evidence until proof of a reasonable effort to obtain the original is given. *Bowick v. Miller*, 21 Oreg. 25 (1891). Sworn copies taken from corporate books are incompetent unless evidence is given of the loss of the book itself. *Latourrette v. Clark*, 51 N. Y. 639 (1872). Entries need not be proven by the clerk who made the entries. *First Nat. Bank v. Tisdale*, 84 N. Y. 655 (1881). Books of the board of directors, in which their proceedings are recorded, proved by proving the handwriting of the clerk and president, are competent evidence to prove the facts therein recorded. *Owings v. Speed*, 5 Wheat. 420 (1820). Acts of a board of directors may be shown by parol when no record of them has been made. *Zalesky v. Iowa, etc. Co.*, 102 Iowa, 512 (1897). In an action by a foreign corporation, oral proof of the corporate books, papers, and records, in the possession of the corporation outside the state, is not admissible in its behalf. *Mandel v. Swan, etc. Co.*, 154 Ill. 177 (1895). Query, whether, under the statutes of Tennessee requiring the board of directors to keep a full and true record of all their proceedings, an authorization of a mortgage is legal where no such record of the authorization is made? *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624 (1893). Even though the resolutions authorizing a mortgage were oral, and no written record was made, yet they may be proved to sustain the mortgage.

of all that is contained in the corporate books, is considered elsewhere.¹ The books, of course, are not admissible as evidence against strangers dealing with the corporation.² Where there is no statute or by-law requiring a private corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal that a resolution was passed cannot be questioned by any one claiming under or through the corporation.³ Minutes or resolutions entered in the books of the corporation may constitute a contract, or sufficient evidence of a contract to satisfy the statute of frauds, and even a third party may be entitled to the benefits of such contract.⁴ When a corporation denies that an employee was author-

Boggs v. Lakeport, etc. Assoc., 111 Cal. 354 (1896). Where the secretary is dead, and his memoranda of the minutes cannot be found, and no record has been made, the minutes may be proved by parol. *New Boston, etc. Co. v. Saunders*, 67 N. H. 249 (1892). Resolutions of the board may be shown by parol where only a part of the business has been entered in the minutes. *Cameron v. First, etc. Bank*, 34 S. W. Rep. 178 (Tex. 1896). The acts and resolutions of the directors, if not recorded, may be proved by parol. *Langsdale v. Bonton*, 12 Ind. 467 (1859); *Bay, etc. Assoc. v. Williams*, 50 Cal. 353 (1875). Minutes not signed by the chairman are not evidence of a call; nor is a subsequent ratification of those minutes. *Cornwall, etc. Co. v. Bennett*, 5 H. & N. 423 (1860). See 117 N. W. Rep. 300.

¹ See § 727, *infra*.

² See § 727, *infra*.

³ *Prentiss, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). A certified copy of resolutions sent to a mortgagee, and authorizing a mortgage, are sufficient proof without proving loss of the corporation records. *Purser v. Eagle Lake, etc. Co.*, 111 Cal. 139 (1896). A person purchasing a mortgage from a savings bank through its treasurer and secretary may rely upon a copy of a resolution passed by the trustees authorizing such sale, and duly signed by the secretary. So though the secretary had intentionally

made the copy different from the original. *Whiting v. Wellington*, 10 Fed. Rep. 810 (1882). A copy of the directors' resolution is evidence, not when merely certified to by the secretary, but when sworn to by him. *Hal-lowell, etc. Bank v. Hamlin*, 14 Mass. 178 (1817). See also § 713a, *supra*.

⁴ *Washer v. Independence, etc. Co.*, 142 Cal. 702 (1904). Where a signed copy of a resolution of the board of directors selling certain corporate lands was handed to the vendee this satisfies the statute of frauds. *Western, etc. Co. v. Kalama, etc. Co.*, 42 Wash. 620 (1906). A resolution of the board of directors, even though entered on the minutes, authorizing the president to sell the real estate of the corporation, does not satisfy the statute of frauds. *Cumberland, etc. R. R. v. Shelbyville, etc. R. R.*, 117 Ky. 95 (1903). A resolution of municipal authorities for supplying water may take the contract out of the statute of frauds relative to sales of merchandise, but not until such resolution has been made known to the other party and accepted by the latter. *Mayor, etc. v. Town of Harrison*, 71 N. J. L. 69 (1904). A resolution of the board of directors may be sufficient evidence of a contract relative to land. *Newport News, etc. Co. v. Newport News, etc. Ry.*, 97 Va. 19 (1899). The corporate record of the vote of the directors and the signature of the recording officer satisfies

ized to make a contract for it, its officers may be examined before trial, but its books and minutes need not be produced unless it is shown that they contain entries relating to that fact.¹

§ 715. *Executive committee*.—There formerly was some doubt as to whether the powers of a board of directors might be delegated to an executive committee. The right of the board of directors to delegate to agents generally the transaction of the ordinary and routine business of the corporation is unquestioned, and indeed is absolutely necessary.² But in matters involving discretion there are decisions to the effect that the directors cannot delegate that discretion.³ The clear weight of authority, however, holds that the

the statute of frauds as to answering for the debts of another. *Lamkin v. Baldwin, etc. Co.*, 72 Conn. 57 (1899). An entry on the corporate minutes of a resolution to form a corporate contract is sufficient on notice of the same to the other party, and suffices to form the contract. It satisfies the statute of frauds. *Argus Co. v. Mayor, etc.*, 55 N. Y. 495 (1874). An entry on the directors' minute-book, duly signed, is sufficient to prevent a contract being void by the statute of frauds. *Jones v. Victoria, etc. Co.*, L. R. 2 Q. B. D. 314 (1877). If on production of the books no resolution is found, proof of acts, etc., may be given. *Melledge v. Boston, etc. Co.*, 59 Mass. 158, 179 (1849). See also § 721 *infra* and note 3, p. 2264 *supra*.

¹ *Wood v. Mott Iron Works*, 114 N. Y. App. Div. 108 (1906). See § 519, *supra*, covering many phases of this subject.

² The corporation may authorize its president to sell and assign its negotiable paper. *Stevens v. Hill*, 29 Me. 133 (1848); *Northampton Bank v. Pepoon*, 11 Mass. 288 (1814). Nearly all corporate acts are done by means of subordinate agents. Such delegations of authority are necessary. See *Manchester Ry. v. Fisk*, 33 N. H. 297 (1856). Difficulty occurs in defining the line which separates powers that may be delegated from those which may not be. See *Lyon v. Jerome*, 26 Wend. 485 (1841); *Gillis v. Bailey*,

21 N. H. 149 (1850). A corporation owning water-works outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one and the profits to be divided equally. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549 (1895). Directors may authorize two of their number to execute corporate notes to a person. *Leavitt v. Oxford, etc. Co.*, 3 Utah, 265 (1883). Or appoint an agent to execute a deed. *Arms v. Conant*, 36 Vt. 744 (1864). Where various corporations appoint a committee to carry on litigation, they are each liable for the attorneys' fees, the attorneys having no knowledge of a limitation of the powers of the committee in the matter. *Prindle v. Washington L. Ins. Co.*, 73 Hun, 448 (1893); *aff'd*, 149 N. Y. 614. Directors having power to fix the rates of their railroad may delegate that power to agents. *Manchester, etc. R. R. v. Fisk*, 33 N. H. 297 (1856). See also many cases in the following sections of this work. See also § 712, *supra*.

³ The directors of a New Jersey holding corporation owning a majority of the stock of a New York insurance company cannot place the stock in a voting trust for a period of years, because it is the duty of such directors to manage and control the property of the corporation instead of delegating such control to outside

powers of a board of directors may be delegated to an executive committee of that board, and the acts and contracts of such a committee may be made binding on the corporation.¹

individuals. *Knickerbocker, etc. Co. v. Voorhees*, 100 N. Y. App. Div. 414 (1905). Where subscribers to the stock of a proposed telephone corporation authorize a committee of nine to purchase material and incorporate, and five of the committee in opposition to four do purchase and incorporate, the minority are not bound by their action. *Mt. Carmel, etc. Co. v. Mt. Carmel, etc. Co.*, 119 Ky. 461 (1905). Directors cannot delegate to two of their number the question of whether a conditional subscription to shares should be accepted. *Howard's Case*, L. R. 1 Ch. 561 (1866). Two directors acting as agents to receive calls have no power to waive a forfeiture of stock and receive the calls thereon. *Card v. Carr*, 1 C. B. (N. S.) 197 (1856). Directors cannot delegate to a committee the power to forfeit and sell stock for non-payment of calls. *York, etc. R. R. v. Ritchie*, 40 Me. 425 (1855). A Pennsylvania railroad corporation cannot authorize its board of directors to delegate to an executive committee the location of the route. *Weidenfeld v. Sugar, etc. R. R.*, 43 Fed. Rep. 615 (1892). In *Gillis v. Bailey*, 21 N. H. 149 (1850), it was held that a board of directors could not delegate to an agent the power to lease various pieces of property owned by the corporation. Power to make assessments cannot be delegated by the directors. *Farmers', etc. Ins. Co. v. Chase*, 56 N. H. 341 (1876); *Silver Hook Road v. Greene*, 12 R. I. 164 (1878), where the delegation was to the treasurer. But see *Read v. Memphis, etc. Co.*, 9 Heisk. (Tenn.) 545 (1872), where such delegation to the president was upheld. Cf. *Lindley, Companies*, p. 156. The directors' duty to pass on paper offered for discount cannot be delegated in Louisiana. *Percy v. Mil-*

laudon, 3 La. 568 (1832). Cf. *Morse, Banks and Banking*, 108. Directors having power to purchase stock cannot delegate that power to a general manager. No ratification arises from the fact that the purchase was entered on the books. *Cartmell's Case*, L. R. 9 Ch. 691 (1874). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. *Dupignac v. Bernstrom*, 76 N. Y. App. Div. 105 (1902). See also § 534, *supra*.

1 An executive committee may be appointed under the statutory power of the company "to appoint such subordinate officers and agents as the business of the corporation shall require." The executive committee may delegate to one of their number the indorsing of checks, etc. *Sheridan, etc. Light Co. v. Chatham Nat. Bank*, 127 N. Y. 517 (1891). A contract between two railroads, by which one was given the right to run over the tracks of the other, is legal, although it is executed by the authority only of the executive committee and of a meeting of the stockholders, the court saying the determination of the management of the corporate affairs rests with its stockholders, and that the stockholders had the power to authorize the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized

The majority of the directors cannot, however, exclude the minority from the meetings and from being heard, by delegating power

to do. *Union, etc. Ry. v. Chicago, etc. Ry.*, 163 U. S. 564, 597 (1896), *aff'd* 51 Fed. Rep. 309 (1892), and 47 Fed. Rep. 15 (1891). See also *Black River Imp. Co. v. Holway*, 85 Wis. 344 (1893), and *Hoyt v. Thompson's Executor*, 19 N. Y. 207 (1859), where the committee consisted of any five or more directors who attended meetings of which notice was given to all. See also *Hoyt v. Sheldon*, 3 Bosw. 267 (1858). A member of the executive committee, who is also practically the business agent of the corporation, may agree that if a sub-contractor will not file a lien his claim will be paid. *Culver v. Pocono, etc. Co.*, 206 Pa. St. 481 (1903). An executive committee of a trust company cannot legally purchase for it its own stock. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608 (1906). An executive committee has no power to make a contract appointing a sole selling agent for five years and giving him six per cent. on all goods sold by him or any one else. Moreover such a contract is unilateral and not binding when the agent does not agree to sell any goods. *Commercial, etc. Co. v. Northampton, etc. Co.*, 115 N. Y. App. Div. 388 (1906); *aff'd*, 190 N. Y. 1. The board of directors may delegate to an executive committee the power to issue promissory notes. *First National Bank v. Com. Travelers' Assoc.*, 108 N. Y. App. Div. 78 (1905); *aff'd*, 185 N. Y. 575, the court intimating, however, that the board of directors could not delegate discretionary powers to a sub-committee. Where all the stock is sold through the executive committee, the stockholders may be bound by the false representations of such committee. *Garrett Co. v. Appleton*, 101 N. Y. App. Div. 507 (1905); *aff'd*, 184 N. Y. 557. Where the board of directors allow one of their number to manage the

company and conduct and transact its business, he is the same as an executive committee or general manager or managing director, and his acts bind the company, even though there was no formal vote giving him authority. *York v. Mathis*, 68 Atl. Rep. 746 (Me. 1907). Where a meeting of the board of directors has been called, the executive committee cannot two hours before such meeting make a contract for a sole selling agency for the entire output of the company for five years. *Commercial, etc. Co. v. Northampton, etc. Co.*, 190 N. Y. 1 (1907); the court intimating also that such an unusual contract would have been beyond the power of the executive committee, even if no meeting of the board of directors had been called.

The acts and contracts of a *de facto* executive committee were upheld in *Salem, etc. Co. v. Lake Superior, etc. Mines*, 112 Fed. Rep. 239 (1901), on the ground that the corporation and the board of directors had for a long time allowed such executive committee to act as though it had been regularly constituted and authorized so to act. A party dealing with a special committee of the board of directors of a corporation must take notice of the powers of such committee. *Kelsey v. New England, etc. Ry.*, 60 N. J. Eq. 230 (1900); s. c., 62 N. J. Eq. 742. Where the charter provides that the business shall be managed by three executive officers they may execute a mortgage, it appearing that no directors have ever been elected. *Bell, etc. Co. v. Kentucky, etc. Co.*, 106 Ky. 7 (1899).

In *Tempel v. Dodge*, 89 Tex. 68 (1895), it was held that a corporation had no right to create by its by-laws an executive committee to exercise the powers of the board of directors. "The managers might, undoubt-

to a committee, and "even if the minority had a voice given to them, still, if there existed a combination among the majority, be-

edly, clothe a committee, in the intervals between the sittings of the board, with all their own authority to conduct the ordinary business of the company." But it seems that this executive committee cannot delegate its power to one of their number. *Olcott v. Tioga R. R.*, 27 N. Y. 546, 558 (1863). Where the by-laws authorize the directors to transact business through a committee, that committee may consist of one person. *Re Touraine Co.*, L. R. 25 Ch. D. 118 (1883). The by-laws may authorize the directors to delegate their powers to a committee. *Harris's Case*, L. R. 7 Ch. 587 (1872), where the committee allotted shares. Directors may delegate to a committee power to sell corporate property, and a mortgage given by the committee is valid. Certainly so where the board of directors subsequently accepted the papers connected with it. *Burrill v. Nahant Bank*, 43 Mass. 163 (1840). In *Andres v. Fry*, 113 Cal. 124 (1896), the contract of the executive committee authorized to purchase patent-rights was declared legal. The constitution of an incorporated camp-meeting association may authorize an executive committee and give it power to make regulations as to the use of the grounds. *Round Lake Assoc. v. Kellogg*, 141 N. Y. 348 (1894). An employee of a company who sues for services, under a written contract made with the "chairman" and "managing director," may collect; their authority is presumed as agents or executive committee. *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674 (1866). In New York it is clearly held that the directors of a banking or loan and trust company may appoint an executive committee and authorize it to act for the board of directors, and that the acts of this committee are as binding, valid, and effective as though they had been au-

thorized by the board of directors directly. *Palmer v. Yates*, 3 Sandf. 137 (1849). *Cf. Bank Com'rs v. Bank of Buffalo*, 6 Paige, 497 (1837). In *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299 (1813), the right of the directors to delegate their power to contract to a committee was not questioned. Stockholders cannot elect a committee not consisting of directors and compel the directors to act with that committee in corporate matters. *Boot, etc. Co. v. Dunsmore*, 60 N. H. 85 (1880). It is fraudulent for an executive committee to vote large compensation to themselves for services as promoters. *Blatchford v. Ross*, 54 Barb. 42 (1869). In *St. Louis, etc. Assoc. v. Augustin*, 2 Mo. App. 123 (1876), a loan committee contracted for the corporation. Where the executive committee can act only when the president is present, action without his presence is void. *Corn, etc. Bank v. Cumberland, etc. Co.*, 1 Bosw. 436 (1857). As to committees of municipal corporations, see *Dillon, Mun. Corp.*, §§ 60, 374. Contracts, etc. by an executive committee have often been recognized as valid. See *Tracy v. Guthrie, etc. Soc.*, 47 Iowa, 27 (1877). A stockholder's request to such a committee to bring an action to remedy a corporate wrong is sufficient. *Hazard v. Durant*, 11 R. I. 196 (1875). The committee's consent to an arbitration may be ratified by the company. *Fryeburg Canal v. Frye*, 5 Me. 38 (1827). Although a contract is irregularly made by the executive committee of a corporation, there being no notice and no quorum, yet, by accepting the benefits of the contract afterwards, the company is bound. *Metropolitan, etc. Co., v. Domestic, etc. Co.*, 44 N. J. Eq. 568 (1888). In *Curtis v. Leavitt*, 15 N. Y. 9 (1857), a finance committee had authorized the issue of bonds. The char-

fore that voice was heard, to overbear it," the acts of such a body would be illegal.¹ Where the board of directors delegates to a committee the power to act for it, due notice of meetings of the executive committee must be given to all its members, but a majority of the committee suffices to constitute a meeting and proceed to business, and a majority of that majority binds the committee, the directors, and the corporation by its vote.² There being nothing

ter required a resolution of the board of directors. The court held that acquiescence cured the defect. In *Taylor v. Agricultural Assoc.*, 68 Ala. 229 (1880), the executive committee was provided for by charter. A committee authorized to settle with a person cannot also settle with a firm in which he is interested, but the company may ratify. *Merchants', etc. Co. v. Rice*, 70 Iowa, 14 (1886). The acts of the executive committee may be construed to be subject to the approval of the next meeting of the board of directors. *Indianapolis, etc. R. R. v. Hyde*, 122 Ind. 188 (1890). An executive committee having the general direction and superintendence of the affairs of the company have no power to issue stock, the whole capital stock being already issued. *Ryder v. Bushwick R. R.*, 134 N. Y. 83 (1892), *aff'g* 10 N. Y. Supp. 748. A person sued on a tort cannot raise the objection that the proceedings of an executive committee or board of directors were irregular, or that stockholders did not consent to a contract. *Farnsworth v. Western, etc. Co.*, 6 N. Y. Supp. 735 (1889). See also *Black River Imp. Co. v. Holway*, 85 Wis. 344 (1893).

¹ *Great Western Ry. v. Rushout*, 5 De G. & Sm. 290, 310 (1852).

² *Burleigh v. Ford*, 61 N. H. 360 (1881); *Metropolitan, etc. Co. v. Domestic, etc. Co.*, 44 N. J. Eq. 568 (1888). Such also is the case with municipal corporations. *State v. Jersey City*, 27 N. J. L. 493 (1859); *Junkins v. Doughty Falls, etc. Dist.* 39 Me. 220 (1855). The directors may delegate to a committee the power to

procure plans and let a contract. A majority of that committee may act and bind the corporation. A third party is justified in acting on the ostensible authority of the committee. *McNeil v. Boston Chamber of Com.*, 154 Mass. 277 (1891). The action of two out of three of an executive committee appointed under authority from the stockholders is binding on the corporation where such action pertained merely to ordinary business. *Canada-Atlantic, etc. Co. v. Flanders*, 145 Fed. Rep. 875 (1906), where the court discussed the question of what powers might be delegated to an executive committee. Where one member of an executive committee of three orders material and another member sees the bills and does not object, the corporation is liable, and even though the by-laws provide that the directors must assent before the acts of the executive committee are binding, yet this restriction does not apply to ordinary business where such restriction has been systematically ignored. *John A. Roebling's Sons Co. v. Barre, etc. Co.*, 76 Vt. 131 (1903). A committee appointed by the directors cannot act unless all are present, although a majority may govern. *Re Liverpool, etc. Assoc.*, 62 L. T. Rep. 873 (1890). Where many persons authorize eight to act as a managing committee, those persons are not liable for debts contracted by a meeting of six of that committee. *Brown v. Andrew*, 13 Jur. 938 (1849). Power to an executive committee of directors "to do all acts necessary for the prosperity" does not authorize the purchase of real estate by a majority

in the English statutes requiring directors, it is legal for an English corporation to have no directors, but to have managers, and another corporation may be one of the directors or may be one of the managers.¹ An auditing committee with the power to pay or reject claims have no power to rescind or settle contracts, or determine the future action of the company.²

§ 716. *President—His power to contract for the corporation.*—

The president of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management.³ His duty is merely to preside at meetings of the board of directors, and to perform only such other duties as the by-laws or resolutions of the board of directors may expressly authorize. This is a rule established by the great weight of authority.

The board of directors may of course expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other director. This question has frequently been before the courts, and many decisions have been rendered in regard to it. A large number of the cases are given in the notes below.⁴

of the executive committee, nor is the company bound by that same majority improving the land. *Tracy v. Guthrie, etc. Soc.*, 47 Iowa, 27 (1877). The minority of the committee certainly cannot act. *Trott v. Warren*, 11 Me. 227 (1834). The managing committee of an unincorporated association may legally resolve that checks signed by any three of them shall bind all. *Maitland's Case*, 4 De G., M. & G. 769 (1853). The executive committee cannot delegate their powers to one of their number. *Cook v. Ward*, L. R. 2 C. P. D. 225 (1877). See also *Lyon v. Jerome*, 26 Wend. 485 (1841), where canal commissioners delegated their powers to an engineer. One of two supervisors cannot contract. *Cooper v. Lampeter*, 8 Watts (Pa.), 125 (1839). A committee of arbitration may act by a majority vote unless the agreement provides otherwise. The resignation of one member just before

the award is made does not invalidate the award. *Republic of Colombia v. Cauca Co.*, 106 Fed. Rep. 337 (1901).

¹ *Re Buluwayo, etc. Co. Ltd.*, 97 L. T. Rep. 752 (1907).

² *Skinner v. Walter, etc. Co.*, 140 N. Y. 217 (1893).

³ Quoted and approved in *Groeltz v. Armstrong, etc. Co.*, 115 Iowa, 602 (1902).

⁴ *Federal Courts*: In the case of *De La Vergne, etc. Co. v. German, etc. Inst.*, 175 U. S. 40 (1899), a contract was made by which the president of an Illinois manufacturing corporation sold all its assets to a rival New York corporation, and all the shares of stock in the Illinois corporation were also delivered to the New York corporation. The court held the transaction to be illegal on the ground that the president was not authorized to sell the

The question seems to have arisen in many forms, and the great weight of authority holds that a president has no inherent power to assets, and that on the other hand the New York corporation was prohibited by its charter from purchasing stock in other corporations. The president of a bank has no implied power to borrow money for it. *Western Nat. Bank v. Armstrong*, 152 U. S. 346 (1893). The president has no authority to direct the treasurer to refuse to receive payments of subscriptions. *Potts v. Wallace*, 146 U. S. 689 (1892). The president and cashier cannot agree with an indorser that he will not be held liable. *Bank of U. S. v. Dunn*, 6 Pet. 51 (1832); *Bank of Metropolis v. Jones*, 8 Pet. 12 (1834). The president has no power to change a purchase of property into a lease of property. *In re Cullman, etc. Assoc.*, 155 Fed. Rep. 373 (1907). The president has no power to convey the lands of the company and a forged resolution giving him power does not sustain the deed, it being shown also that he had not been accustomed to sell corporate lands and that the officers and stockholders knew nothing of the sale. *Ansley, etc. Co. v. Western, etc. Co.*, 152 Fed. Rep. 841 (1907). The president of a newspaper corporation is not personally liable in damages for a libel published in the newspaper, even though he was editor in chief and the principal stockholder, it appearing that he had no personal knowledge of the publication before it was made. *Folwell v. Miller*, 145 Fed. Rep. 495 (1906). A pledgee in good faith of the bonds of a corporation from its president and secretary acting for the corporation is protected. *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 146 (1904); *aff'd*, 137 Fed. Rep. 387. The president of a bank has no authority to agree with the pledgor of stock to the bank that it would not be sold in liquidation of the debt. *Arbogast v. American, etc. Bank*, 125 Fed. Rep. 518 (1903). Misrepresentations by the president of a bank to a surety company in order to obtain a bond from the cashier do not bind the bank. *United States, etc. Co. v. Muir*, 115 Fed. Rep. 264 (1902). The president of a railroad company has no inherent authority to negotiate a loan of \$150,000 and agree to pay ten per cent. thereof as brokerage. *Tobin v. Roaring, etc. R. R.*, 86 Fed. Rep. 1020 (1898). The president has no power to assign a patent belonging to the company to pay a corporate debt where there is no meeting of the board of directors to authorize the same. *Kansas, etc. Co. v. Devol*, 72 Fed. Rep. 717 (1896). The president of a national bank has no power inherent in his office to execute a note in the name of the bank. *National Bank, etc. v. Atkinson*, 55 Fed. Rep. 465 (1893). "It is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use." *Cherry v. City Nat. Bank*, 144 Fed. Rep. 587 (1906). The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. *Grand Rapids, etc. Co. v. Cincinnati, etc. Co.*, 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. The president has no power to execute a mortgage. *Corbett v. Woodward*, 5 Sawyer, 403 (1879); *s. c.*, 6 Fed. Cas. 531.

Alabama: The president has no authority to sell corporate property. *Drennen & Co. v. Jasper Inv. Co.*, 45 S. Rep. 157 (Ala. 1907). Where the

represent or contract for the corporation. His duties are confined to presiding and to voting as a director. The fact, however, that

corporate seal is not attached to a mortgage the authority of the president to execute it must be shown. *American, etc. Assoc. v. Smith*, 122 Ala. 502 (1899). The president has no authority to discharge the secretary, who was elected by the board of directors. *Mobile, etc. R. R. v. Owen*, 121 Ala. 505 (1899). The president has no inherent authority. *Brush, etc. Co. v. City, etc. Montgomery*, 114 Ala. 433 (1897); *Mobile, etc. Ry. v. Gilmer*, 85 Ala. 422 (1888). The president of a company cannot agree for it to redeem certain outstanding claims against it—"labor tickets." *Stanley v. Sheffield, etc. Co.*, 83 Ala. 260 (1888).

Arkansas: The president has no power by contract to sell the entire assets of the company. *Ft. Smith, etc. Co. v. Baker*, 105 S. W. Rep. 591 (Ark. 1907). A defense that the officers were not authorized to execute a contract must be pleaded. *Simon v. Cálfee*, 80 Ark. 65 (1906). The president has no authority to make the corporation a partner in a copartnership. *Dixie, etc. Co. v. Morris*, 79 Ark. 113 (1906). The president and secretary have no inherent power to execute notes in the name of the corporation. *Estes v. German Nat. Bank*, 62 Ark. 7 (1896).

California: The president has no authority to sell the output of the corporation. *Northwestern, etc. Co. v. Whitney*, 89 Pac. Rep. 981 (Cal. 1907). Where without the knowledge of the board of directors the president purchases from a corporation notes which it owns and endorses the corporate name thereon, the corporation cannot be held liable on such endorsement. *Smith v. Pacific, etc. Works*, 145 Cal. 352 (1904). The president and secretary have no power to make a contract by which the corporation issues certain stock and agrees to take

it back within a certain time and to pay the equivalent of dividends thereon in the meantime. *Fontana v. Pacific, etc. Co.*, 129 Cal. 51 (1900). The president cannot bind the corporation by his agreement that it will pay the debts of a person. *Hamilton v. Bates*, 35 Pac. Rep. 304 (Cal. 1893). A president has no inherent power to execute a mortgage. *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629 (1889). The president of a ditch company has no power to exchange half of its ditch for half of the ditch of another company. *Bliss v. Kaweah, etc. Co.*, 65 Cal. 502 (1884). The president and a director of a miners' water supply company have no power to purchase land for an extension of the works, but the board of directors may ratify the purchase. *Blen v. Bear, etc. Co.*, 20 Cal. 602 (1862).

Colorado: Where two officers jointly are authorized to make leases, the terms of the lease, when once fixed by them, cannot be changed without the consent of the board of directors. *Allunde, etc. Co. v. Arnold*, 16 Col. App. 542 (1901).

Connecticut: A dentist cannot avoid payment for goods which he buys of a corporation by setting up that he was to make payment in professional services to the president and his family, such agreement not being known to the board of directors. *Bowditch, etc. Co. v. Jones*, 74 Conn. 149 (1901). Where an executor is president of a corporation, no formal demand for payment of a claim by the corporation against the estate need be made. *Brown v. Brown*, 58 Conn. 85 (1889).

Florida: The president of a private corporation may employ an agent to negotiate for a sale of a part of its property. *Skinner Mfg. Co. v. Douville*, 44 S. Rep. 1014 (Fla. 1907).

Georgia: The presumption that the president was authorized to execute a

he is almost always the corporate officer who is directed to sign

corporate note does not arise where the instrument on its face is not for corporate purposes in the ordinary course of corporate business. *Capital, etc. Co. v. Jackson*, 59 S. E. Rep. 92 (Ga. 1907). The president of a bank has no power to agree that the maker of a note need not pay it. *Swindell & Co. v. Bainbridge, etc. Bank*, 60 S. E. Rep. 13 (Ga. 1908).

Idaho: The president and secretary have no power to sell the property of the corporation or to authorize anybody else to sell it. *Johnson v. Sage*, 4 Idaho, 758 (1896).

Indiana: The president of a mining company has power to employ a physician to attend to an injured employee. *Cushman v. Cloverland, etc. Co.*, 83 N. E. Rep. 390 (Ind. 1908). Even though the president buys pipe for the company, yet if he bought it in his individual capacity he may sell it, although he may have to account to the corporation for his profit. *Teviss v. Hammersmith*, 84 N. E. Rep. 337 (Ind. 1908). The president has no inherent power to sign and issue a corporate note. *Elkhart, etc. Co. v. Turner*, 84 N. E. Rep. 812 (Ind. 1908). The president has no implied power to mortgage the corporate property. *National State Bank v. Vigo, etc. Bank*, 141 Ind. 352 (1895).

Iowa: The president of a bank has no power to modify the cashier's bond where by statute such bond was controlled by the board of directors. *Ida county, etc. Bank v. Seidensticker*, 92 N. W. Rep. 862 (Iowa, 1902). Where a corporation is sued on a note, and it denies that the president had authority to sign the note, such authority must be proved. *Marshall, etc. Co. v. Oren, etc. Co.*, 117 Iowa, 157 (1902). The president of a railroad corporation has no power to let a construction contract. *Templin v. Chicago, etc. Ry.*, 73 Iowa, 548 (1887); *Griffith v. Chicago, etc. R. R.*, 74 Iowa, 85 (1888).

Kansas: The president and cashier cannot even conjointly sell the safe of a bank. *Asher v. Sutton*, 31 Kan. 286 (1884).

Kentucky: The president has no power to authorize an agent to sell the land of the company. *New Glasgow, etc. Co. v. Shaw*, 99 S. W. Rep. 661 (Ky. 1907). A chattel mortgage executed by the president and secretary and purporting to be executed by the corporation is presumed to be legal. *Burkamp v. Healey*, 72 S. W. Rep. 759 (Ky. 1903). The president and secretary have no inherent power to execute a corporate mortgage. *Mason, etc. Co. v. Metcalfe Mfg. Co.*, 44 S. W. Rep. 629 (Ky. 1898). The president of a bank has no power to compromise a debt due to it from an insolvent firm. *Wheat v. Bank of Louisville*, 5 S. W. Rep. 305 (Ky. 1887). The president cannot employ workmen. *Mt. Sterling, etc. Co. v. Looney*, 1 Metc. (Ky.) 550 (1858).

Louisiana: The president has no power to consent to the appointment of a receiver and to waive legal notice. *Saxon v. Southwestern, etc. Co.*, 113 La. 637 (1904). The president and secretary have no power to employ a broker to purchase real estate for the company, and hence neither party is bound by a purchase made by the broker. *Jackson Brewing Co. v. Canton*, 43 S. Rep. 454 (La. 1907). Inasmuch as the president of a corporation has no inherent authority to issue its stock, the corporation is not liable if he issues fraudulent stock, the president having kept the money received for the stock, and it appearing that the forged certificates did not even resemble the genuine stock, and that the signatures of the secretary and treasurer had been forged by the president. *Rogers v. Southern Fiber Co.*, 44 S. Rep. 442 (La. 1907).

Maine: The president has no implied authority to sell the treasury stock. *Camden Land Co. v. Lewis*,

the corporate contracts that have been authorized by the board of directors has led to an enlargement of his importance as a corporate

101 Me. 78 (1905). Where the corporation is merely an intermediary of title to a note, less strict proof is required. *Brown v. Donnell*, 49 Me. 421 (1860).

Maryland: The president of a church corporation has no power to purchase lumber for it to rebuild. *East Baltimore, etc. Co. v. K'Nessett, etc.*, 100 Md. 125 (1904).

Massachusetts: An offer of a corporation to sell but in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. *Bi-Spool, etc. Co. v. Acme Mfg. Co.*, 153 Mass. 404 (1891). The president of a lumber company has no power to employ a general agent in another part of the country. The latter can hold the company liable for his salary only by proving that at least a majority of the directors knew thereof and acquiesced. *Murray v. Nelson Lumber Co.*, 143 Mass. 250 (1887). The president, treasurer and general manager cannot give a mortgage. *England v. Dearborn*, 141 Mass. 590 (1886). Where he is authorized to discharge one mortgage, the company is not bound by his mistake in discharging two mortgages. *Smith v. Smith*, 117 Mass. 72 (1875). The president of a bank has no power to sell and assign a note held by it. *Hallowell, etc. Bank v. Hamlin*, 14 Mass. 178 (1817).

Michigan: Merely proving the signature of a corporation to a note by proving that it was signed by the president, secretary and treasurer is not sufficient. *Gould v. Gould & Co.* 134 Mich. 515 (1903). The fact that a person buying land is president of a

company and gives a draft on the company in part payment does not make it a purchase by the company for which it is liable. *Re Seymour*, 83 Mich. 496 (1890). The president, treasurer and general manager cannot give accommodation or renewal notes. *McLellan v. Detroit, etc. Works*, 56 Mich. 579 (1885). A president of a bank cannot agree that sureties on paper given to the bank will not be held liable. *First Nat. Bank v. Bennett*, 33 Mich. 520 (1876).

Minnesota: The president has no authority to increase the price of construction work. *Grant v. Duluth, etc. Ry.*, 66 Minn. 349 (1896). A director is liable to his bank on a note given to it by him, although the president, who has purchased stock of the director, cancels the note in payment for the stock and considers himself indebted to the bank for that amount. There was no ratification by the bank. *Rhodes v. Webb*, 24 Minn. 292 (1877).

Mississippi: The president cannot execute a note for the company. *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116 (1856).

Montana: The president has no power to employ an architect. *Mathias v. White S. S. Assoc.*, 19 Mont. 359 (1897).

Nebraska: If the president of a bank sells its securities he is liable to it for any loss incurred thereby. *First Nat. Bank v. Lucas*, 21 Neb. 280 (1887).

Nevada: A president and secretary have no implied power to give a corporate note. *Edwards v. Carson Water Co.*, 21 Nev. 469 (1893). The president cannot lease land. *Yellow etc. Co. v. Stevenson*, 5 Nev. 224 (1869).

New Hampshire: The president and treasurer are not authorized to contract that the excess realized by the corporation in the sale of property

officer. Hence the rule has arisen in New York that a contract, taken by strict foreclosure shall belong to the mortgagor. *Holland v. Laconia, etc. Assoc.*, 68 N. H. 480 (1896). The president has no power to employ an architect to prepare plans, and the company is not liable therefor. *Wait v. Nashua, etc. Assoc.*, 66 N. H. 581 (1891).

New Jersey: The president has no authority to modify a contract. *Mauersert v. Christian Feigenspan*, 68 N. J. Eq. 671 (1906). The president has no authority to give up a right which the corporation has in a lease to purchase the property. *Lister, etc. v. Selby*, 68 N. J. Eq. 271 (1904). The president has no inherent power to assign a claim. *Cogan v. Conover, etc. Co.*, 69 N. J. Eq. 358 (1905). A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent, where statute prohibits assignments after insolvency. *Howell v. Keen*, 43 Atl. Rep. 1070 (N. J. 1899). The president has no power to confess judgment for the corporation. *Raub v. Blairstown Creamery Assoc.*, 56 N. J. L. 262 (1893). One who is president, treasurer and general manager cannot confess judgment for the company, even though he owns all but two shares of the stock. *Stokes v. New Jersey, etc. Co.*, 46 N. J. L. 237 (1884). The president of a railroad cannot sell its bonds. "In the absence of anything in the act of incorporation bestowing special power upon the president, he has from his mere official station no more control over the corporate property and funds than any other director." *Titus v. Cairo, etc. R. R.* 37 N. J. L. 98 (1874). The president and cashier have no power to execute a mortgage. *Leggett v. New Jersey, etc. Co.*, 1 N. J. Eq. 541 (1832).

North Carolina: Although two corporations have the same officers, one is not liable for the wages of an em-

ployee of the other, discharged by such officers. *Holder v. Cannon Mfg. Co.* 138 N. C. 308 (1905). The spokesman of a corporation at a stockholders' meeting does not bind it by his statement that the corporation does not care for certain property covered by a deed about to be made to it. *Pinchback v. Bessemer, etc. Co.*, 137 N. C. 171 (1904). A bank may reclaim money paid by the cashier on overdrafts of the president to pay his private debts, such overdrafts not having been authorized by the board of directors. *Dowd v. Stephenson*, 105 N. C. 467 (1890).

Oregon: The president and secretary have no power to execute a note for the corporation, and even though they are two of the five directors, and two other directors know of the note and do not object, yet the note is not enforceable. *Crawford v. Albany Ice Co.*, 36 Ore. 535 (1900). The president has no power to mortgage, even though he has been given power to pledge notes and contracts. *Currie v. Bowman*, 25 Ore. 364 (1894). The president of a railroad company cannot give a chattel mortgage on one of its engines, even though he is also its "business and financial agent." *Luse v. Isthmus, etc. Ry.*, 6 Ore. 125 (1876).

Pennsylvania: In Pennsylvania it is held that the oral promise of the president of a railroad in taking a deed of a right of way, that a certain crossing would be built, will be enforced, even though it changes the writing, it having been made at the time and used to procure the execution of the writing. *Perkiomen R. R. v. Bromer*, 66 Atl. Rep. 359 (Penn. 1907). Where the president of a railroad agrees that it will erect a siding if a person will erect a saw mill and this is done and continues for nine years, the railroad cannot then claim that it was not bound by its president's action. *Pannebaker v. Tusca-*

which apparently is a corporate contract, being signed by the president, etc. Co., 67 Atl. Rep. 923 (Pa. 1907). The president of a slate company has no power to make a time contract with a railroad to ship the product of the company over such road, and knowledge of such contract by the president is not notice to the corporation. *Bangor, etc. Ry. v. American, etc. Co.*, 203 Pa. St. 6 (1902). The president of a street railway company has no authority to indorse its name to a note given by a construction company in payment for machinery. *Worthington v. Schuylkill, etc. Ry.*, 195 Pa. St. 211 (1900). The president has no power to sell goods unless he is specially authorized or has made similar sales without objection. *Pittsburgh Melting Co. v. Reese*, 118 Pa. St. 355 (1888). A president of a bank may bind it by his agreement with an indorser of a note that the maker of a note will not give a mortgage, and that the indorser will not be held liable. *Cake v. Pottsville Bank*, 116 Pa. St. 264 (1887). The president of a national bank cannot bind it by his purchase of bonds and stock for it. *First Nat. Bank v. Hoch*, 89 Pa. St. 324 (1879). Brokers employed by the president cannot hold the corporation liable even though the corporation has had the benefit of their services, the board of directors having no knowledge thereof. *Twelfth St. Market Co. v. Jackson*, 102 Pa. St. 269 (1883); *Allegheny County Workhouse v. Moore*, 95 Pa. St. 408 (1880); in the last case the superintendent joined in employing the broker. The president may accept a conditional subscription to stock. *Pittsburgh, etc. Co. R. R. v. Stewart*, 41 Pa. St. 54 (1861).

Rhode Island: The president of a bank has no power to release a claim. *Olney v. Chadsey*, 7 R. I. 224 (1862).

South Dakota: The president has no authority to consent to a decree foreclosing a mortgage on the corporate property. *Frederick Milling Co. v.*

Frederick, etc. Co., 106 N. W. Rep. 298 (S. Dak. 1906). The president and secretary have no power to buy machinery for the corporation. *Des Moines, etc. Co. v. Tilford, etc. Co.*, 9 S. Dak. 542 (1897).

Texas: In a suit on a note it is insufficient to prove the signatures of the president and treasurer. Proof must be given that they had authority to sign. *Dreeben v. First Nat. Bank*, 99 S. W. Rep. 850 (Tex. 1907). The president has no power to waive the purchase-money mortgage of the corporation upon land sold by the corporation. *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416 (1893). The president cannot be held personally liable for plans which he orders for the corporation, unless want of authority to give the order is shown. *Johnson v. Armstrong*, 83 Tex. 325 (1892). The president of a national bank has power to take property in payment of a debt and bind the bank to pay off a lien on it. *Panhandle Nat. Bank v. Emery*, 78 Tex. 498 (1890). A corporate deed by the president conveying what he owns personally does not estop him from claiming the property. *Carothers v. Alexander*, 74 Tex. 309 (1889).

Virginia: "The office itself, however, confers no power to bind the corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or through its board of directors, formally expressed or implied from a habit or custom of doing business." Quoted and approved in *Taylor v. Sutherland, etc. Co.*, 60 S. E. Rep. 132 (Va. 1908). Neither the president, general manager nor agent of a land company have power to dedicate a part of its land for a street. *Town of West Point v. Blank*, 56 S. E. Rep. 802 (Va. 1907). The president cannot collect an amount paid by him on a note to which he

dent, is presumed to be a corporate contract until the want of authority of the president is shown by the corporation.¹

had endorsed the company's name without authority. *Triplett v. Fauver*, 103 Va. 123 (1904). The president of a bank has no power to transfer its paper. *Smith v. Lawson*, 18 W. Va. 212, 228 (1881); *Hodges v. First Nat. Bank*, 22 Gratt. (Va.) 52 (1872). Misrepresentations of the president as to property which the company sells are not binding upon it. *Crump v. U. S. Min. Co.*, 7 Gratt. (Va.) 352 (1851).

Vermont: The president of a literary and biblical institution has no power to buy lumber for it, and it is not liable therefor although it has used it, where some of the directors had agreed among themselves to pay for the lumber. *Lyndon Mill Co. v. Lyndon, etc. Inst.*, 63 Vt. 581 (1891). The president cannot increase the pay allowed to a director by a vote of the directors. *Hodges v. Rutland, etc. R. R.*, 29 Vt. 220 (1857).

Washington: Where the president apparently has authority, he may bind the company to pay the hospital expense of an injured employee. *Russell v. Schade, etc. Co.*, 95 Pac. Rep. 327 (Wash. 1908). A president has no power to contract for the corporation. *Lawson v. Black, etc. Co.*, 44 Wash. 26 (1906). The president may waive notice of an application for a receiver. *Davis v. Consolidated Coal Co.*, 41 Wash. 480 (1906). The public statement of the president as to what the corporation will do is not binding on it. *Lewiston, etc. Co. v. Brown*, 42 Wash. 555 (1906).

Wisconsin: It is presumed that the president or vice president of a trust company has authority to sign its name on the back of a note running to it. *Milwaukee, etc. Co. v. Van Valkenburgh*, 112 N. W. Rep. 1083 (Wis. 1907), the court saying that any other rule would obstruct and judicially handicap operations. In *Ford v. Hill*, 92 Wis. 188 (1896), the court

held that the president had no inherent power to confess judgment, but that under the circumstances of the case the court would not set the judgment aside. A president authorized to execute a mortgage cannot insert the usual terms—such as that the principal sum should become due at the option of the bondholder in case of non-payment of interest. *Jesup v. City Bank, etc.*, 14 Wis. 331 (1861). A railroad president cannot sell its ties. *Walworth, etc. Bank v. Farmers', etc. Trust Co.*, 14 Wis. 325 (1861); s. c., 16 Wis. 629. *Wood, Railw. Law*, pp. 436-439.

As to the declarations or admissions of the president, see § 726, *infra*.

1 "Where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified." *Patterson v. Robinson*, 116 N. Y. 193 (1889); *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189 (1881); *Lee v. Pittsburgh Coal, etc. Co.*, 56 How. Pr. 373 (1877); *aff'd*, 75 N. Y. 601. Where a bank and a mill company have the same individual as president, his action as representing the bank in regard to the application of moneys to particular paper due from the mill to the bank is valid and binding on the bank, if fair and reasonable. *Patterson v. Robinson*, 116 N. Y. 193 (1889). The signature of the president and secretary of a religious corporation does not raise any presumption as to its being the vote of the corporation. *Columbia Bank v. Gospel Tabernacle*, 127 N. Y. 361 (1891). Although a note is signed by the president, secretary, and treasurer of a religious corporation, yet it may be shown that they were not authorized by the board of trustees to sign. *Peo-*

In Illinois the courts go still further and hold that the president, *ple's Bank v. St. Anthony's, etc. Church*, 109 N. Y. 512 (1888). The president has no power to sell treasury stock. *Re Utica, etc. Co.*, 154 N. Y. 268 (1897). A tender of calls on stock may be made to the president in order to avoid a forfeiture. *Mitchell v. Vermont, etc. Co.*, 67 N. Y. 280 (1876). The company is liable to an architect who has done work at the instance of the president and two directors. *Hooker v. Eagle Bank*, 30 N. Y. 83 (1864). A president of a trust company has no authority to make a contract by which it guarantees the sale of the securities of a shipbuilding company, and proof that the board of directors authorized such a contract must be very clear to sustain it. *Gause v. Commonwealth T. Co.*, 124 N. Y. App. Div. 438 (1908). The president is presumed to have power to employ a person on a salary and commission. *Norman v. Loomis, etc. Co.*, 123 N. Y. App. Div. 739 (1908). A bank is not bound by the acts of its president in dealing in its behalf with himself. *Fowler v. Walch*, 119 N. Y. App. Div. 542 (1907). Where the president and treasurer are held out as having authority to do the business of the company and they contract in the name of the company to sell land and the treasurer receives the advanced payment therefor the company may be compelled to fulfill. *Davidson v. Cannabis, etc. Co.*, 113 N. Y. App. Div. 664 (1906). Where the president makes a personal bill of sale of property belonging to the corporation, a receiver of the latter may sue to recover the property, even though the president owned most of the stock. *Palmer v. Ring*, 113 N. Y. App. Div. 643 (1906). A president who sells the property of the corporation without authority from the board of directors is liable in damages for conversion. *Giebler Mfg. Co. v. Kranenberg*, 102 N. Y. App. Div. 470 (1905). A corporation is bound by its president's agreement borrowing money and turning over to the lender the accounts receivable and giving the lender a lien upon present and future assets, such agreement having been carried out for a year, but such agreement may be void under the bankruptcy act, where possession is taken within four months prior to the bankruptcy. *Mathews v. Hardt*, 79 N. Y. App. Div. 570 (1903). A corporation may demand a bill of particulars in order to ascertain what officers executed a contract which the corporation denies was ever authorized. *Fruin, etc. Co. v. Marks*, 48 N. Y. App. Div. 51 (1900). The president of a corporation engaged in conducting a large department store has power to make a contract with a pattern publishing company in regard to the pattern department of the store, there being but five stockholders in the corporation. *Standard, etc. Co. v. Siegel-Cooper Co.*, 44 App. Div. 121 (1899). A national bank which sells securities to a person by means of misrepresentations of its president as to the character of the securities and by means of a breach of trust on his part is liable for the money so paid to it. *Carr v. National Bank, etc.* 43 App. Div. 10 (1899); *aff'd*, 167 N. Y. 375. The president has no authority to make an assignment for the benefit of creditors. *Schaefer v. Scott*, 40 N. Y. App. Div. 438 (1899). Where the president, who is also managing director, presents for discount a note running to himself and increased both by him and the corporation, and states that the proceeds are to be used to pay a corporate obligation, the purchaser of the note is protected. *Orvis v. Warner & Co.*, 75 N. Y. App. Div. 463 (1902). A telegram from the president authorizing an agent to contract is insufficient proof of authority. *Felton v. McClave*, 46 N. Y. Super. Ct. 53 (1880). Where the president of a bank receives money

by virtue of his office, has power to transact business for the corpora-

on deposit from himself as attorney and subsequently withdraws it and misappropriates it, the bank is liable. *Smith v. Anderson*, 57 Hun, 72 (1890). The president has no power to modify a resolution of the board that certain notes shall be subject to the joint order of himself and the secretary. *Tradesmen's Nat. Bank v. Manhattan Lumber Co.*, 18 N. Y. Supp. 920 (1892). "It is not within the authority of the president of a bank, when he discounts paper for the bank, to promise the maker that he need not pay it." *First Nat. Bank v. Tisdale*, 18 Hun, 151 (1879); *aff'd*, 84 N. Y. 655. The president cannot borrow money for the company unless the charter or the board of directors authorizes him. *Life & F. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. 31 (1831). In *Powers v. Schlicht, etc. Co.*, 23 N. Y. App. Div. 380 (1897), *aff'd* 165 N. Y. 662, the court stated that the president of a business corporation has implied power to make contracts in its behalf. The president of a national bank has no power to bind it to accept drafts in the future drawn by a railroad company, where the party relying thereon knew that the bank directors objected. *Stallcup v. National Bank*, 15 N. Y. St. Rep. 39 (1888). The president and secretary cannot issue drafts in the company's name. *Dabney v. Stevens*, 40 How. Pr. 341 (1870). A resolution authorizing the president to sign checks, drafts, etc., does not authorize an indorsement of commercial paper by him in the company's name and in its behalf. *Hitchings v. St. Louis, etc. Co.*, 68 Hun, 33 (1893). A corporation is not liable for commissions promised by its president to a broker, even though a sale resulted. *Bright v. Canadian, etc. Co.*, 83 Hun, 482 (1895). The president of a manufacturing company cannot buy goods for it. *Wes-*

terfield v. Radde, 7 Daly, 326 (1877). *Of. Silva v. Metropolitan, etc. Co.*, 42 N. Y. Super. Ct. 307 (1877). Where a contract to build a railroad is made by contractors with a committee of directors duly authorized to make it, a provision against sub-letting cannot be waived by the president of the railroad and a director. *Western R. R. v. Bayne*, 11 Hun, 166 (1877); *affirmed*, 75 N. Y. 1. A bank receiving funds from its president in payment of his debts to it, which funds he had fraudulently obtained from another bank by using his standing as president of the former, is bound to pay over the same to the defrauded bank, where such president had complete control of the former bank. *City Nat. Bank v. National Park Bank*, 32 Hun, 105 (1884). A president authorized by resolution of the board of directors to sell bonds cannot loan them; if he does so it is a conversion of the property of the corporation. *Second Ave. R. R. v. Mehrback*, 46 N. Y. Super. Ct. 267 (1883). The president of an insurance company cannot indorse and transfer notes. *Marine Bank, etc. v. Clements*, 31 N. Y. 33 (1865), *rev'g* on another point 3 Bosw. 600 (1858). But in an earlier case it was held that the indorsee in good faith was protected. *Caryl v. McElrath*, 3 Sandf. 176 (1849). A bank president has no implied authority from the bank to agree to pay interest on a particular deposit, there being no evidence of special authority nor of a bank custom to that effect. The president of a corporation has no implied authority to check corporate funds out of the bank unless there is an established usage to that effect. *Fulton Bank v. New York, etc. Canal Co.*, 4 Paige, 127 (1833). The president, secretary, and general agent cannot issue the corporate notes. *McCulough v. Moss*, 5 Denio, 567 (1846).

tion,¹ and there are some scattering decisions in other states to the same effect.² A person taking a company's note from the president in *Cf. Moss v. Rossie, etc. Co.*, 5 Hill, 137 (1843). A railroad president cannot contract to pay a commission to a promoter who induces a contractor to build the road. *Risley v. Indianapolis, etc. R. R.*, 1 Hun, 202 (1874); *rev'd on other points*, 62 N. Y. 240. The president cannot increase the pay of a director. *Bailey v. Buffalo, etc. R. R.*, 14 Hun, 483 (1878). See also *De Bost v. Albert Palmer Co.*, 35 Hun, 386 (1885).

1 The president and general manager may together bind an insurance company to an agreement that its mortgagor may redeem even after foreclosure. *Union Mut. etc. Ins. Co. v. White*, 106 Ill. 67 (1883). The president of a railroad company has power to contract for the transportation of railroad iron. *Chicago, etc. R. R. v. Coleman*, 18 Ill. 297 (1857). A deed of land executed by the president and secretary is valid where all the stockholders join also in the deed. *Hull v. Glover*, 126 Ill. 122 (1888). The president of a railroad company may assign notes and mortgages given to it to aid in constructing the road. *Irwin v. Bailey*, 8 Biss. 523 (1879); *s. c.*, 13 Fed. Cas. 114. A judgment note of a corporation may be executed by its president and secretary. It is good as a mere note, even though not as a judgment note. *Matson v. Alley*, 141 Ill. 284 (1892). A corporate note signed by the president and secretary, giving the payee the right to enter judgment, is sufficient to sustain such a judgment although the note was not under seal. *Snyder Bros. v. Bailey*, 46 N. E. Rep. 452 (Ill. 1896). A duly executed contract of a corporation to give a judgment note is authority to the president to give that note. *McDonald v. Chisholm*, 131 Ill. 273 (1890). The president has no power to agree that an absolute subscription for stock shall be changed so as to be condi-

tional. *Morgan County v. Thomas*, 76 Ill. 120 (1875). The president has power to offer a reward for the arrest of a defaulting teller. *Bank v. Griffin*, 168 Ill. 314 (1897). The president is presumed to have authority to assign a chattel mortgage. *Anderson v. South, etc. Co.*, 173 Ill. 213 (1898). In Illinois a president has power to give a corporate judgment note. *Anderson Transfer Co. v. Fuller*, 174 Ill. 221 (1898). A sale of land by the president and secretary of a building association binds the company, unless the purchaser knows that they have no authority. *Domestic, etc. Assoc. v. Guadiano*, 195 Ill. 222 (1902). The vice-president has no inherent power to make an assignment for the benefit of creditors, even though the president is dead, and even though the vice-president owns most of the stock. *Friedman v. Leshner*, 198 Ill. 21 (1902). The president is presumed to have had authority to execute a contract which he did execute. *Lloyd & Co. v. Matthews, etc.*, 223 Ill. 477 (1906). Where a corporation acquiesces in its president agreeing in its name to an arbitration, it is bound. *White Star, etc. Co. v. Hultberg*, 220 Ill. 578 (1906). A provision in a contract of a corporation that notice should be given to it of the performance of a condition, within a certain time, is fulfilled if its president and secretary acknowledged the condition as being fulfilled, even though no formal notice was given. *Merchants' etc. Co. v. Chicago, etc. Co.*, 210 Ill. 26 (1904). The president is presumed to have authority to waive reports from a licensee. *Jones v. Crary*, 84 N. E. Rep. 651 (Ill. 1908).

2 Where the president is apparently in charge of the business, he may bind the corporation by a contract made by him in its behalf. *Meating v. Tigerton, etc. Co.*, 113 Wis. 379

payment of an individual debt is bound to inquire into the regularity of the issue of the note.¹

A president, however, may employ an attorney for the company and authorize him to prosecute or defend a case.² The president

(1902). The court in this case follows the Illinois rule and declares that even where the president assumes the right to act as general agent a *bona fide* contractor with the corporation through him is protected. A bank president may assign a judgment held by bank. *Guernsey v. Black, etc. Co.*, 68 N. W. Rep. 777 (Iowa, 1896). In Iowa it is held that the president is presumed to have authority to act in all matters arising in the ordinary course of the corporate business. *White v. Elgin, etc. Co.*, 108 Iowa, 522 (1899). The agreement of a president of a bank, who has had entire charge of the bank, that if a creditor will not sue for six months to enforce the liability of the bank as a stockholder the bank will not set up the statute of limitations, is legal. *Wells, etc. Co. v. Enright*, 127 Cal. 669 (1900). Where a steam railroad is interfering with the rights of a street railroad, and the latter does not apply for an injunction, relying on the promise of the steam railroad to the president of the street railroad that the steam railroad would pay all the damages, such promise is binding, and the street railroad cannot thereafter maintain an ejectment. *Fresno, etc. R. R. v. Southern Pac. R. R.*, 135 Cal. 202 (1901). The president and secretary of a corporation are presumed to have authority to execute a promissory note in the name of the corporation, and the holder of such note will not be affected by the fact that such authority did not exist unless he is shown to have had notice thereof. *American, etc. Bank v. Oregon, etc. Co.*, 55 Fed. Rep. 265 (1892). The president is presumed to have authority to issue notes. *Dexter Sav. Bank v. Friend*, 90 Fed. Rep. 703

(1898). The fact that the president of a corporation indorsed and transferred in its behalf its negotiable paper does not prevent the indorsee being a *bona fide* holder, without proof of the authority of the president to so transfer the paper. *Jones v. Stoddart*, 8 Idaho, 210 (1902). Where a contract consists of letters, the fact that they are signed by the president does not prevent his signature being considered that of the company. *Towers v. Stevens, etc. Co.*, 83 Minn. 243 (1901). Where the holder of a mortgage sends it to a bank to collect, and the mortgagor buys and sends a draft payable to the president individually, followed by the letters "Pt.," and he embezzles the funds, the mortgagor is released. *Griffin v. Erskine*, 131 Iowa, 444 (1906). The president has implied authority to collect accounts and sell them for their face value. *Cogan v. Conover Mfg. Co.*, 69 N. J. 816 (1906).

¹ *Wilson v. Metropolitan, etc. Ry.*, 120 N. Y. 145 (1890). See also § 293, *supra*.

² *Beebe v. George H. Beebe Co.*, 64 N. J. L. 497 (1900); *American Ins. Co. v. Oakley*, 9 Paige, 496 (1842); *Mumford v. Hawkins*, 5 Denio, 355 (1848); *Potter v. New York Inf. Asylum*, 44 Hun, 367 (1887). He may also employ special counsel. *Davis v. Memphis, etc. Ry.*, 22 Fed. Rep. 883 (1883); *Recamier Mfg. Co. v. Seymour*, 5 N. Y. Supp. 648 (1889), holding that he may do so, though the suit is by the corporation against the board for fraud. *Contra*, *Bright v. Metaire Cem. Assoc.*, 33 La. Ann. 58 (1881). Suit instituted by authority of the president is properly instituted if ratified by the board of directors, even though such ratification is after the commencement of the suit. *Mas-*

has no inherent authority to foreclose a mortgage running to his company, but if the corporation then brings an action to obtain possession of the land it ratifies his acts.¹ And in all cases the president binds the corporation by his acts and contracts when he is expressly authorized to so act or contract,² or when he has been

sachusetts, etc. Co. v. Kidd, 142 Fed. Rep. 285 (1905). The oral agreement of the president of a corporation to pay the attorney's fees and expenses of a person who is negotiating for a contract with the corporation is enforceable against the president personally. Manary v. Runyon, 43 Ore. 495 (1903). The president may bring a writ of entry to foreclose a mortgage. Smith Charities v. Connolly, 157 Mass. 272 (1892). The president cannot authorize an attorney to accept service where the board of directors were accustomed to vote on the employment of attorneys. Bridgeport Sav. Bank v. Eldredge, 28 Conn. 556 (1859). The case of Ashuelot, etc. Co. v. Marsh, 55 Mass. 507 (1848), holds that the president cannot cause an action to be commenced. Where the president is dead the vice-president may employ an attorney. Coleman v. West, etc. Co., 25 W. Va. 148 (1884). A hold-over president and manager for sixteen years may institute a suit in behalf of the corporation. Lucky Queen Min. Co. v. Abraham, 26 Oreg. 282 (1894). The president and general manager may engage an attorney to give advice in company's matters. Dallas, etc. Co. v. Crawford, 18 Tex. Civ. App. 176 (1898). A bank president has no power to employ an attorney. Pacific Bank v. Stone, 121 Cal. 202 (1898). In winding up, the president has authority to institute suits. Kalb v. American Nat. Bank, 11 Ohio Circuits, 437 (1901). The president has no authority to consent to a receiver being appointed. Nesbit v. North Georgia, etc. Co., 156 Fed. Rep. 979 (Ga. 1907).

¹ New England, etc. Co. v. Wing, 191 Mass. 192 (1906).

² The board of directors may, of course, authorize the president to sign the company's name to a promissory note. McCormick v. Stockton, etc. R. R., 130 Cal. 100 (1900). A resolution authorizing the president to execute a chattel mortgage does not authorize him to give a chattel mortgage which can be foreclosed on ten days' notice and which gives other executory powers to the mortgagee. Monroe, etc. Co. v. Arnold, 108 Ga. 449 (1899). Even though the president has full power to sell corporate property, yet where he refers the party to the superintendent and the latter makes the sale, it is not binding on the company, even though the president stated that the superintendent had full authority to sell. He could not so delegate his authority. Trent v. Sherlock, 24 Mont. 255 (1900). Under express power to have full control of the business, the president may purchase materials. Castle v. Belfast, etc. Co., 72 Me. 167 (1881). Under power to adjust and pay losses he may transfer papers. Baker v. Cotter, 45 Me. 236 (1858); Aspinwall v. Meyer, 2 Sandf. 186; s. c., 3 N. Y. 290 (1850), where the express power was very general. Express authority, of course, may be given to the president to sell and assign the securities of the corporation. Mitchell v. Deeds, 49 Ill. 416 (1867). Authority to the president to borrow includes authority to give ordinary securities, i. e., bonds, notes, acceptances, and collaterals. A person dealing with him may rely on it. He is not bound to know that the president's authority has been re-

permitted by the corporation for some time to act and contract for it.¹

So also the company is bound when it ratifies or accepts the con-

voked. *Hatch v. Coddington*, 95 U. S. 48 (1877). Where the president has, by by-laws, authority to make a contract, and does make one, and it is signed by him as such, though no corporate seal and no resolution are recited, the president may compromise and release the same. Six months' delay by directors in repudiating the compromise after knowledge is a fatal delay. *Rolling Mill v. St. Louis, etc. R. R.*, 120 U. S. 256 (1886). The president who is authorized to obtain land patents for the company may make contracts in regard to obtaining them. *Wood v. Saginaw, etc. Co.*, 105 N. W. Rep. 101 (So. Dak. 1905). Parol authority to the president suffices to enable him to pay out money. *New Orleans Bldg. Co. v. Lawson*, 11 La. 34 (1837). Although the president is given power to make a contract, yet the directors may make it, and their action overrules his. *East, etc. Co. v. Brower*, 80 Ga. 258 (1888). Authority to sell gives authority to contract to sell. *Augusta Bank v. Hamblet*, 35 Me. 491 (1853). Officers authorized to give a note cannot agree to pay attorney fees. *Hardin v. Iowa, etc. Co.*, 78 Iowa, 726 (1889). The authority of a president to sell or lease gives him power to point out and make representations as to the boundaries. *Holmes v. Turner's Falls Co.*, 150 Mass. 535 (1890). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re George T. Smith, etc. Co.*, 86 Mich. 149 (1891). The authority of the president to buy property gives authority also to buy on credit. *Arapahoe, etc. Co. v. Stevens*, 13 Colo. 534 (1889). Under a by-law giving him authority the president may pur-

chase on credit. *Siebe v. Joshua, etc. Works*, 86 Cal. 390 (1890). An assignment of a corporate claim by the manager and president in the regular course of business, and with the knowledge and consent of the board of directors, is sufficient. *Greig v. Riordan*, 99 Cal. 316 (1893). Under a broad power given to the president to make contracts he may take a lease of property. *Hawley v. Gray, etc. Co.*, 106 Cal. 337 (1895). The president and secretary authorized to execute a mortgage have no authority to insert a provision to pay the attorney fee in case of foreclosure. Ratification of the mortgage by the directors without knowledge of such provision is not ratification thereof. *Pacific, etc. Mill v. Dayton, etc. Ry.*, 5 Fed. Rep. 852. (1881). See 96 Pac. Rep. 787.

¹ Where the president of a construction Co. takes entire charge of its business, and is allowed so to do by the directors, the company is bound by notes given in the corporate name by him for the company's business. "The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they objected to it." *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98, 109 (1890). Where the president has been accustomed to exercise power without the dissent of the company and with its acquiescence, the law implies that he has such power. *Chambers v. Lancaster*, 160 N. Y. 342 (1899). As to the evidence necessary to prove that the officers of a corporation consented and acquiesced in acts of the president, see *Corn, etc. Bank, v. American, etc. Co.*, 163 N. Y. 332

tract after it is made, or accepts the benefit of the contract. Hav-

(1900). A sale of all the property by the president and general manager will be sustained where they have been allowed to take entire charge of the company and the directors did not repudiate the sale. *Northwestern, etc. Co. v. Lee*, 102 Wis. 426 (1899). Where the president is allowed for several years to carry on all the business of the corporation and sign its name to contracts, notes, etc., a note signed by him in the name of the corporation is valid, especially where he and another stockholder, who sign the note, own nearly all of the stock. The same rule applies to a mortgage executed by him in the name of the corporation. *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); *aff'd*, 95 Fed. Rep. 23. It may be left to the jury to decide whether the president had an implied power to make a contract as its managing agent, if it is shown that he was at the office and talked with people who called on business. *West v. Prather & Co.*, 93 Pac. Rep. 892 (Cal. 1907). The president may hire for a year a general sales manager where he has hired him for several years past. *Arkadelphia Lumber Co. v. Asman*, 107 S. W. Rep. 1171 (Ark. 1907). Where one family own all the stock of a mercantile corporation and one of them is president and has entire control and management of its affairs and he wilfully fires the property in order that the insurance may be collected, the insurance company is not liable. *Meily Co. v. London, etc. Co.*, 142 Fed. Rep. 873 (1906); *aff'd*, 148 Fed. Rep. 683. A letter of the president employing a person for the company may be binding on the company where it paid the salary called for and it is shown that the president exercised general authority in conducting the corporate affairs. *Egbert v. Sun Co.*, 126 Fed. Rep. 568 (1903). By usage the president, secretary and treasurer of a trust company may bind the company by acts which they ordinarily have not authority to enter into. *Carrington v. Turner*, 101 Md. 437 (1905). Customary action may be authority for the president to sign a petition to a city. *Eddy v. City of Omaha*, 103 N. W. Rep. 692 (Neb. 1905). Where the president and his wife and daughter own all the stock and he transacts all the business, the delivery of a deed from the corporation, which had been deposited in escrow, may be made by him with their consent. *Rubie, etc. Co. v. Princes, etc. Co.*, 31 Colo. 158 (1903). Where the president has been accustomed to borrow money for the company, the company is liable for a similar loan, even though he converted the money. *Martin & Co. v. Logan*, 99 S. W. Rep. 648 (Ky. 1907). Where the president has been accustomed to act he binds the corporation by his employment of a manager. *Berlin v. P. L. Cusachs*, 114 La. 744 (1905). The president of a manufacturing corporation is presumed to have authority to transfer notes which are received in payment, where he has previously transferred similar ones. *Iowa Nat. Bank v. Sherman, etc.*, 17 S. Dak. 396 (1903). Where the president has controlled the entire business he may confess judgment for the corporation. *Gilman v. Heitman*, 113 N. W. Rep. 932 (Iowa, 1907). The authority of the president to sign notes may be implied from the acquiescence of the company or its managers in the general course of business. *Crossley v. St. Philip Neri*, 67 Atl. Rep. 27 (N. J. 1907). A corporation is bound by the acts of its president if he has been allowed to conduct its business. *Tervis v. Hammersmith*, 81 N. E. Rep. 614 (Ind. 1907). Where a corporation has recognized the authority of its president to make certain contracts, this is *prima facie* evidence of his authority

ing knowingly received the benefit of a contract made and carried

to make another contract of that kind. *Scribner v. Flagg, etc. Co.*, 175 Mass. 536 (1900). Where the president has been allowed by the board of directors to carry on all the business as though it was his own, a mortgage in the name of the corporation executed by him on the corporate property is valid. *National, etc. Bank v. Sanford, etc. Co.*, 157 Ind. 10 (1901). Where the president is also general manager and practically the whole corporation, a bill of sale of corporate property by him is good. *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87 (1900). Where the corporation allows all its affairs to be conducted by its president, without observing legal formalities, a note and mortgage executed by him is valid, it being shown that such note had been renewed several times. *G. V. B. Min. Co. v. First Nat. Bank, etc.*, 95 Fed. Rep. 23 (1899). Where the president had been accustomed to act and contract for the company without express authority, and his acts had always been accepted, his order to a contractor to stop work binds the company. *Leroy, etc. R. R. v. Sidell*, 66 Fed. Rep. 27 (1895).

A note signed by the president and secretary is binding, if they have been accustomed to sign notes, especially where a corporation obtains the benefit of the note. *Bullen v. Milwaukee, etc. Co.*, 109 Wis. 41 (1901). Where the president of a national bank manages its business he may, for the benefit of the bank, rediscount paper held by the bank. *Hanover, etc. Bank v. First, etc. Bank*, 109 Fed. Rep. 421 (1901). Where the president of a railroad has been accustomed to sign notes without action of the board of directors, a note signed by him is enforceable, even though he used the money for his own purposes. *Texarkana, etc. Ry. v. Bemis, etc. Co.*, 67 Ark. 542 (1900). Where the board of directors of a bank allow the presi-

dent to transact all the business of the bank the bank is bound. *Tourtelot v. Whithed*, 9 N. Dak. 407 (1900). The president has no inherent power to contract for the company, but where he has been allowed to carry on the whole business of the corporation, the company is bound by a contract within the ordinary business of the corporation, such as selling timber land on time. *St. Clair v. Rutledge*, 115 Wis. 583 (1902). Where a corporation allows certain officers to manage its business it is responsible for their contracts, unless it is shown that such contracts were unauthorized. *Anderson v. Wallace, etc. Co.*, 30 Wash. 147 (1902). The president binds the company when he does all the business with the knowledge and consent of the directors. *McComb v. Barcelona, etc. Assoc.*, 134 N. Y. 598, 608 (1892); aff'g, 10 N. Y. Supp. 546. Where for eight years the president has been allowed to manage and carry on the whole business of the company, and to indorse its name to notes in order to raise money for the business, and the company had no cash capital and no other way of obtaining money, it is for the jury to say whether the company is bound by such an indorsement by him. *Fifth Nat. Bank v. Navassa, etc. Co.*, 119 N. Y. 256 (1890). *Of. National Bank v. Navassa Phosphate Co.*, 56 Hun, 136 (1890). Where for many years the president has managed a company, the company's note executed by him binds the company without special authority. *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890), aff'g 44 Hun, 130 (1887). Where the president for several years has run the company, borrowed money for it, and given its notes, etc., and the by-laws give him "general supervision over the property and affairs of the corporation," the company's note made by him, and an assignment of "\$150,000 of such good and collectible accounts now ex-

out by the president, even without authority, the corporation must

isting or that shall hereafter accrue or be acquired in the conduct of the business," are valid. *Preston Nat. Bank v. George T. Smith, etc. Co.*, 84 Mich. 364 (1890). A president who has been accustomed to issue corporate notes may bind the corporation by a similar note. *McDonald v. Chisholm*, 131 Ill. 273 (1890).

A general understanding that the president and secretary shall manage the business and make contracts, and their open and public assumption of that power, with the knowledge and acquiescence of the directors, are equal to a vote of the directors authorizing them to make contracts. *Sherman, etc. Co. v. Morris*, 43 Kan. 282 (1890). Where the president and secretary of a mining company have for a long time signed checks, and they have been paid by a bank, they may continue to draw checks and the bank must pay them. The corporation is liable for overdrafts caused thereby. *Mining Co. v. Angelo, etc. Bank*, 104 U. S. 192 (1881). A uniform practice of a company for several months previous to the transfer of a corporate note by its president, in cases of notes negotiated for the purpose of raising money to carry on its legitimate business, where such notes were payable to the company, to have them indorsed by the president, is sufficient authority for his indorsement. *Marine Bank v. Clements*, 31 N. Y. 33 (1865). See also, in general, *Chicago, etc. Ry. v. James*, 24 Wis. 388 (1869); *First Nat. etc. Bank v. North, etc. Co.*, 86 Mo. 125 (1885), where the president and secretary were accustomed to make notes. Where the board of directors for three years relinquishes to the president the exclusive management of the business of the corporation and the purchase of all classes of articles, giving corporate notes, bills, and securities therefor, and then the directors took charge and for several years con-

tinued business without repudiating his acts, his purchase of locomotives and giving corporate notes therefor while he was in charge binds the corporation. *Olcott v. Tioga R. R.*, 27 N. Y. 546 (1863). If accustomed so to do, the president may settle an account and take a due-bill in payment. *Dougherty v. Hunter*, 54 Pa. St. 380 (1867). Where the president has been accustomed to make and indorse paper, the corporation will be bound, even though the directors supposed that all business had been stopped. *National Park Bank v. German, etc. Co.*, 53 N. Y. Super. Ct. 367 (1886). Where the president has several times been authorized to pledge corporate securities, and now does so without special authorization, and a majority of the directors ratify the act, not in meeting, but separately, the pledge is legal. *Bibb v. Hall*, 101 Ala. 79 (1893). Where the president owns practically all the stock, and for years has managed the business without any meeting of the board of directors, a sale of the corporate property by him is legal. *McElroy v. Minnesota, etc. Co.*, 96 Wis. 317 (1897). The authority of the president to discharge mortgages may be shown by the fact that he has done so many times before. *Swasey v. Emerson*, 168 Mass. 118 (1897). The power of a president of a bank to rediscount paper may arise from his having done so for a long time to the knowledge of the board of directors. *U. S. Bank v. First Nat. Bank*, 79 Fed. Rep. 296 (1897). Where the president of a bank is practically manager, he may settle a claim by taking an assignment of a judgment. *First Nat. Bank v. New*, 146 Ind. 411 (1896). Long usage may give the president authority. *Estes v. German Nat. Bank*, 62 Ark. 7 (1896); *Missouri Pac. Ry. v. Sidell*, 67 Fed. Rep. 464 (1895). Where the president, who is also general manager and financial agent, is

perform on its part.¹ The authority of the president of a railroad to take a lease of a hotel in behalf of the company may be inferred

accustomed to borrow money for the corporation, he binds the company by a loan, even though he misapplies the proceeds. *Kraft v. Freeman, etc. Co.*, 87 N. Y. 628 (1881). If he has been accustomed for a long time to sign notes, a person taking a note without his signature is not protected. *Davis, etc. Co. v. Best*, 105 N. Y. 59 (1887). The president has no implied power to sell the lands of the company, and the power given by usage to former presidents to sell and take a purchase-money lien does not give power to sell without retaining that lien. *Fitzhugh v. Franco-Tex. Land Co.*, 81 Tex. 306 (1891). The president, even though he is also manager, head, and majority stockholder, cannot bind the corporation by his statement that the corporation was to indemnify him from loss on certain indorsements made by him. *Minneapolis Trust Co. v. Clark*, 47 Minn. 108 (1891). Where the board of directors allow one of its officers the exclusive management of its affairs, the company is bound by its acts. *Davies v. New York Concrete Co.*, 13 N. Y. Supp. 739 (1891); *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531 (1891). Although the president has been accustomed to issue corporate notes, yet, if the bank taking the note in question knew that the proceeds were to be used by him in his private business, the note cannot be enforced. *Third Nat. Bank v. Marine Lumber Co.*, 44 Minn. 65 (1890).

¹ Quoted and approved in *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320 (1902); *Pittsburgh, etc. Ry. v. Keokuk Bridge Co.*, 131 U. S. 371 (1889). A corporation obtaining property illegally by act of its president cannot deny his right to rectify the injury by reconveying the title. *Sprague, etc. Co. v. Fuller*, 158 Fed. Rep. 588 (1908). Where the president bought

railroad iron without authority so to do, but the directors stood by and allowed the corporation to use it, the company is liable for the price. *Scott v. Middletown, etc. R. R.*, 86 N. Y. 200 (1881). Where the board of directors ratifies an unauthorized endorsement of a note and the company receives the money, the company is bound, the president having made the endorsement. *Beacon T. Co. v. Souther*, 183 Mass. 413 (1903). Where the company accepts the benefit of a contract made by its president it is bound thereby. *Owyhee, etc. Co. v. Tautphas*, 121 Fed. Rep. 343 (1903). Where for a year a corporation accepts and acts on a contract made by its president it is bound thereby. *Michigan Central R. R. v. Chicago, etc. Ry.*, 132 Mich. 324 (1903). Acquiescence in the acts of the president and treasurer of a trust company in accepting a trust may bind the company. *Smith v. Bank of New England*, 72 N. H. 4 (1903). A corporation suing on a contract need not show that the president was authorized to sign it, no issue being raised as to his authority. *Mebius, etc. Co. v. Mills*, 150 Cal. 229 (1907). Where the president and secretary of an insurance company receive bank stock as the purchase price of a claim against an insolvent corporation, and the directors treat the stock as a part of their assets, they ratify the transaction. *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa, 591 (1905). Allowing the president to make a contract to employ an engineer and accepting his services may bind the company. *Rowland v. Carroll, etc. Co.*, 44 Wash. 413 (1906). Even though the president borrows money and gives a note to the corporation without authority, yet if the corporation uses the money and the directors do not return it when the transaction is called to their atten-

from the facts of his signing, sealing, and delivering the instrument, and of the company's entering into possession under the lease

tion, the corporation is bound by the note. *Third Nat. Bank v. Laboring-man's, etc. Co.*, 56 W. Va. 446 (1904). Where the president of a bank obtains a bond from a surety company for the fidelity of the cashier, the bank is bound by representations made by him as to the duties of the cashier. *Warren, etc. Bank v. Fidelity, etc. Co.*, 116 Ky. 38 (1903). Even though a mortgage deed of trust is executed by the president without authority, yet, if the corporation afterwards obtains a release of some of the property from the mortgage, it ratifies the same. *Clark v. Elmendorf*, 78 S. W. Rep. 538 (Tex. 1904). Where the president dedicates corporate land for a street and the company allows the street to be constructed, it is too late then to object. *City of West End v. Eaves*, 44 S. Rep. 588 (Ala. 1907). Even though the president of a company obtains a loan from a bank in order to loan it to his company, yet if he gives his individual note, the company is not liable. *Andrews Co. v. National Bank, etc.*, 58 S. E. Rep. 633 (Ga. 1907), distinguishing *Third Nat. Bank v. Van Haagen Mfg. Co.*, 141 Pa. St. 214. If a corporation retains and uses money borrowed for it by its officer in excess of his authority, it ratifies the transaction, and is liable. *Willis v. St. Paul Sanitation Co.*, 53 Minn. 370 (1893). Even though a mortgage is not authorized at a formal meeting of the directors, nevertheless if the directors knew and approved of the same and the corporation accepted the benefits, the mortgage will be enforced, it having been signed by the president and secretary and the corporate seal having been attached. *Nevada, etc. Syndicate v. National, etc. Co.*, 96 Fed. Rep. 133 (1899). Where one person is president and general manager and owns all the stock, a note executed by him in the name of the corporation is valid, the proceeds being used in the corporate business. *Africa v. Duluth, etc. Co.*, 82 Minn. 283 (1901). Where a corporation accepts the benefit of a lease made by the president it is bound thereby. *Alexander v. Culbertson, etc. Co.*, 85 N. W. Rep. 283 (Wis. 1901). Proof that a corporation carried out a contract and accepted the benefits of it is sufficient to show that it was duly authorized, it having been signed by the president. *Neosho, etc. Co. v. Hannum*, 10 Kan. App. 499 (1901). A chattel mortgage executed by the president and secretary of an insolvent corporation, with the knowledge and consent of all the stockholders, is valid. *Kalamazoo, etc. Co. v. Winans, etc. Co.*, 106 Mich. 193 (1895). Even though the president sells property without authority, yet if the board of directors receive the interest on a note given in part payment they ratify the sale. *Poche v. New Orleans, etc. Co.*, 52 La. Ann. 1287 (1900). Where a corporation ratifies its president's contract it is bound by his declarations as to the meaning of the contract. *Balfour v. Fresno, etc. Co.*, 123 Cal. 395 (1899). Where but one meeting of the board of directors was ever held and then the charter was forfeited, and the president, with the consent of the directors, individually, and of all the stockholders, conveyed away the property, and creditors were not injured, the transaction is legal. *Aransas, etc. Co. v. Manning*, 94 Tex. 558 (1901). A corporate creditor cannot attack a sale of all the assets of the corporation for a valuable consideration and in good faith, even though such sale was not formally authorized by the board of directors or stockholders. *Magowan v. Groneweg*, 14 S. D. 543 (1901). See s. c., 16 S. D. 29. The board of directors may ratify an act of the presi-

and exercising acts of ownership and control over the demised

dent without a formal resolution being spread on the minutes. *Texas, etc. Ry. v. Davis*, 54 S. W. Rep. 381 (Tex. 1899); rev'd on another point in 93 Tex. 378. A note guaranteed by a corporation through its president, the act being within the corporate power, is binding if the corporation had the benefit, even though the president had no authority to make such indorsement. *Hunt v. Northwestern, etc. Co.*, 16 S. D. 241 (1902). Where the president agrees to pay an employee a certain percentage of the profits of the business and the corporation acquiesces in the contract and has been benefited by it, the corporation is bound. *Bennett v. Millville Imp. Co.*, 67 N. J. L. 320 (1902). If the board of directors by their acts accept a modification made by the president in a contract, the company is bound, although there was no formal ratification. *Taylor, etc. Co. v. Wood*, 119 Fed. Rep. 966 (1903); aff'd, 125 Fed. Rep. 337. A pledge of bonds by the president is ratified by the directors knowing thereof and accepting the proceeds. *Prentiss, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). A bank is liable for money received, and used by it in its business, even though the president was not authorized to borrow it. *Blanchard v. Commercial Bank*, 75 Fed. Rep. 249 (1896). A bank cannot enforce notes which its president obtains for it by misrepresentations inducing the maker of the notes to give them in exchange for the notes of a worthless party. *Wilson v. Pauly*, 72 Fed. Rep. 129 (1896). The president may release a mortgage where a majority of the directors separately authorized it, and the stockholders in meeting assembled gave him general authority. *Smith v. Wells, etc. Co.*, 148 Ind. 333 (1897). By acquiescence of the board of directors the president's contract employing an editor and manager of a newspaper may bind the company.

Jones v. Williams, 139 Mo. 1 (1897). Allowing the contract to be completed cures any defect of power on the part of the president to make the contract. *Omaha, etc. Co. v. Burns*, 49 Neb. 229 (1896). Accepting the benefit of the president's contract cures any defect in his authority. *Davies v. Harvey Steel Co.*, 6 N. Y. App. Div. 166 (1896). By accepting a deed of a right of way a corporation accepts written covenants which its president made in connection therewith. *Mobile, etc. Ry. v. Gilmer*, 85 Ala. 422 (1888). Where the president, as the financial manager, pledges the company's bonds, and for more than a year such pledge continues without objection, the pledge is ratified. *Illinois T. & S. Bank v. Pacific Ry.*, 117 Cal. 332 (1897), holding also that although the by-laws require notes to be signed by the secretary, yet by acquiescence a note signed by the president alone may bind the corporation. A chattel mortgage given by the president and treasurer, without previous authority from the directors, may be validated by the corporation accepting the benefit of the same. *Edelhoff v. Horner, etc. Co.*, 86 Md. 595 (1898). A contract made by the president without authority may be considered ratified by the fact that the directors individually knew of the same, although they did not act upon the matter as a board. *Henry v. Colorado, etc. Co.*, 10 Colo. App. 14 (1897). A railroad contractor may enforce his construction contract with a railroad corporation, although he made it with the president, and the board of directors did not pass upon it, where the contractor proceeded to perform. The contractor was justified in stopping work when he was not paid according to the contract. *Cunningham v. Massena, etc. R. R.*, 63 Hun, 439 (1892); aff'd, 138 N. Y. 614. Acquiescence in sales by the president, where a vendor's lien was re-

premises, even if the minutes of the company failed to disclose such

tained, does not sustain a sale by him without retaining such a lien. *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306 (1891). Although the president accepts in the corporate name a draft drawn on him personally, yet where the bank of the corporation pays the draft and charges it to the corporation, and the latter acquiesces for nine months, it cannot hold the bank liable. *McLaren v. First Nat. Bank*, 76 Wis. 259 (1890). The president's contract with an attorney may be ratified. *Merrill v. Consumers' Coal Co.*, 114 N. Y. 216 (1889). A transfer of all the property by the president is valid where the directors and all the stockholders knew of it and assented to it. *Fort Worth Pub. Co. v. Hitson*, 80 Tex. 216 (1890). The company, by accepting and using property purchased by the president without authority, thereby ratifies the purchase. *West Salem Land Co. v. Montgomery Land Co.*, 89 Va. 192 (1892). That stockholders may ratify and validate notes and mortgages given by the president, see *Martin v. Niagara, etc. Mfg. Co.*, 122 N. Y. 165 (1890). The contracts of the president may be ratified subsequently by the board of directors. *Wehrhane v. Nashville, etc. R. R.*, 4 N. Y. St. Rep. 541 (1886). For a clear statement of this principle, see *Dabney v. Stevens*, 40 How. Pr. 341 (1870). Rates as advertised by the president bind the railroad when it continues to accept them. *Hilliard v. Goold*, 34 N. H. 230 (1856). The president's unauthorized contracts, when known to and acted upon by the directors and corporation, are binding. *Perry v. Simpson, etc. Co.*, 37 Conn. 520 (1871).

Where the president of a bank instructs its correspondent bank to charge to the former a debt due by him to the latter bank, and the accounts of the latter to the former bank showed to that effect, and no objection is made, the former bank is bound. *Burton v. Burley*, 13 Fed. Rep. 811 (1880). A lease by the president and treasurer without authority may be ratified by the stockholders. *Mount Washington Hotel Co. v. Marsh*, 63 N. H. 230 (1884). A bank is liable on an agreement of its president to give a person ten shares of stock if he would deposit with it, the deposits having been made. *Rich v. State Nat. Bank*, 7 Neb. 201 (1878). Where the company acquiesces in work done by contract with the president it is liable. *Grape Co. v. Small*, 40 Md. 395 (1874). The company may ratify a mortgage given by him. *Krider v. Western College*, 31 Iowa, 547 (1871); *Sherman v. Fitch*, 98 Mass. 59 (1867), where all but one of the directors knew and acquiesced. The acquiescence of a minority of the directors is insufficient. *Yellow, etc. Co. v. Stevenson*, 5 Nev. 224 (1869). Acceptance of the property purchased, with knowledge, is ratification. *Dent v. North, etc. Co.*, 49 N. Y. 390 (1872). The failure of the president to repudiate at once an agent's unauthorized act is ratification. *First Nat. Bank v. Fricke*, 75 Mo. 178 (1881); *Alabama, etc. R. R. v. Kidd*, 29 Ala. 221 (1856). See also § 727, *infra*, on notice. Ratification of a president's acts may arise by long use of the results, even though the directors expressly repudiated the acts, but did not notify the other party. *Belleville Sav. Bank v. Winslow*, 35 Fed. Rep. 471 (1888). It is a sufficient ratification if the directors discuss the matter at a meeting, though they take no action. *Walworth, etc. Bank v. Farmers', etc. Co.*, 16 Wis. 629 (1883). A corporate agent with full powers may ratify the president's act. *Perry v. Simpson, etc. Co.*, 37 Conn. 520 (1871). Acquiescence of the board of directors may cure the omission of a previous resolution as required by the charter in the issue of the bonds. *Curtis v. Leavitt*, 15 N. Y. 9 (1857),

authority expressly given.¹ The stockholders of a corporation at a special meeting duly called may amend the by-laws so as to authorize the board of directors to remove the president and treasurer, and the board of directors may subsequently make such removal under the amended by-laws.² Stockholders may amend the by-laws so as to increase the number of directors, and may at the same meeting elect the additional directors.³

The same rules apply to a vice-president that apply to the president on this subject.⁴ A stockholder cannot act as temporary presi-

the court saying of the board (p. 49): "They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized transaction, and so put it out of their power to dispute its validity."

1 Jacksonville, etc. Nav. Co. v. Hooper, 160 U. S. 514 (1896).

2 *In re Griffing Iron Co.*, 63 N. J. L. 168 (1898); *aff'd*, 63 N. J. L. 357 (1899). A discharged general manager cannot maintain a bill to be reinstated and to remove the president. *Dimmick v. Stokes*, 43 S. Rep. 854 (Ala. 1907).

3 *Gold Bluff, etc. Co. v. Whitlock*, 75 Conn. 669 (1903).

4 A vice-president who is authorized to sell municipal bonds owned by a railroad company may represent that the bonds were legally issued. *Union Bank v. Oxford, etc. R. R.*, 143 Fed. Rep. 193 (1906). A vice-president has no inherent power to repudiate in behalf of the corporation an unauthorized sale of the corporate property by the secretary. *Alaska, etc. Co. v. Solner*, 123 Fed. Rep. 855 (1903). The vice-president may call a special meeting of the board of directors in the absence of the president where the by-laws provide for the president calling such meeting, and the president is deemed absent, even though he is within four or five hours' travel. *Bell v. Standard, etc. Co.*, 146 Cal. 699 (1905). The assignment of a claim owned by a corporation is not good where it was merely signed by the

vice-president and the seal was not attached and there was no evidence that the vice-president was authorized to sign it. *Allen v. Alston*, 147 Ala. 609 (1906). In the absence of the president the vice-president may employ counsel. *Fernald v. Spokane, etc. Co.*, 31 Wash. 672 (1903). Where a corporation authorizes the issue and sale of bonds, without specifying any officer to make the sale, the president is not personally liable for such bonds, even though he turned them over to the vice-president to sell and the vice-president kept the proceeds. *Owego, etc. Co. v. Boyer*, 111 N. Y. App. Div. 140 (1906). The power of a vice-president to endorse and sell a corporate note is shown sufficiently where the company received the proceeds. *Jones v. Evans*, 91 Pac. Rep. 532 (Cal. 1907). Where a chattel mortgage statute requires an affidavit by the mortgagee or his agent or attorney stating certain facts, and the mortgagee is a corporation, the affidavit may be made by its vice-president without reciting his authority. *American, etc. Co. v. Stolzenbach*, 68 Atl. Rep. 1078 (N. J. 1908). The mere fact that a deed is executed by the vice-president instead of the president does not require additional proof as to why the vice-president signed it instead of the president doing so. *Ellison v. Branstrator*, 153 Ind. 146 (1899). It is legal for the board of directors to authorize the vice-president to execute a deed. *American, etc. Bank v. Ward*, 111 Fed. Rep. 782 (1901). The unauthorized

dent of the board of directors where he has never been elected a director.¹

§ 717. *Secretary and treasurer — Their power to contract for the corporation.*—The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it.² The secre-

action of the vice-president in delivering a note which had been duly indorsed by the corporation is ratified by the corporation receiving the benefit therefrom. *Johnson v. Weed, etc. Co.*, 103 Wis. 291 (1899). A lumber company is not liable for transactions of its vice-president with outsiders, where such vice-president had no power to represent it. *Shavallier v. Grand Rapids, etc. Co.*, 128 Mich. 230 (1901). The vice-president of a bank may, by reason of having for a long time conducted the business of the bank, have power to assign a judgment owned by the bank. *Cox v. Robinson*, 82 Fed. Rep. 277 (1897). The vice-president may sign a corporate deed if the president refuses to do so. *Smith v. Smith*, 62 Ill. 492 (1872). The fact that a vice-president swears to a complaint does not raise a presumption that the company authorized its service. *American Water-works Co. v. Venner*, 18 N. Y. Supp. 379 (1892). The vice-president may make an assignment for the benefit of creditors, where he is authorized "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interest of the association, and to use the corporate seal for such purpose." *Huse v. Ames*, 104 Mo. 91 (1891). The vice-president has no power to sell the bonds of the company, even though he is a director, member of the executive committee, and one of the two persons who "run" the company. The purchasers are not *bona fide*. *American L. & T. Co. v. St. Louis, etc. Ry.*, 42 Fed. Rep. 819 (1890). It may be proved that the vice-president had authority to accept a draft, although drawn by himself

upon the company. *Rumbough v. Southern Imp. Co.*, 106 N. C. 461 (1890). A suit is presumed to be authorized where the vice-president swears to the pleading. *Lacaze v. Creditors*, 46 La. Ann. 237 (1894). The vice-president's contracts may be ratified by the directors. *Dallas v. Columbia, etc. Co.*, 158 Pa. St. 444 (1893). The vice-president may, in certain circumstances, employ counsel. *Streeten v. Robinson*, 102 Cal. 542 (1894). The vice-president has no power to sign notes. *Morris v. Griffith, etc. Co.*, 69 Fed. Rep. 131 (1895). As to the powers of a vice-president, see also *Missouri, etc. Ry. v. Faulkner*, 88 Tex. 649 (1895).

¹ *Benson v. Keller*, 37 Oreg. 120 (1900).

² "A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." Hence a receipt by the secretary that certificates of stock had been actually lodged in the corporate office for transfer does not bind the corporation where they were not actually lodged, and the receipt was a part of a fraud. *George Whitechurch, Ltd. v. Cavanagh*, [1902] A. C. 117. Quoted and approved in *Taylor v. Sutherland, etc. Co.*, 60 S. E. Rep. 132 (Va. 1908). A corporation is not liable on checks forged by its secretary, even though he is the son of one of the directors and his father knew that the son had forged his name several years prior thereto. *Lewes, etc. Co., Ltd. v. Barclay & Co., Ltd.*, 95 L. T. Rep. 444 (1906). A secretary has no implied authority to make contracts for a corporation. *Donaldson v. Orchard, etc. Co.*, 92 Pac.

tary is one of the corporate officers, but he has practically no authority. Rep. 1046 (Cal. 1907). The secretary of a hotel company has no authority to issue its promissory note. *First Nat. Bank, etc. v. Abilene Hotel Co.*, 103 S. W. Rep. 1120 (Tex. 1907). The secretary has no power to compromise a debt. *Oscar, etc. Co. v. Pennsylvania R. R.*, 150 Cal. 658 (1907). The secretary has no power to sell any of the property of the company. *California, etc. Corp. v. Sciaroni*, 139 Cal. 277 (1903). Neither the secretary nor the assistant secretary of the corporation can render it liable for malicious prosecution by reason of their arresting a person. *Beiswanger v. American, etc. Co.*, 98 Md. 287 (1904). The mere fact that the secretary states that he has authority to notify a party to stop work under a contract is not evidence of such authority. *Bradford, etc. Co. v. Gibson*, 68 Ohio St. 442 (1903). The secretary cannot make a contract. *Ross, etc. Co. v. Eastham*, 73 Kan. 464 (1906). A person dealing with an agent of the corporation is bound at his peril to ascertain the extent of the agent's authority and is chargeable with knowledge thereof, and if the agent gives a warrant which he is not authorized to give, the secretary's ratification of the same is not binding on the company. *Reid v. Alaska, etc. Co.*, 47 Ore. 215 (1905). The secretary has no inherent power. *Farrell v. Gold Flint, etc. Co.*, 32 Mont. 416 (1905). The secretary has no power to endorse the company's name on a note, especially an accommodation note. *Wheeling, etc. Co. v. Conner*, 55 S. E. Rep. 982 (W. Va. 1906). The secretary has no inherent power to sell real estate. *Cobb v. Glenn, etc. Co.*, 57 W. Va. 49 (1905). A letter from the secretary approving a sale of property is not binding on the corporation. *Mexican, etc. Co. v. Frank*, 154 Fed. Rep. 217 (1907). Where the secretary wrongfully deposits another person's money to the credit of the company, and then checks it out for his private debts, the company is not liable therefor. *Glendale, etc. Assoc. v. Harvey, etc. Co.*, 114 Wis. 408 (1902). The secretary has no power to assign the company's claims for goods sold by it. The assignee's rights are not perfected by the directors' resolution made after he sues on the account. *Read v. Buffum*, 79 Cal. 77 (1899). The secretary of a religious corporation cannot contract for paying for the corporation. *Thomason v. Grace, etc. Church*, 113 Cal. 558 (1896). The secretary has no implied power to bind the company. *Wolf v. Davenport, etc. R. R.*, 93 Iowa, 218 (1895). He cannot sell and assign its notes, *Blood v. Marcuse*, 38 Cal. 590 (1869); nor sign a draft for it, *First Nat. Bank v. Hogan*, 47 Mo. 472 (1871); nor purchase iron for it, *Williams v. Chester, etc. R. R.*, 15 Jur. 828 (1850); nor accept a bill of exchange, *Neale v. Turton*, 4 Bing. 149 (1827); nor bind it to pay a debt of an old company whose property it purchased upon a reorganization, *American, etc. Ry. v. Miles*, 52 Ill. 174 (1869); nor rent a place for the company, *Ridley v. Plymouth, etc. Co.*, 2 Exch. 711 (1848); nor accept accommodation paper, *Farmers', etc. Bank v. Empire, etc. Co.*, 5 Bosw. 275 (1859); nor purchase, *Kingsbridge Flour Mill Co. v. Plymouth, etc. Co.*, 2 Exch. 718 (1848). Where the assistant secretary signs a mortgage instead of the secretary, it is sufficient to prove that he was the *de facto* assistant secretary. *Augusta, etc. R. R. v. Kittel*, 52 Fed. Rep. 63 (1892). The secretary has no power to execute a note. *Thompson v. Des Moines, etc. Park*, 112 Iowa, 628 (1900); *Sanders v. Chartrand*, 59 S. W. Rep. 95 (Mo. 1900). A letter signed by the secretary employing a person is not sufficient to prove a contract. *Hallenbeck v. Powers, etc. Co.*, 117 Mich. 680 (1898).

thority.¹ The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made.² A corporation may maintain replevin to re-

¹ *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473 (1893).

² Quoted and approved in *Cobb v. Glenn, etc. Co.*, 57 W. Va. 49 (1905), and *Taylor v. Sutherlin*, 60 S. E. Rep. 132 (Va. 1908). Where the assistant secretary of a foreign corporation opens a bank account in the corporate name and uses it and the corporation checks up the account from time to time it is bound. *Hennessy, etc. Co. v. Memphis Nat. Bank*, 129 Fed. Rep. 557 (1904). A corporation is bound by a contract made in its behalf by its secretary for the sale of its treasury stock, where the directors knew that he was acting as agent and had formerly approved a previous sale of stock by him. *Bauersmith v. Extreme, etc. Co.*, 146 Fed. Rep. 95 (1906). Even though the secretary has sold the corporate property without authority, yet if the money has been used by the corporation, the amount must be tendered back before the transfer can be set aside. *Alaska, etc. Co. v. Solner*, 123 Fed. Rep. 855 (1903), holding also that if the board of directors do not disaffirm a sale of corporate property by the secretary, but acquiesce therein and retain the proceeds, the corporation is bound. Where the directors separately assent to the employment of a physician to attend an injured employee and acquiesce in the secretary so employing him, the corporation is bound. *Scott v. Superior, etc. Co.*, 144 Cal. 140 (1904). Even though the secretary employs an attorney without authority, yet if the company received the benefit of his services, it may be liable therefor. *Kelly v. Ning, etc. Assoc.*, 2 Cal. App. 460 (1905). Where a secretary has been accustomed to transact the business the corporation is bound. *Ring v. Long Island, etc.*, 93 N. Y. App. Div.

442 (1904); *aff'd*, 184 N. Y. 553. As to the proof necessary to show the secretary's authority to endorse a note, see *Karsch v. Pottier, etc. Co.*, 82 N. Y. App. Div. 230 (1903). A note signed by the president and secretary is good even though the secretary had at that time been succeeded by another. *Houts v. Sioux City, etc.*, 110 N. W. Rep. 166 (Iowa, 1907). See also *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833), where the secretary was authorized to affix the corporate seal; *New England, etc. Ins. Co. v. De Wolf*, 25 Mass. 56 (1829), where the company accepted the benefits. A note signed by the corporate secretary as directed by the president, the money therefor being used by the corporation, is enforceable against it. *Jansen v. Otto Stietz, etc. Co.*, 1 N. Y. Supp. 605 (1888). Although corporate notes given by the secretary to a bank are unauthorized, yet if the money was used regularly in the business of the company it is liable. *Pauly v. Pauly*, 107 Cal. 8 (1895). Where the secretary has been permitted to sell the notes of the corporation, a transfer of a note by him to a bank makes the latter a *bona fide* purchaser, the corporation being the payee. *Commercial Nat. Bank v. Brill*, 37 Neb. 626 (1893). The secretary has power to indorse the company's note for discount or sale where for a long time he has been allowed to do so. *Blake v. Domestic, etc. Co.*, 38 Atl. Rep. 241 (N. J. 1897). By allowing the secretary to conduct the business the company is bound by his contracts. *Hess v. Sloane*, 66 N. Y. App. Div. 522 (1901); *aff'd*, 173 N. Y. 616. Where a corporation pays the expense of collecting notes owned by it and assigned by its secretary, it thereby ratifies such assignment. *McCormick v. Bittinger*, 13 Colo. App. 170

cover its records and seal from one who claims to be its secretary.¹

The treasurer of a corporation has no power, merely by reason of his office as treasurer, to contract for the corporation.² But if

(1899). A person who loans a sum of money to a corporation on the agreement of its directors that he was to be assistant secretary at a specified salary, may recover back the money. *Meridian, etc. Co. v. Eaton*, 81 N. E. Rep. 667 (Ind. 1907). A person who by agreement is to be made secretary, but who acts as such before he is elected, is nevertheless a *de facto* officer. *Welker v. Anheuser, etc. Assoc.*, 114 N. W. Rep. 745 (Minn. 1908).

¹ *Stovell v. Alert, etc. Co.*, 38 Col. 80 (1906).

² Quoted and approved in *Taylor v. Sutherlin, etc. Co.*, 60 S. E. Rep. 132 (Va. 1908). The treasurer has no power to borrow money and give the corporate note therefor, and the company is not liable where the money was paid into the corporate treasury and immediately embezzled by the treasurer. *Craft v. South Boston R. R.*, 150 Mass. 207 (1889). Even though the treasurer of a corporation presents to the registrar of the bonds of another corporation, in which the former company owns bonds registered in the former's name, a copy of the resolution of the directors of the former authorizing a transfer, and also the power of attorney apparently containing the signatures of the president and secretary and the corporate seal, yet if these were not authorized, and a transfer is made, the corporation issuing the bonds is liable. *Clarkson Home, etc. v. Missouri K. & T. R. R.*, 182 N. Y. 47 (1905). In a suit by a corporation on a promissory note, the contract leading to the note cannot be introduced as a defense unless it is proved that the treasurer who signed the contract in behalf of the corporation, had authority to do so, the contract

not being sealed. *Coney Island, etc. R. R. v. Boyton*, 87 N. Y. App. Div. 251 (1903). Even though the treasurer and president of a brewing company are also treasurer and a director of a trust company in which the former company deposits its funds, the trust company is not liable for embezzlement of such funds by the treasurer. *Elk, etc. Co. v. Neubert*, 213 Pa. St. 171 (1906). A corporation may repudiate a fraudulent agreement of its president and treasurer to take a worthless note in payment of rent. *National, etc. Co. v. Chicago Ry. etc.*, 226 Ill. 28 (1907). In a suit on a note it is insufficient to prove the signatures of the president and treasurer. Proof must be given that they had authority to sign. *Dreeben v. First Nat. Bank*, 99 S. W. Rep. 850 (Tex. 1907). The treasurer has no authority except to keep the corporate funds and disburse them when properly authorized so to do. *Albro Min. etc. Co. v. Chinn*, 20 Colo. App. 238 (1904). The treasurer has no power to endorse the corporate name to corporate notes. *Pelton v. Spider, etc. Co.*, 112 N. W. Rep. 29 (Wis. 1907). A treasurer has no power to sign the corporate name to promissory notes unless he is expressly given that power. If the note is made payable to his own order, the purchaser of it must take notice that it was issued without authority. *Chemical Nat. Bank v. Wagner*, 93 Ky. 525 (1892). Notes of a cattle company purporting to be signed by it through its treasurer are presumed to have been authorized. *Corcoran v. Snow Cattle Co.*, 151 Mass. 74 (1890). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee upon a sale of the stock by

the treasurer has been accustomed to make certain contracts for the corporation, and the corporation has acquiesced in them, it is bound by a new contract of that kind entered into by him.¹ It is for the jury to decide whether such a custom exists.² A treasurer has no

the latter. *Holden v. Metropolitan Nat. Bank*, 151 Mass. 112 (1890); s. c., 138 Mass. 48. The treasurer cannot, upon the sale of a note held by the company, indorse the note so as to render the company liable, even though a trustee was aware thereof, the opening of an account with the bank being unknown to the company. *Columbia Bank v. Gospel Tabernacle*, 57 N. Y. Super. Ct. 149 (1889). A treasurer has no power to issue corporate notes, and where he does so, the proceeds being used to pay his personal debt to the corporation, the notes are not binding on the company. *First Nat. Bank v. Council Bluffs, etc. Co.*, 56 Hun, 412 (1890). The corporate indorsement of a note by the treasurer without authority and for accommodation does not bind the corporation. *Wahlig v. Standard, etc. Co.*, 9 N. Y. Supp. 739 (1890). The treasurer has no inherent authority to indorse. *Security Bank v. Kingsland*, 5 N. Dak. 263 (1895). The treasurer has no implied power to make a corporate note. *Oak, etc. Co. v. Foster*, 7 N. M. 650 (1895). The treasurer of a manufacturing corporation has no implied power to bind the corporation as an accommodation indorser, and a person taking the note with notice cannot enforce such indorsement. *Usher v. Raymond Skate Co.*, 163 Mass. 1 (1895). An arbitration agreed to by the treasurer was sustained in *Remington Paper Co. v. London Assur. Corp.*, 12 N. Y. App. Div. 218 (1896). A demand for rent may properly be made on the secretary and treasurer. *State v. Felton*, 52 N. J. L. 161 (1889). He cannot compromise or relinquish its claims, *Carver Co. v. Manufacturers', etc. Co.*, 72 Mass. 214 (1856); nor sell and indorse its paper, *Bradlee v. Warren*,

etc. Bank, 127 Mass. 107 (1879); *Holden v. Upton*, 134 Mass. 177 (1883). *Contra*, *Perkins v. Bradley*, 24 Vt. 66 (1851); nor assume the debt of a third person, *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144 (1861); nor sell and assign a mortgage owned by the corporation, even though he uses the corporate seal. *Jackson v. Campbell*, 5 Wend. 572 (1830). He may employ an attorney to collect unpaid bills. *Bristol, etc. Bank v. Keavy*, 128 Mass. 298 (1880). He cannot give a release under seal. *Dedham Inst. v. Slack*, 60 Mass. 408 (1850). He may accept money. *Brown v. Winnissimmet Co.*, 93 Mass. 326 (1865). The treasurer of a manufacturing corporation is presumed to have authority to indorse and sell to a bank a note running to the corporation. *Standard, etc. Co. v. Windham Nat. Bank*, 71 Conn. 668 (1899). As to admissions by him, see § 726, *infra*.

¹ The treasurer has no inherent power to sign and indorse corporate notes, but long usage may constitute such authority. *Page v. Fall River, etc. R. R.*, 31 Fed. Rep. 257 (1887); *Lester v. Webb*, 83 Mass. 34 (1861), where the treasurer indorsed a note; *Bank of Attica v. Pottier, etc. Co.*, 1 N. Y. Supp. 483 (1888); *Partridge v. Badger*, 25 Barb. 146 (1857); *Foster v. Ohio, etc. Co.*, 17 Fed. Rep. 130 (1883), where he gave a note. Where the secretary and treasurer have been accustomed to manage the entire business and make contracts, a contract entered into by them for the company is legal and enforceable. *Moore v. H. Gaus Co.*, 113 Mo. 98 (1892).

² *Foster v. Ohio, etc. Co.*, 17 Fed. Rep. 130 (1883); *Fifth, etc. Bank v. First Nat. Bank*, 48 N. J. L. 513 (1886), where the treasurer pledged securities.

power to indorse the company's note for discount or sale, but if allowed to do so for a long time such indorsements are legal.¹ If the treasurer is accustomed to act as the managing agent of the corporation he can sell its property,² and borrow money and give security.³ The treasurer binds the corporation by a contract which he is expressly authorized to make.⁴ The secretary and treasurer cannot even conjointly bind the corporation by their purchases of

1 *Blake v. Domestic, etc. Co.*, 38 Atl. Rep. 241 (N. J. 1897). Where the corporation has allowed the secretary and treasurer to indorse notes received by it, such indorsements are legal. *Black v. First Nat. Bank*, 96 Md. 399 (1903).

2 *Phillips v. Campbell*, 43 N. Y. 271 (1870).

3 *Fay v. Noble*, 66 Mass. 1 (1853); *Fifth, etc. Bank v. First Nat. Bank*, 48 N. J. L. 513 (1886). Where the treasurer has been accustomed to handle the finances of the corporation, a judgment note with warrant of attorney by him is valid. *Chicago, etc. Co. v. Chicago Nat. Bank*, 176 Ill. 224 (1898). Where the secretary and treasurer and a director have been allowed to transact the business of the company and they borrow money for the company and give the company's bond and mortgage therefor, and produce a certified copy of a resolution passed by the board of directors, the lender may rely on such certified copy, even though it afterwards turns out to have been unauthorized. *Hutchison v. Rock Hill, etc. Co.*, 65 S. C. 45 (1902).

4 *Odd Fellows v. Bank of Sturgis*, 42 Mich. 461 (1880), where the authority was oral; *Gafford v. American, etc. Co.*, 77 Iowa; 736 (1889). Funds drawn out by the treasurer on the express authority of the directors and kept apart from his funds are held by him at the risk of the corporation. *Butler v. Duprat*, 51 N. Y. Super. Ct. 77 (1884). Where a corporation authorizes its agent to pledge its bonds the agent may make the pledge on

the usual terms as to selling the bonds in case of default. *Morris, etc. v. East Side Ry.*, 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13. Where a corporation keeps two accounts in the same bank, and in one account the checks are to be signed by the president and the treasurer, and in the other by the treasurer alone, a check on the first account signed by the treasurer alone is not good, and the bank is liable if it pays it. *Shoe, etc. Co. v. Western Nat. Bank*, 70 N. Y. App. Div. 588 (1902). Where an officer is authorized to issue notes, a note issued by him is legal if in the hands of a *bona fide* holder, though the purpose was unauthorized. Hence he cannot be held personally liable, and the notes are binding on the corporation. *Dexter Sav. Bank v. Friend*, 90 Fed. Rep. 703 (1898). Where the treasurer of a land company is authorized to purchase realty he may sell it for the corporation. *Henry v. Black*, 210 Pa. St. 245 (1904). Where a vice-president and treasurer have authority to make a contract and the treasurer makes it alone but the vice-president with knowledge thereof accepts for the corporation the benefit of the contract, the company is bound. *Peach River, etc. Co. v. Ayers*, 91 S. W. Rep. 387 (Tex. 1906). Even though the board of directors authorizes a sale of the company's bonds by the president and treasurer, and a sale is made by the treasurer alone and he embezzles the proceeds, a *bona fide* purchaser from him is protected. *Doty v. Oriental, etc. Co.*, 67 Atl. Rep. 586 (R. I. 1907).

the article in which it deals;¹ nor can they borrow money for the corporation;² nor release the maker of a note to the corporation;³ nor subscribe for stock in another corporation.⁴ But if the company acquiesces in a contract made by either or both of these officers it is bound.⁵ By usage the treasurer may have power to sell

1 *Alexander v. Cauldwell*, 83 N. Y. 480 (1881), where a coal company was held not liable for coal so purchased, there being no evidence that the corporation authorized it, or used it, or ratified it. *Cf. Alexander v. Brown*, 9 Hun, 641 (1877). The secretary and treasurer has no power to sell machinery of the company. *Winsted, etc. Co. v. New Britain, etc. Co.*, 69 Conn. 565 (1897).

2 *Adams v. Mills*, 60 N. Y. 533 (1875). The secretary and treasurer of a coal company has no implied power to borrow money for it. *Alabama, etc. Bank v. O'Neil*, 128 Ala. 192 (1901). The secretary and treasurer has no authority to agree to pay a commission to an agent for selling property belonging to the corporation. *Extension, etc. Co. v. Skinner*, 28 Colo. 237 (1901). A *bona fide* purchaser of a promissory note executed by the officers of a private trading corporation is protected in assuming that the officers have not exceeded their authority in issuing the note. *National, etc. Co. v. Rockland Co.*, 94 Fed. Rep. 335 (1899). Merely proving the signature of a corporation to a note by proving that it was signed by the president, secretary and treasurer is not sufficient. *Gould v. Gould & Co.*, 134 Mich. 515 (1903).

3 *Moshannon, etc. Co. v. Sloan*, 7 Atl. Rep. 102 (Pa. 1885). The secretary and treasurer of a company organized to deal in mortgages may authorize a debtor of the company to transfer real estate to one of the company's creditors in settlement of both claims. *First Nat. Bank v. Garretson*, 107 Iowa, 196 (1899).

4 The secretary and treasurer of a cotton trading company has no power to subscribe in the name of the com-

pany for stock in a cotton manufacturing company. *Wells Co. v. Avon Mills*, 118 Fed. Rep. 190 (1902). See same case 198 U. S. 177.

5 *St. James's Parish v. Newburyport, etc. R. R.*, 141 Mass. 500 (1886), where the treasurer gave an obligation under seal and reported it in his reports, and a committee approved. If the company ratifies a contract made by the president and secretary, the company may compel its officers to give it the benefit of the contract. *Church v. Sterling*, 16 Conn. 388 (1844). Accepting the benefit of an insurance contract made by the secretary and president accepts the contract itself. *Emmet v. Reed*, 8 N. Y. 312 (1853). Where the secretary and treasurer has power to execute and carry out a lease he may agree to a cancellation of the same. *Commercial Hotel Co. v. Brill*, 123 Wis. 638 (1905). An indorsement by the secretary, with the knowledge and acquiescence of the directors, is binding. *Williams v. Cheney*, 69 Mass. 215 (1855). So, also, where he pledges bonds with their knowledge and acquiescence. *Darst v. Gale*, 83 Ill. 136 (1876). And see *Durar v. Hudson, etc. Ins. Co.*, 24 N. J. L. 171 (1853), in insurance contracts; and *Conover v. Mutual Ins. Co.*, 1 N. Y. 290 (1848), where he was accustomed to contract for the company; *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 453 (1872); *Talladega Ins. Co. v. Peacock*, 67 Ala. 253 (1880), where the secretary was accustomed to sign notes. Where a corporation uses a wharf under a contract made by its treasurer, it is liable for the contract price. *Taylor v. Albemarle, etc. Co.*, 105 N. C. 484 (1890). Taking the benefit of a piece of statuary for ad-

goods.¹ In Massachusetts it is held that the treasurer of a trading or manufacturing company has implied power to execute notes in behalf of the corporation, and the *bona fide* holder of such notes may enforce them. This rule was also applied to a gas-light company.² And in Vermont it is held that the treasurer has power to buy, where the company's letterheads direct that all correspondence be addressed to him.³ Where the treasurer of a corporation uses its money for his own purposes he may be sued therefor, even though he continues to be treasurer.⁴ Where the by-laws provide that checks shall be signed by the president and treasurer it is conversion for the treasurer to check the money out on his sole signature.⁵ A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity.⁶ A treasurer sued by the corporation for money held by him as treasurer cannot offset a debt due from the corporation to him individually.⁷ Where a treasurer has been expelled by the board of directors for irregularities in his accounts, the corporation may maintain *quo warranto* to oust him from office and obtain possession of its money and books.⁸ A peremptory *mandamus* granted without notice is not the

vertising purposes binds it to pay therefor, though the treasurer made the contract. *Ellis v. Howe, etc. Co.*, 9 Daly, 78 (1880). The secretary and treasurer may bind the company by being allowed to do all the business of the company. *Colorado, etc. Co. v. American, etc. Co.*, 97 Fed. Rep. 843 (1899). Where the secretary and treasurer has managed the business as though the property was his own, a sale of all the property with the consent of ninety-five per cent. of the stockholders to an innocent purchaser for value is legal, even though no meeting of the directors or stockholders authorized the sale. *Magowan v. Groneweg*, 14 S. D. 543 (1901). See s. c., 16 S. D. 29. Where the treasurer signs the company's name to a note without authority, but the company uses the money, it is liable on the note. *Wayne, etc. Co. v. Schuykill, etc. Ry.*, 191 Pa. St. 90 (1899). Where the treasurer has had entire management of the business, an extension of the company's notes by him is legal. *Franklin Sav. Bank v. Cochran*, 182 Mass. 586 (1903).

¹ *Nashua, etc. Co. v. Chandler, etc. Co.*, 166 Mass. 419 (1896).

² *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505 (1893).

³ *Woodbury Granite Co. v. Mulliken*, 66 Vt. 465 (1894).

⁴ *Marlborough Assoc. v. Peters*, 179 Mass. 61 (1901).

⁵ *Sanitary, etc. Co. v. Mullins*, 86 N. Y. App. Div. 450 (1903).

⁶ *Hunter v. Robbins*, 117 Fed. Rep. 920 (1902). See also § 648, *supra*. A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands, and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account. *Consolidated, etc. Works v. Brew*, 112 Wis. 610 (1902). A suit to recover money improperly disposed of by the treasurer may be in equity. *Hawkeye, etc. Co. v. State Bank, etc.*, 157 Fed. Rep. 253 (1907).

⁷ *Oregon, etc. Co. v. Schmidt*, 60 S. W. Rep. 530 (Ky. 1901).

⁸ *Commonwealth v. Jankovic*, 216 Pa. St. 615 (1907).

proper remedy to compel the treasurer of the corporation to pay a debt in accordance with the order of the executive committee.¹ Where the statute prescribes that officers and agents shall hold their places during the pleasure of the board, the board may oust the secretary and treasurer at any time.² A secretary and treasurer elected for a year cannot be arbitrarily removed and his salary stopped, if the salary is by the year.³

§ 718. *Cashier—The extent of his powers.*—The cashier of a bank has greater inherent powers than any other corporate officer. By virtue of his office he performs many and important acts for the bank. He may pledge the bank's securities;⁴ and sell and assign its paper;⁵ and extend the payment of a note;⁶ and certify checks;⁷ and may bind the bank by various other acts.⁸ But a

¹ Horton v. State, 60 Neb. 701 (1900).

² Darrah v. Wheeling, etc. Co., 50 W. Va. 417 (1901).

³ Even if he takes part in selling out the company, yet if it is understood that the new company was to continue him he may collect the salary. Daspit v. Holmes Co., 44 S. Rep. 993 (La. 1907). Where a person makes a contract with a corporation to sell a certain amount of its preferred stock, and in return he is made treasurer at a monthly salary for a year, and indefinitely thereafter, and he actually takes some of the stock himself and pays for it, but is discharged because he does not sell the stock as agreed, he can recover on his contract, the company having refused to return the money he has paid. Hinchman v. Matheson, etc. Co., 115 N. W. Rep. 48 (Mich. 1908).

⁴ Coats v. Donnell, 94 N. Y. 168 (1883); Barnes v. Ontario Bank, 19 N. Y. 152 (1859); Donnell v. Lewis County Sav. Bank, 80 Mo. 165 (1883). As to the power of the cashier to borrow money for the bank, compare Coats v. Donnell, 94 N. Y. 168 (1883), with Western Nat. Bank v. Armstrong, 152 U. S. 346 (1893). A cashier may borrow money for the bank and pledge its assets. Citizens' Bank v. Bank, etc., 103 S. W. Rep. 249 (Ky. 1907).

⁵ "It is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use." Cherry v. City Nat. Bank, 144 Fed. Rep. 587 (1906). Smith v. Lawson, 18 W. Va. 212, 227 (1881); Wild v. Bank, 3 Mason, 505 (1825); s. c., 29 Fed. Cas. 1215; Lafayette Bank v. State Bank, 4 McLean, 208 (1847); s. c., 14 Fed. Cas. 939; Everett v. United States, 6 Port. (Ala.) 166 (1837); Crocket v. Young, 9 Miss. 241 (1843). He may indorse paper in a private bank after banking hours. Bissell v. First Nat. Bank, 69 Pa. St. 415 (1871).

⁶ Wakefield Bank v. Truesdell, 55 Barb. 602 (1864).

⁷ Merchants' Bank v. State Bank, 10 Wall. 604 (1870); Cooke v. State Nat. Bank, 52 N. Y. 96 (1873). A *bona fide* holder of a certificate of indebtedness issued by him is protected. Citizens', etc. Bank v. Blakesley, 42 Ohio St. 645 (1885).

⁸ A bank is liable for the embezzlement by a cashier of a special deposit of bonds. First Nat. Bank v. Dunbar, 118 Ill. 625 (1886). See also Caldwell v. National Mohawk Bank, 64 Barb. 333 (1869), and § 681, *supra*. He may sell assets to pay a debt, and may

cashier cannot authorize a person to loan money to the bank, and deliver it to an agent to carry it to a distant city;¹ nor any other act which is not in the regular course of business.² A bank may be a *bona fide* pledgee of stock from its cashier, even though such stock is in the name of a third person and is indorsed by the

guarantee the priority of a mortgage. *Peninsular Bank v. Hanmer*, 14 Mich. 208 (1866). He may employ an attorney. *Root v. Olcott*, 42 Hun, 536 (1886); *aff'd*, 115 N. Y. 635; *Potter v. New York Inf. Asylum*, 44 Hun, 367 (1887); *Western Bank v. Gilstrap*, 45 Mo. 419 (1870), where the other officers were absent; *Mumford v. Hawkins*, 5 Denio, 355 (1848). The president and cashier are presumed to have authority to compromise a debt. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189 (1881). Where an agreement is signed by the president and cashier of a bank concerning a matter which is within the regular business of the bank, the authority of these officers to execute the contract is presumed. *Nat. Bank Commerce v. Atkinson*, 8 Kan. App. 30 (1898). The president and cashier of a bank have inherent power to sell or mortgage land owned by the bank. *Steinke v. Yetzer*, 108 Iowa, 512 (1899). The cashier may transfer stock held in pledge. *Matthews v. Massachusetts Nat. Bank*, 1 Holmes, 396 (1874); *s. c.*, 16 Fed. Cas. 1113. A *bona fide* holder may enforce accommodation paper indorsed by him. *City Bank v. Perkins*, 29 N. Y. 554 (1864); *Bank of Genesee v. Patenin Bank*, 19 N. Y. 312 (1859); *Faneuil Hall Bank v. Bank of Brighton*, 82 Mass. 534 (1860). A receiver of a bank who sues a surety company on a bond given in behalf of an employee of the bank is bound by representations of the assistant cashier of the surety company made in connection with the bond. *Willoughby v. Fidelity, etc. Co.*, 16 Okl. 546 (1906). Where the cashier steals collateral the bank is liable even though the cashier was

also an endorser on the note. *First Nat. Bank v. Sing Sing, etc. Co.*, 120 N. Y. App. Div. 542 (1907). The cashier has no inherent power to agree to make a loan for the bank. *Swindell & Co. v. Bainbridge, etc. Bank*, 60 S. E. Rep. 13 (Ga. 1908).

¹ In no case has the term "ordinary business" "been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property or create an agency of any kind for a bank which he had not been authorized to make by those to whom had been confided the power to manage its business, both ordinary and extraordinary." *U. S. v. City Bank of Columbus*, 21 How. 356 (1858).

² He cannot bind the bank by indorsing the bank's name as an accommodation indorser to his own note. *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557 (1877). A cashier may indorse bank paper to any one except himself. *Preston v. Cutter*, 64 N. H. 461 (1888). A cashier has no power to make the bank a surety on a replevin bond for the accommodation of a third person. *Sturdevant v. Farmers', etc. Bank*, 62 Neb. 472 (1901). The mere fact that the cashier of the bank acts as intermediary in the purchase and sale of stock in the bank does not make the bank liable for his conversion of a certificate of stock. *Preston v. Marquette County, etc. Bank*, 122 Mich. 696 (1900).

latter.¹ A bank may borrow money, but it is so unusual that the loaner must inquire into the authority of the officer or agent acting for the bank which borrows the money. Special authority or ratification by the board of directors must be shown.² A bank has no power to buy stock in an insurance company, and the cashier of the bank has no authority to take stock in payment of a debt.³ Where a director of a bank delivers bonds to the cashier as security for a debt, and the cashier pledges them to the bank to secure his own debt, the court will hold that the bank holds the bonds as security for the creditor's debt and not for the cashier's debt.⁴ The cashier of a bank, in answering an inquiry as to the responsibility of a third person, need not disclose the fact that the bank has a mortgage on the property of such person.⁵ A cashier has no right to agree that a note discounted by another bank for a company in which he is personally interested shall be charged up to his bank in case of non-payment.⁶ Although a cashier does an act in excess of his powers, yet if the board of directors ratify it or accept its benefits the corporation is bound.⁷ A person who merely receives

¹ *Brady v. Mount Morris Bank*, 65 N. Y. App. Div. 212 (1901).

² *Western Nat. Bank v. Armstrong*, 152 U. S. 346 (1893). A cashier having power to borrow money for the bank has power to pledge bank securities as collateral. *Sloan v. Kansas City, etc. Bank*, 158 Mo. 431 (1900). The cashier may borrow for the bank and pledge securities where he has been allowed to conduct the bank alone for many years. *First Nat. Bank, etc. v. State Bank, etc.*, 109 N. W. Rep. 61 (N. Dak. 1906).

³ *Bank of Commerce v. Hart*, 37 Neb. 197 (1893). A bank cashier has no power to allow a note due the bank to be paid in work for a railroad. *First Nat. Bank, etc. v. Alexander*, 44 S. Rep. 866 (Ala. 1907).

⁴ *Detroit, etc. Co. v. Third, etc. Bank*, 111 Mich. 407 (1897).

⁵ *First Nat. Bank v. Marshall, etc. Bank*, 83 Fed. Rep. 725 (1897).

⁶ *Ft. Dearborn Nat. Bank v. Seymour*, 71 Minn. 81 (1898).

⁷ Although the officers of a bank have no power to borrow money from the bank without special authority from the board of directors, yet if

for a long time they have been accustomed to do so, this is the same as though express authority had been given. *Armstrong v. Chemical Nat. Bank*, 83 Fed. Rep. 556 (1897); *aff'd*, 176 U. S. 618 (1900). Even though an officer of a bank is not authorized to obtain a loan for the bank from its correspondent bank, yet if he does so and the bank uses the money, it is liable to repay the same. *Aldrich v. Chemical, etc. Bank*, 176 U. S. 618 (1900); *Martin v. Webb*, 110 U. S. 7 (1884), where the cashier had canceled a deed of trust; *Payne v. Commercial Bank*, 14 Miss. 24 (1846); *Bank of Pennsylvania v. Reed*, 1 Watts & S. (Pa.) 101 (1841); *Ryan v. Dunlop*, 17 Ill. 40 (1855), where he satisfied a mortgage; *Kelsey v. National Bank*, 69 Pa. St. 426 (1871), where he offered a reward with the knowledge and acquiescence of the directors; *Medomak Bank v. Curtis*, 24 Me. 36 (1844), where the bank claimed the benefit of a contract; *U. S. Bank v. Dandridge*, 12 Wheat. 64 (1827), where a cashier's bond in possession of a bank was held to have been accepted by the bank,

money in a branch of the business is not the cashier. The cashier is one who has charge of the funds to the exclusion of every other person.¹

§ 719. *General manager, superintendent, and general agent—Their power to contract for the corporation.*—The general manager of a corporation has no power to make and deliver the promissory note of the company;² nor to indorse the company's name on

though no vote accepting it was to be found in its records; *Bank of Lyons v. Demmon, Hill & D. Supp.* (N. Y.) 398 (1844), where the president and secretary sold stock and agreed to purchase it if the vendee desired. He cannot assign non-negotiable paper. *Barrick v. Austin*, 21 Barb. 241 (1855). As to the power of the cashier and president together to pledge paper for an antecedent debt, see *Tennessee v. Davis*, 50 How. Pr. 447 (1874). As to the power of the cashier to take payment in other notes, etc., see *Sandy River Bank v. Merchants', etc. Bank*, 1 Biss. 146 (1857); s. c., 21 Fed. Cas. 356. A cashier has no power to agree with an indorser of a note to a bank that he shall not be liable. *Thompson v. McKee*, 5 Dak. 172 (1888); *Bank of Metropolis v. Jones*, 8 Pet. 12 (1834); *Bank of U. S. v. Dunn*, 6 Pet. 51 (1832). A person taking a note from the cashier on the latter's personal debt cannot hold the bank liable on the latter's indorsement of the note as cashier. *West St. Louis Sav. Bank v. Shawnee, etc. Bank*, 3 Dill. 403 (1874); s. c., 29 Fed. Cas. 831; s. c., 95 U. S. 557. A cashier cannot assign corporate notes to a depositor in payment of a deposit. *Schneitman v. Noble*, 75 Iowa, 120 (1888). He cannot render the charter forfeitable by taking payment on subscriptions in an illegal manner. *State v. Commercial Bank*, 14 Miss. 218 (1846). A bank may be bound by a release of its cashier upon a note signed by the cashier and several others, where the cashier pays his part of the note and erases his name from the note,

and such facts become known to the board of directors. *First Nat. Bank v. Shook*, 100 Tenn. 436 (1898).

¹ *Eisenhofer v. New York, etc. Co.*, 91 N. Y. App. Div. 94 (1904).

² *New York, etc. Mine v. Negaunee Bank*, 39 Mich. 644 (1878), in which case the note was held not enforceable, although the general manager had often drawn drafts on the company. See *Re Cunningham*, L. R. 36 Ch. D. 532. The general manager of a railroad company has no inherent power to execute promissory notes in its name. *Baines v. Coos, etc. Co.*, 45 Ore. 307 (1904). A general manager of a cattle company has no power to give its note or to postpone payment for an engine at a high rate of interest and a commission. *Sanford, etc. Co. v. Williams*, 18 Colo. App. 378 (1903). The manager of a mining corporation has no inherent power to draw and cash a bill of exchange. *Bank of Commerce v. Baird, etc. Co.*, 85 Pac. Rep. 970 (New Mex. 1906). Where a corporation and a firm are practically one and the same concern, and the same man signs for both, his signature of the corporate name to the firm obligation is binding on the corporation. *National Bank, etc. v. John, etc. Sons*, 33 S. W. Rep. 415 (Ky. 1895). A general manager is presumed to have authority to sign a corporate note. *Citizens' Nat. Bank v. Wintler*, 14 Wash. 558 (1896). The president and general manager has no implied power to issue notes. The fact that he has done so before is immaterial, where all of the directors, excepting one, were ignorant of such acts. *Elwell*

commercial paper,¹ except possibly in payment of debts;² nor to change the terms of a sealed contract of the corporation;³ nor to employ a person on a three years' contract.⁴ But he may give a note in payment of wages due;⁵ and he may accept a draft.⁶ There is grave doubt as to whether he may borrow money and give a lien or chattel mortgage therefor.⁷ The president and general manager of

v. Puget Sound, etc. R. R., 7 Wash. 487 (1893). The general manager of a telegraph company has no implied authority to make a note for it and in its name. *Helena Nat. Bank v. Rocky, etc. Tel. Co.*, 20 Mont. 379 (1898). Where the manager for several years has been accustomed to sign notes for the company, the company is bound by such notes. *Cadillac, etc. Bank v. Cadillac, etc. Co.*, 129 Mich. 15 (1901).

1 Accommodation acceptances, accepted in the corporate name by the manager of the corporation without the knowledge of the directors, are not enforceable, though the manager had at times drawn notes to meet expenses. *Merchants' Nat. Bank v. Detroit, etc. Works*, 68 Mich. 620 (1888). The power of a manager to borrow money for the company by giving his own note and indorsing the company's name to it is a question for the jury. The books of the company are evidence to prove that the company received the money. The jury may decide that his authority might be "either authority or subsequent ratification, and that it could be evidenced by general course of business as well as by resolution." *Huntington v. Attrill*, 118 N. Y. 365 (1890). A general manager has no power to guarantee in the corporate name the payment of a third person's note. *Dobson v. More*, 164 Ill. 110 (1896). A general manager has no inherent power to indorse the commercial paper coming to the company. The by-laws are admissible on the subject. *Railway Equip. etc. Co. v. Lincoln Nat. Bank*, 82 Hun, 8 (1894). But he may accept a draft if he is

accustomed so to do. *Munn v. Commission Co.*, 15 Johns. 44 (1818). And the general agent of a bank may indorse. *Merchants' Bank v. Central Bank*, 1 Ga. 418 (1846). Where there is no treasurer, the general manager or a director may sign the corporate name to negotiable paper for collection. *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561 (1891). Where the power to indorse notes is given by the by-laws to the president and vice-president, a general manager does not have that power, although he has drawn checks and previously indorsed two notes, but without the knowledge of the board of directors. *Davis v. Rockingham Investment Co.*, 89 Va. 290 (1892). The general manager of a corporation organized to buy and sell products has no power to have it do business gratuitously as an accommodation to a third party, the directors never having authorized the same. *Clark, etc. Co. v. Parker, etc. Co.*, 131 Mich. 139 (1902).

2 *McKieran v. Lenzen*, 56 Cal. 61 (1880); *Seeley v. San José*, 59 Cal. 22 (1881).

3 *Boynton v. Lynn, etc. Co.*, 124 Mass. 197 (1878). The president and general manager has no power to modify a lease under seal given by the corporation. *Granite Bldg. Corp. v. Greene*, 25 R. I. 586 (1904).

4 *Laird v. Michigan, etc. Co.*, 116 N. W. Rep. 534 (Mich. 1908).

5 *Bates v. Keith, etc. Co.*, 48 Mass. 224 (1843).

6 *Hascall v. Life, etc. Assoc.*, 5 Hun, 151 (1875); *aff'd*, 66 N. Y. 616.

7 The general agent and treasurer may borrow money and give a chattel

a mining company has no power to grant a permit to others to mine on the corporate property.¹ A gas company cannot be held liable for letters written by its general manager for publication attacking a former general manager, unless it be shown that such letters were authorized by the corporation itself. A general manager has no such inherent authority.² But where the president and manager and attorney of the company illegally cause the arrest of an employee for embezzling corporate funds, the corporation may be held liable for malicious prosecution.³ A newspaper corporation may be liable on the contract of its managing editor chartering a boat to collect war news, and agreeing to pay the value of the boat in case it is lost.⁴ A general manager or general agent has power at common law to direct and contract in regard to the usual running business of the corporation.⁵ A general manager has power to borrow money to meet corporate bills in due course of business.⁶ A general man-

mortgage as security. *Fay v. Noble*, 66 Mass. 1 (1853). The general manager has no power to mortgage the property. *First Nat. Bank v. Kirkby*, 43 Fla. 376 (1901). The superintendent of a mine cannot borrow money for the company. *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531 (1872). Where a superintendent borrows money for himself, giving a lien on corporate property as security, the parties loaning the money with knowledge of these facts cannot hold the company liable. *Planters', etc. Co. v. Olmstead*, 78 Ga. 586 (1887). The well considered case of *Whitwell v. Warner*, 20 Vt. 425 (1848), holds that the general manager cannot give a lien to secure the price of goods which he purchases; but it is held that if the company uses the goods, even without knowledge of the lien, the vendors may pursue the goods or the proceeds realized therefrom. In *Leonard v. Burlington, etc. Assoc.*, 55 Iowa, 594 (1881), it is held that he may borrow money, and the company is liable if it has used the money. A superintendent's mortgage was upheld in *Poole v. West, etc. Assoc.*, 30 Fed. Rep. 513 (1887).

¹ *Integrity, etc. Co. v. Moon*, 109 S. W. Rep. 1057 (Mo. 1908).

² *Washington Gas L. Co. v. Lansden*, 172 U. S. 534 (1899). A libelous statement published by the manager of a manufacturing company in connection with its business renders the company liable. *Pattison v. Gulf, etc. Co.*, 116 La. 963 (1906). Even though the general manager prevents the secretary of a corporation performing his duties, yet the secretary cannot collect his salary unless he shows that the corporation ratified the acts of its manager. *Roberts v. Stanton Co.*, 94 Pac. Rep. 647 (Wash. 1908).

³ *Schwarting v. Van Wie, etc. Co.*, 69 N. Y. App. Div. 282 (1902). A general superintendent who causes the arrest of a person to whom stolen goods have been sold, for which goods the corporation had offered a reward, does not thereby render the corporation liable for false imprisonment. *Lubliner v. Tiffany & Co.*, 54 N. Y. App. Div. 326 (1900).

⁴ *Sun, etc. Assoc. v. Moore*, 183 U. S. 642 (1902).

⁵ *Kansas City v. Cullinan*, 68 Pac. Rep. 1099 (Kan. 1902).

⁶ *Rosemond v. Northwestern, etc. Co.*, 62 Minn. 374 (1895). Even though a manager has no power to borrow money for the company, yet if he does so and the company uses

ager of a commercial company has no power to sell its real estate.¹ Neither the president, general manager, nor agent of a land company has power to dedicate a part of its land for a street.² The president and general manager of an insolvent corporation has no power to give a preference;³ nor can he transfer all its assets to one creditor in payment of his claim, even though the by-laws gave him entire charge of the business, subject to the approval of the board of directors.⁴ A transfer of a lease of property by the general manager who has exercised all the powers of the company is valid, even though there is no vote of the stockholders, where such lease does not constitute all the assets of the corporation and the transaction was fair in itself.⁵ A general manager may give a mortgage where he has the power to sell the property and carry on the entire business.⁶ Where the duties and powers of a general manager are not defined they may be proved by parol evidence.⁷

It has been held that he may waive demand and notice of a note indorsed by the company;⁸ may also employ an attorney;⁹ may

it, the company must repay it. *Topeka, etc. Co. v. March*, 10 Kan. App. 40 (1900).

1 *Calloway v. Stobart, etc. Co.*, 35 Can. S. C. Rep. 301 (1904). A vice-president and general manager of a land company has no power to sell its land. *Hurlbut v. Gainor*, 103 S. W. Rep. 409 (Tex. 1907).

2 *Town of West Point v. Blank*, 56 S. E. Rep. 802 (Va. 1907).

3 *Dooley v. Pease*, 79 Fed. Rep. 860 (1897). The general manager, secretary and treasurer may agree that judgment creditors may sell certain corporate property and apply the proceeds to their debts. *Lewiston, etc. Co. v. Garvey*, 89 Pac. Rep. 940 (Idaho, 1907).

4 *Hadden v. Linville*, 86 Md. 210 (1897). A general manager of an insolvent corporation has no power to turn over all the property to one creditor as a preference. *Hadden v. Dooley*, 92 Fed. Rep. 274 (1899). Where the stockholders do not hold meetings, and allow a person to manage the corporation, an assignment by him for the benefit of its creditors will be upheld, and a transfer of all the assets to a person in trust to

sell and pay the debts is such an assignment and is not a mortgage. *Conely v. Collins*, 119 Mich. 519 (1899). The general manager and treasurer has no power to turn over the whole property to a corporate creditor, even though he ran all the business of the company. *First Nat. Bank, etc. v. Asheville, etc. Co.*, 116 N. C. 827 (1895). The power of a general manager to give preferences cannot be questioned by other creditors. *Beaman v. Stewart*, 19 Colo. App. 226 (1903).

5 *Pennsylvania, etc. Co. v. Pure-Oil Co.*, 195 Pa. St. 388 (1900).

6 *Thayer v. Nehalem Mill Co.*, 31 Oreg. 437 (1897).

7 *Clarke v. Lexington Stove-works*, 72 S. W. Rep. 286 (Ky. 1903).

8 *Whitney v. South, etc. Co.*, 39 Me. 316 (1855).

9 *St. Louis, etc. R. R. v. Grove*, 39 Kan. 731 (1888); *Frost v. Domestic, etc. Co.*, 133 Mass. 563 (1882); *Southgate v. Atlantic, etc. R. R.*, 61 Mo. 89 (1875). A general manager may employ an attorney. *Gulf, etc. Ry. v. James*, 73 Tex. 12 (1889). The general manager may execute an appeal bond. *Sarmiento v. Davis, etc. Co.*,

render the company liable for overpayment of a check by mistake of the bank;¹ may contract for the use of a patent;² may render the company liable for an illegal use of the word "patented";³ and may enter into various contracts which pertain to the regular course of the business.⁴

105 Mich. 300 (1895). A manager cannot engage an employee for a long period of time, but may engage an attorney for one year. *Reupke v. D. H. Stuhr, etc. Co.*, 126 Iowa, 632 (1905). The corporation may be liable for the action of the general manager in levying an attachment. *Carey v. Wolff & Co.*, 63 Atl. Rep. 270 (N. J. 1906).

¹ *Kansas, etc. Co. v. Central Bank*, 34 Kan. 635 (1886).

² *Eureka Co. v. Bailey Co.*, 11 Wall. 488 (1870).

³ *Tompkins v. Butterfield*, 25 Fed. Rep. 556 (1885).

⁴ Where a grower of beets, who has agreed to deliver a certain quantity to a sugar company, is about to abandon his crop, the general manager of the latter has power to agree that the company will indemnify him against loss. *Constantine v. Kalamazoo, etc. Co.*, 132 Mich. 480 (1903). A general manager of a corporation owning saloons may sell one of them. *Freyberg v. Los Angeles, etc. Co.*, 88 Pac. Rep. 378 (Cal. 1906). Where the directors know that a *de facto* manager has employed a person and they do not object, the corporation is liable for his services. *Brown v. Crown, etc. Co.*, 150 Cal. 376 (1907). A by-law that no contract shall be made except on a resolution of the directors, does not invalidate the employment of an engineer by the general manager of a mining company, the engineer having no knowledge of the by-law. *Golden Age, etc. Co. v. Langridge*, 88 Pac. Rep. 1070 (Col. 1907). The general manager of a railroad has power to make a contract relative to repairing Pullman cars which are injured by accident. *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700 (1905).

The general manager of a mining company has power to buy ordinary articles used in its operation. *Buffalo, etc. Co. v. Troendle*, 99 S. W. Rep. 622 (Ky. 1907). The general manager of a trading corporation is presumed to have authority to sell cotton, that being a part of the corporate business. *Walnut, etc. Co. v. Cohn*, 79 Ark. 338 (1906). A general manager of a railroad may offer a reward for the conviction of persons maliciously placing obstructions on the tracks. *Arkansas, etc. Ry. v. Dickinson*, 78 Ark. 483 (1906). The managing agent of a real estate corporation may bind it on business within the scope of the real estate business. *Harvey v. Sparks Bros.*, 88 Pac. Rep. 1108 (Wash. 1907). The general manager of a land company may employ a person to purchase land for the company. *Chilcott v. Washington, etc. Co.*, 88 Pac. Rep. 113 (Wash. 1906). A general agent may authorize another agent to make such settlement of a claim as he deems best. *Russell & Co. v. Stevenson*, 34 Wash. 166 (1904). A representation by the general manager of an irrigation company that the company had a water right at a certain place, may render the company liable if it was false. *Cleghon v. Barstow, etc. Co.*, 93 S. W. Rep. 1020 (Tex. 1906). The general manager of a livestock company has implied power to sell a part of such stock. *Hamm v. Drew*, 83 Tex. 77 (1892). A manager of a warehouse corporation may issue warehouse receipts to himself for articles properly stored by him in the warehouse. *Riley v. Loma, etc. Co.*, 1 Cal. App. 488 (1905). A manager is one who has the general direction and control of the corporate affairs.

Anything out of the usual course of business, however, must be authorized by the board of directors. The general manager does

He may sign an appeal bond. *American Inv. Co. v. Cable Co.*, 60 S. E. Rep. 1037 (Ga. 1908). The president, treasurer, and general manager of a plumbing company may employ a person to repair certain buildings on which the company has an option. *Paphro, etc. Co. v. Baty*, 69 N. H. 453 (1899). A general manager may buy land which is necessary or useful to the corporation in conducting its business. *New, etc. Co. v. Shuck*, 50 S. W. Rep. 681 (Ky. 1899). A general manager may employ a superintendent. *Sandberg v. Victor, etc. Co.*, 24 Utah, 1 (1901). Where a firm is turned into a corporation the latter may assume a contract of the former, for the purchase of lumber, by adopting it through its manager. *Pratt v. Oshkosh Match Co.*, 89 Wis. 406 (1895). The president and general manager may agree that the stage company will be co-owner of a stage line with another. *Calvert v. Idaho Stage Co.*, 25 Oreg. 412 (1894). A local manager of a branch store is a general manager to the extent of having power to take a lease of a store for five years. *Phillips, etc. Co. v. Whitney*, 109 Ala. 645 (1896). The general agent of a cattle-feeding company has power to buy feed. *Powder River, etc. Co. v. Lamb*, 38 Neb. 339 (1893). Although the company owes a bank money secured by mortgage, the manager and secretary may deposit the company's money and agree that it may be drawn out free from the mortgage. *Merchants', etc. Bank v. Hervey Plow Co.*, 45 La. Ann. 1214 (1893). Where the general manager of a corporation owning a mine and reduction mill causes laborers to work in the company's mine and mill, and also to open a mine of his own, all without the knowledge of the company or the employees, who supposed they were working for the com-

pany, the company is liable for their wages. *Oro, etc. Co. v. Kaiser*, 4 Colo. App. 219 (1893). A general manager authorized to pay commissions on receipts from sales may agree to pay commissions on sales irrespective of the receipts. *American, etc. Co. v. Maurer*, 10 Atl. Rep. 762 (Pa. 1887). A contract for a corporation by its general superintendent to give right of way to another railroad may become binding by acquiescence. *Alabama, etc. R. R. v. South, etc. R. R.*, 84 Ala. 570 (1887). As to insurance agents, see *Insurance Co. v. McCain*, 96 U. S. 84 (1877). A treasurer of a corporation not authorized to sell any part of its property, but who was its sole managing agent, may pass a valid title of personal property to a vendee as against the claim of one who levied upon it under judgment. *Phillips v. Campbell*, 43 N. Y. 271 (1870). A general manager has implied power to make a reasonable time contract of employment. *Stahlberger v. New Hartford Leather Co.*, 92 Hun, 245 (1895). Long acquiescence in a person's assuming to act for the company is the same as expressly authorizing his action. *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561 (1891). The president and general manager of a lumber company may engage a lawyer for the season. *Ceeder v. Loud, etc. Co.*, 86 Mich. 541 (1891). Where the president carries on the negotiations in regard to a contract, and also the modifications of that contract, and is the manager and in control, and as manager assents to the modifications, the company is bound thereby. *Nichols v. Scranton Steel Co.*, 137 N. Y. 471 (1893). Where the by-laws give the general manager power to sell, he has power to sell the product for a certain length of time in the future. *Robert, etc. Min. Co. v. Omaha, etc. Co.*, 16 Colo.

not displace them, and a person dealing with the corporation is bound to take notice of that fact.¹ Where the president is also

118 (1891). For a discussion of what constitutes the appointment of a resident general agent by a corporation, see *Rathbun v. Snow*, 123 N. Y. 343 (1890). Where a superintendent negotiates sales and the president fixes the price, the corporation is responsible for the superintendent's representations. *Decker v. Gutta Percha, etc. Co.*, 61 Hun, 516 (1891).

1A surety bond for the fidelity of an officer, if obtained on representations of the general manager, is not enforceable if those representations were untrue. *Issaquah, etc. Co. v. United States, etc. Co.*, 126 Fed. Rep. 89 (1903). A general manager of a lumber company has no power to agree that the company will build a truss bridge across an irrigation ditch to support a flume of the lumber company. *Centerville, etc. Co. v. Sanger, etc. Co.*, 140 Cal. 385 (1903). The managing agent of an insurance company, to which company a note is endorsed, has no power to state to the maker that the company will look to the endorser only. *Muller v. Swanton*, 140 Cal. 249 (1903). Where the by-laws state that the superintendent shall be selected by the directors, a superintendent appointed by the manager cannot collect on a contract, and even if the board has practically ratified the appointment, the company is liable only for what the services were worth, the directors having knowledge of the special contract. *Colpe v. Jubilee, etc. Co.*, 2 Cal. App. 393 (1906). A general manager of a stockyards company has no power to sign a petition to pave a street and thus charge the corporation with a portion of the expense. *Trephagen v. City of South Omaha*, 69 Neb. 577 (1903). A managing director of a saloon corporation has no power to buy another saloon. *Manhattan, etc. Co. v. Magnus & Co.*, 94 S. W. Rep.

1117 (Tex. 1906). A general manager of an irrigation company has no inherent power to sign contracts for furnishing water for irrigation. *Tres, etc. Co. v. Eidman*, 93 S. W. Rep. 698 (Tex. 1906). It may be for a jury to decide whether a local superintendent of a foreign corporation, who is practically general manager of a large business, has power to purchase a lighting plant costing \$300. *Grand Rapids, etc. Co. v. Walsh, etc. Co.*, 142 Mich. 4 (1905). The treasurer and general manager has no power to agree to give to the vice-president a commission on purchases and sales by the corporation, but this does not prevent his recovering reasonable compensation therefor. *Waters v. American, etc. Co.*, 102 Md. 212 (1905). A general manager may employ labor. *Forked, etc. Co. v. Shipley*, 80 S. W. Rep. 476 (Ky. 1904). A general manager has no power to engage an employee for five years. *Camacho v. Hamilton, etc. Co.*, 2 N. Y. App. Div. 369 (1896). An executive officer having power to employ persons does not thereby have power to employ a person for life. *Carney v. New York L. Ins. Co.*, 19 N. Y. App. Div. 160 (1897); *aff'd*, 162 N. Y. 453. The managing agent may employ a person, but not for a long time in the future. *Smith v. Co-operative, etc. Assoc.*, 12 Daly, 304 (1884). He cannot employ a broker. *Allegheny, etc. Co., v. Moore*, 95 Pa. St. 412 (1880). The general manager of a mining company has no inherent power to contract for machinery. *Victoria, etc. Co. v. Fraser*, 2 Colo. App. 14 (1892). The president and manager of a milling company cannot purchase flour. *Getty v. Barnes, etc. Co.*, 40 Kan. 281 (1888). The general manager of a mining corporation has no inherent authority to grant a right of way for a tramway. *Butte, etc. Min. Co. v. Montana, etc.*

general manager and has entire charge of the business of a corporation, he may bind it by his contract to pay for promoting expenses,¹ and where the president is general manager and is authorized to carry on the business, he may agree to pay a salary as well as a commission on sales made.² The by-laws may give to the general manager power to carry on the business of the company.³ Even though a by-law confers upon the general manager, among other powers, the "general and exclusive charge and management of the business of the company," the by-law is not void as a whole, and until the general manager illegally exercises power the courts will not interfere.⁴ In a suit against the corporation for breach of a general manager's contract of employment, the by-laws defining his authority may be introduced in evidence.⁵ But a purchaser of goods from the manager of sales of a manufacturing company is not bound to know of the restrictions on his authority by the by-laws.⁶ If the general manager has been allowed to exercise unusual powers for some time the corporation will be bound by a further act by him of the same kind.⁷ Although a general manager exceeds his authority in agree-

Co., 21 Mont. 539 (1898). A general manager has no power to deed the company's real estate, and a purchaser other than a *bona fide* one from the vendee cannot retain the title. Allowance, however, will be made for improvements. Especially is the deed invalid where the grantee was a director. Schetter v. Southern, etc. Co., 19 Oreg. 192 (1890).

1 Oakes v. Cattaraugus Water Co., 143 N. Y. 430 (1894).

2 Pettibone v. Lake View, etc. Co., 134 Cal. 227 (1901). The managing director of a corporation engaged in the selling of merchandise may agree to pay a broker a commission on the sale of real estate, where the sale was authorized by the board of directors. Henderson v. Raymond Syndicate, 183 Mass. 443 (1903).

3 Burden v. Burden, 8 N. Y. App. Div. 160 (1896); *aff'd*, 159 N. Y. 287 (1889). A general manager authorized to "take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest," may appoint a local agent and empower him to hire a barge. Ten-

nessee River Transp. Co. v. Kavanaugh, 101 Ala. 1 (1893).

4 Burden v. Burden, 159 N. Y. 287 (1889).

5 Perry v. Noonan Furniture Co., 95 Pac. Rep. 1128 (Cal. 1908).

6 Barber v. Stromberg, etc. Co., 116 N. W. Rep. 157 (Neb. 1908).

7 Where the general manager and president has been allowed to conduct the business, a corporate note given by him is valid, especially where the corporation received the proceeds. McKinley v. Mineral, etc. Co., 89 Pac. Rep. 495 (Wash. 1907). A contract by the general manager to pay commissions is binding when the directors knew of it and had authorized practically a similar contract. Longmont, etc. Co. v. Aldridge, 36 Col. 93 (1906). A contract and deed made by the general manager and president is binding on the company where for several years the officers and stockholders, with full knowledge, acquiesced in the same and the corporation has received the benefit thereof. West, etc. Co. v. Novelty, etc. Co., 31 Wash. 435 (1903). A railroad president who by by-law had general su-

ing to an arbitration, yet, if the company does not repudiate his agreement promptly, it is bound.¹ A general manager occupies a fiduciary relation towards the corporation, and is held to strict observance of good faith.² It is a criminal offense in England for any

pervision of the company, and who managed the business, may execute construction contracts with the knowledge of the directors and acquiescence of the company itself. *Johnson & Sons v. Des Moines, etc. Ry.*, 129 Iowa, 281 (1906). A chattel mortgage executed by the manager may be binding on the company, even though not authorized by the board of directors, where the board of directors had been inactive for a long time and the shareholders acquiesced in the manager doing all the business without action of the board of directors. *Garmany v. Lawton*, 124 Ga. 876 (1906). Although a general manager extends a note without authority, yet if the company continues to pay interest it ratifies his act. *Lyndon, etc. Bank v. International Co.*, 78 Vt. 169 (1905). A secretary who is allowed to manage the business the same as a general manager may bind it by an ordinary contract in the line of the business. *Betts v. Southern, etc.*, 144 Cal. 402 (1904). The general manager who has dealt with the public in selling the product may bind it by a form of contract, which differs from the company's printed form. *Alston v. Broadus Cotton Mill*, 44 S. Rep. 654 (Ala. 1907). Where a manager has acted for two years in selling the product, a corporation cannot then object. *Mayville, etc. Co. v. Lake Arthur, etc. Co.*, 44 S. Rep. 260 (La. 1907).

¹ *Central Trust Co. v. Ashville Land Co.*, 72 Fed. Rep. 361 (1896). Where a corporation allows its manager to largely control its business, it is liable on a contract made by him in the name of the company and in the line of its business. *Carrigan v. Port Crescent Imp. Co.*, 6 Wash. 590 (1893). So also as to its president and sec-

retary. *Duggan v. Pacific Boom Co.*, 6 Wash. 593 (1893). Where a party who buys a mine does not object to a lease thereof made by the superintendent without authority, but on the contrary allows the lessee to proceed and receives the rent, he thereby ratifies the lease. *Bicknell v. Austin Min. Co.*, 62 Fed. Rep. 432 (1894). A stockholder may defend against a statutory liability on the ground that the debt has been taken over by a trust company by the manager of the latter and that his acts have not been repudiated. *First Nat. Bank v. Littlefield*, 67 Atl. Rep. 594 (R. I. 1907). The general manager of a mining company has no power to pay a lessee a sum of money to cancel the lease and his action is not ratified by the directors if they act without full knowledge of the transaction. *Conqueror, etc. Co. v. Ashton*, 90 Pac. Rep. 1124 (Col. 1907). The general manager of a railroad may bind it by a sale of land where the corporation took the money. *West v. Washington, etc. R. R.*, 90 Pac. Rep. 666 (Ore. 1907). Where a manager employs a real estate agent to sell some of its property, and the company completes the sale, it is liable for the agent's commissions. *Dillard v. Olalla Min. Co.*, 94 Pac. Rep. 966 (Ore. 1908).

² A general manager has no power to agree that the corporation will assist with its funds a private enterprise in which he is interested. *Leigh v. American, etc. Co.*, 205 Ill. 147 (1903). The general manager cannot render the corporation liable for his own debts. *Barnhardt v. Star Mills*, 123 N. C. 428 (1898). Where the manager, in order to continue a profitable contract which he has with the corporation, keeps up a deadlock in the board of directors, due to there being a va-

director, manager, or officer of a corporation to publish false statements with intent to induce persons to purchase stock. Under this statute a person is liable as a manager for such acts, if he acted as manager, even though he was never appointed.¹ A manager is an "officer" who may verify a complaint.² Where a general manager has been discharged, whether rightfully or wrongfully, he cannot act further and a mandatory injunction is not the proper remedy to obtain the company's books and papers from him.³

A managing *director* may, by a by-law, be given the powers of the board. An outside party need not inquire as to whether his appointment was validly made, and may assume that such director has the powers which the board might delegate to him.⁴ A "business manager" is not known in the law, and hence a note to which he affixes the name of the corporation is not enforceable against it, unless proof is given of his authority.⁵ A construction company is liable for the failure of its general foreman to notify an employee of the danger connected with a certain piece of work.⁶ A "managing agent" may be one who has charge of a department of the business.⁷ A "general agent" of an insurance company is not an officer within the

cancy, he is bound to prefer the interests of the company or else to terminate his employment and rely on his contract. *Kane v. Schuykill*, 199 Pa. St. 198 (1901). Where the general manager attempts to obtain proxies for the purpose of ousting the existing management, and uses methods calculated to deceive the persons giving the proxies, he is guilty of a breach of trust and his contract with the company may be canceled. *Townsley v. Bankers', etc. Co.*, 56 N. Y. App. Div. 232 (1900). Where a general manager transfers corporate property in payment of his personal debt, a purchaser from the vendee is not protected unless he shows that he was not aware of the lack of authority of the manager. *Grooms v. Neff, etc. Co.*, 79 Ark. 401 (1906). Where a director, who is also general manager, presents a claim for his services to the board of directors, he is not to be counted in making up the quorum or in taking the vote. *Paxton v. Heron*, 92 Pac. Rep. 15 (Col. 1907).

¹ *Rex v. Lawson*, [1905] K. B. 541.

² *Stockton, etc. Co. v. Blodget*, 3 Cal. App. 94 (1906).

³ *Maine, etc. Co. v. Alexander*, 115 N. Y. App. Div. 109 (1906). A discharged general manager cannot maintain a bill to be reinstated and to remove the president. *Dimmick v. Stokes*, 43 S. Rep. 854 (Ala. 1907).

⁴ *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93. Even though the by-laws give a managing director wide powers as to the commercial business of the company, this does not give him any powers as to the transfer of stock. *George Whitechurch Ltd. v. Cavanagh*, [1902] A. C. 117. *Cf. Orvis v. Warner, etc. Co.*, 75 N. Y. App. Div. 463 (1902). A managing director may by long usage have sufficient authority to sell property owned by the corporation. *Walker v. Detroit, etc. Ry.*, 47 Mich. 338 (1882).

⁵ *Topeka, etc. Co. v. Remington, etc. Co.*, 61 Kan. 1 (1899).

⁶ *Connolly v. Hall, etc. Co.*, 192 N. Y. 182 (1908).

⁷ *Federal, etc. Co. v. Reeves*, 73 Kan. 107 (1906).

meaning of a provision of a contract that its terms shall not be varied except by an officer.¹ A person who is put in charge of corporate business by the stockholders is not a trustee, even though he is called a trustee.²

It has been held that a superintendent has not the powers of a general manager.³ The superintendent of a mining company has no power to employ a physician to attend to an injured employee except in an emergency involving life or limb.⁴ The superintendent may, of course, be given express power to contract.⁵ If the com-

¹ *Vardeman v. Penn. etc. Co.*, 125 Ga. 117 (1906).

² *Bank of Visalia v. Dillonwood, etc. Co.*, 148 Cal. 18 (1905).

³ A superintendent has no power to agree to continue the employment of a person for life. *Smith v. Crum, etc. Co.*, 208 Pa. St. 462 (1904). A superintendent or general superintendent does not render a company liable for malicious prosecution by reason of a suit instituted by him. *Canon v. Sharon, etc. Ry.*, 216 Pa. St. 408 (1907). A superintendent of a manufacturing company cannot employ medical treatment for one of the employees at the expense of the company. *King v. Forbes, etc. Co.*, 183 Mass. 301 (1903). A superintendent or other managing official of a lumber company has power to contract for the hauling of logs. *Minnesota, etc. Co. v. Hobbs, etc.*, 122 Ga. 20 (1905). A superintendent may employ experts to investigate and testify in behalf of the corporation in certain litigation, especially where the officers ratified his acts. *Lincoln, etc. Co. v. Williams*, 37 Col. 193 (1906). A manager or general agent has power to make a contract in the ordinary course of business. *Empire, etc. Co. v. Hench*, 67 Atl. Rep. 995 (Pa. 1907). A district manager of a manufacturing company with general supervision over a particular branch of its business has the powers of a general agent in that branch. *American, etc. Co. v. Alexandria, etc. Co.*, 67 Atl. Rep. 861 (Pa. 1907). The superintendent has no power to attach the corporate seal.

Florida Ry. v. Thomas, 45 S. Rep. 720 (Fla. 1908). *Adriance v. Roome*, 52 Barb. 399 (1868), holding that the superintendent cannot borrow money and agree to make payment in iron. Where it is customary for a railroad so to do, the superintendent may bind the company by his agreement that the company will give a life job to a person who has been injured by the railroad, and it is for the jury to say whether such promise was made. *Jackson v. Illinois, etc. R. R.*, 76 Miss. 607 (1899). Where the president has power to execute a bill of sale, but instead of doing so allows the superintendent to execute it, it may be a question for a jury as to whether the sale was binding on the corporation. *Trent v. Sherlock*, 26 Mont. 85 (1901), modifying 24 Mont. 255. The superintendent of a mining company has no power to pledge the company's property to secure a debt. *Trent v. Sherlock*, 24 Mont. 255 (1900); s. c., 26 Mont. 85. The authority of a corporate agent to manage the affairs of a company cannot be proved by a question to a witness in the absence of the vote of the directors or proof that the resolution cannot be found. *St. Regis, etc. Co. v. Hotchkiss*, 45 Atl. Rep. 11 (Conn. 1900). A superintendent has no inherent power to indorse checks of the company. *Jackson, etc. Co. v. Commercial Nat. Bank*, 199 Ill. 151 (1902).

⁴ *Cushman v. Cloverland, etc. Co.*, 84 N. E. Rep. 759 (Ind. 1908).

⁵ Where the by-laws give the president and superintendent power to make a contract, they have power to

pany ratifies the contract or accepts its benefits the contract becomes binding.¹ The testimony of a person that he is the manager of a corporation is not sufficient proof of that fact.² A railroad superintendent may employ a physician in cases of accident,³ and may offer rewards for the conviction of persons obstructing the tracks.⁴ A general freight agent may agree to give rebates.⁵

release that contract. Directors knowing of the release must act promptly if they intend to question its validity. *Indianapolis, etc. Co. v. St. Louis, etc. R. R.*, 26 Fed. Rep. 140 (1886); *aff'd*, 120 U. S. 256. A general power authorizes the purchase of a house and the giving of a mortgage. *Shaver v. Bear, etc. Co.*, 10 Cal. 396 (1858).

¹ *Kickland v. Menasha, etc. Co.*, 68 Wis. 34 (1887), where the superintendent and a director took a deed and agreed to pay an extra price; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841), where he gave a mortgage and the company received the money; *Lyndeborough, etc. Co. v. Massachusetts, etc. Co.*, 111 Mass. 315 (1873), where he bought glass and the directors acquiesced; *Seeley v. San José, etc. Co.*, 59 Cal. 22 (1881), where he and the president gave a note; *Goodwin v. Union, etc. Co.*, 34 N. H. 378 (1857), where he and the president employed workmen; *Starr v. Gregory, etc. Co.*, 6 Mont. 485 (1887), where he accepted a mill; *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 565 (1875); *affirmed*, 96 U. S. 640, where a loan of the bank's money was made by him and the president. Ratification cannot be by the same persons who assume power to contract. *Tracy v. Guthrie, etc. Soc.*, 47 Iowa, 27 (1877). A superintendent, authorized to sell a steamboat, has authority to pay the usual commissions, especially

where the sale is approved by the board of directors, and by the general manager who knew about the commissions. *Hartford, etc. Co. v. Plymmer*, 120 Fed. Rep. 624 (1903).

² *Castner v. Rinne*, 31 Colo. 256 (1903). The mere statement from a person that he is an officer of the company does not sustain a contract made by him for the company. *Interstate, etc. Co. v. Welsh*, 43 S. Rep. 274 (La. 1907).

³ *Pacific R. R. v. Thomas*, 19 Kan. 257 (1877); *Toledo, etc. Ry. v. Rodrigues*, 47 Ill. 188 (1868); *Atlantic, etc. R. R. v. Reiser*, 18 Kan. 458 (1877). *Contra*, *Stephenson v. New York, etc. R. R.*, 2 Duer, 341 (1853); *Shriver v. Stevens*, 12 Pa. St. 258 (1849), holding that the agent of a stage line cannot. A yardmaster cannot employ a physician for the company. *Marquette, etc. R. R. v. Taft*, 28 Mich. 289 (1873). Nor an engineer. *Cooper v. New York, etc. R. R.*, 6 Hun, 276 (1875). Nor a station agent. *Tucker v. St. Louis, etc. R. R.*, 54 Mo. 177 (1873); *Cox v. Midland, etc. R. R.*, 3 Exch. 268 (1849). Unless the superintendent ratifies it by silence upon being notified thereof. *Cairo, etc. R. R. v. Mahoney*, 82 Ill. 73 (1876); *Toledo, etc. R. R. v. Prince*, 50 Ill. 26 (1869). The general manager cannot render the company liable for medical services rendered on an occasion of a private brawl. *Dale v. Donaldson*

⁴ *Central, etc. Co. v. Cheatham*, 85 Ala. 292 (1888).

⁵ *Kansas Pac. Ry. v. Bayles*, 19 Colo. 348 (1894). Even though a railroad agent has no power to advertise, yet if he does so and the bills are sub-

mitted to the general passenger agent, who has power and does not object, the company may be bound. *McMahan v. Canadian, etc. Ry.*, 40 Ore. 148 (1901).

§ 720. *Subordinate agents — Their power to contract.* — It is a general rule that a corporate agent, like the agent of an individual, can make only such contracts as he is expressly authorized to make, or such contracts as pertain to the duties which the corporation imposes upon him. It is a rule, however, that the corporation may ratify and confirm a contract which an unauthorized agent has made in its name, and this ratification may be by express vote of the directors, or it may be implied by an acceptance of the benefits to the corporation. The subordinate agents of a corporation may be of great variety: tellers, engineers, stewards, station agents, local agents, freight agents, roadmasters, clerks, attorneys, and miscellaneous agents. Various decisions on their powers are given in the notes.¹ These decisions show that a corporation is bound by its

Lumber Co., 48 Ark. 188 (1887); Wood, Railw. Law, pp. 439-444. The general manager of a mining company cannot bind the company by employing a doctor for an injured employee. *Spelman v. Gold, etc. Co.*, 26 Mont. 76 (1901). The general manager of a coal company has no power to employ a physician in case of an accident. *New, etc. Co. v. Shaley*, 25 Ind. App. 282 (1900). A general manager has power to render the company liable for hospital services rendered to a sick employee. *Mt. Wilson, etc. Co. v. Burbidge*, 11 Colo. App. 487 (1898).

¹ An inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock must be made of officers having authority to speak for the corporation. *Browning v. Hinkle*, 48 Minn. 544 (1892). The financial agent may give notes in accordance with a corporate contract. *Case Mfg. Co. v. Soxman*, 138 U. S. 431 (1891); *Wilson v. Kings, etc. Ry.*, 114 N. Y. 487 (1889). An agent to sell and collect has no authority to overdraw the company's account in the bank. *Merchants' Nat. Bank v. Nichols, etc. Co.*, 223 Ill. 41 (1906). A salesman has no authority to endorse checks and a delay of two years in complaining thereof is not a ratification. *Blum, etc. v. Whipple*, 80 N. E. Rep. 501 (Mass. 1907). Even though an appraiser appointed by the

board of directors substitutes some one else in his place, yet if the officers acquiesce therein the corporation is bound. *City of Fayetteville v. Fayetteville, etc. Co.*, 135 Fed. Rep. 400 (1905). A person authorized to attend to the insurance of a corporation cannot delegate his power to another unless the corporation expressly and impliedly consents thereto. *Insurance Co. etc. v. Wisconsin, etc. Ry.*, 134 Fed. Rep. 794 (1905). Where the attorney of the company negotiates its contracts, and questions as to whether contracts should be taken are referred to him for decision the company is bound by a contract made by him. *Kent v. Addicks*, 126 Fed. Rep. 112 (1903). Where the general counsel has general supervision of the litigation of the company his statement that a certain person is authorized to accept service is binding on the company. *Taylor, etc. Co. v. Adams Exp. Co.*, 71 N. J. L. 523 (1904). A purchasing agent of a railroad company may render the company liable to a bank for advances to sellers if such has been the course of business. *Batavian Bank v. Minneapolis, etc. Ry.*, 123 Wis. 389 (1904).

A corporation is not liable on a note to which its name has been endorsed by its salesman without authority, even though it received the money, it appearing that it knew noth-

agents' acts only when a partnership would be bound under similar circumstances. There are no arbitrary rules as to the mode of

ing about the endorsement or note until it was presented for payment, and there had been no previous transaction of that nature. *Wickersham, etc. Co. v. Nicholas*, 2 Cal. App. 18 (1905). Even though a corporate agent is authorized to lease a dredge, and is told not to lease it unless it is insured, the lessor is not bound to know of such limitation of his authority. *California, etc. Co. v. Yuma, etc. Co.*, 84 Pac. Rep. 88 (Ariz. 1906). A local agent of a foreign corporation has no power to turn over a bill of lading to one of its creditors. *Jones v. North Pacific, etc. Co.*, 42 Wash. 332 (1906). A person dealing with an agent of the corporation is bound at his peril to ascertain the extent of the agent's authority and is chargeable with knowledge thereof, and if the agent gives a warrant which he is not authorized to give, the secretary's ratification of the same is not binding on the company. *Reid v. Alaska, etc. Co.*, 47 Ore. 215 (1905). An agent authorized by a railroad to purchase land may agree to pay more therefor than is mentioned in the deed. *Windsor v. St. Paul, etc. Ry.*, 37 Wash. 156 (1905). An agent in charge of a mine may agree that the company will pay its just proportion of the cost of a drain, which is necessary. *Fisk, etc. Co. v. Reed*, 32 Colo. 506 (1903). The cashier and clerk of a lumber company cannot agree to give a customer a carload of lumber in case certain other lumber is not satisfactory. *Delta Lumber Co. v. Williams*, 73 Mich. 86 (1888). Where the assistant to the president of a railroad is sent to hasten bridge work and he increases the compensation of the contractor, it is assumed he had authority if the company does not promptly object. *Freygang v. Vera Cruz, etc. R. R.*, 154 Fed. Rep. 640 (1907). The local manager of a branch bank renders it liable for his embezzlement of depositor's funds

which he induces the depositor to give to him to pay a lien of the bank on the property. *Thompson v. Bell*, 26 Eng. L. & Eq. 536 (1854). The receiving teller of a savings bank has no power to bind the bank not to pay out money deposited in one name, except upon the order of three other persons. The bank is protected in paying on the check of a person in whose name the deposit is made. *Riley v. Albany Sav. Bank*, 36 Hun, 513 (1885); *aff'd*, 103 N. Y. 669. A railroad company is liable for a slander by one of its employees in regard to another employee made in the performance of duties, even though the corporation knew nothing about it. *Rivers v. Yazoo, etc. R. R.*, 43 S. Rep. 471 (Miss. 1907). If a corporation keeps and uses a part of goods purchased for it by an unauthorized agent, it is bound by the purchase. *Hayward, etc. Co. v. Cox*, 104 S. W. Rep. 403 (Tex. 1907). A telephone company is liable for hospital and doctor's bill in treating a lineman's injuries as requested by the foreman, but this liability is only during the emergency and not for long continued treatment. *Salter v. Nebraska, etc. Co.*, 112 N. W. Rep. 600 (Neb. 1907). A general counsel in connection with the president and superintendent has authority to employ local attorneys. *Dublin, etc. Ry. v. Akerman*, 59 S. E. Rep. 10 (Ga. 1907). An agent who is accustomed to and has been allowed to purchase for the company may bind it by his purchases. *Fitzgerald, etc. Co. v. Farmers', etc. Co.*, 59 S. E. Rep. 713 (Ga. 1907). A teller's certification of a check in bad faith does not bind the bank. *Mussey v. Eagle Bank*, 50 Mass. 306 (1845); unless it is in the hands of a *bona fide* indorsee. *Farmers', etc. Bank v. Butchers', etc. Bank*, 16 N. Y. 125 (1857); *Farmers', etc. Bank v. Butchers', etc. Bank*, 14 N. Y. 624 (1856). As to certification of check,

making a corporate contract. A contract may be inferred from corporate acts and customs without a vote or formal act.¹ It is not

see also *Meads v. Merchants' Bank*, 25 N. Y. 143 (1862); *Cooke v. State, etc. Bank*, 52 N. Y. 96 (1873); in the latter case the certification being by the cashier. Where a depositor sends deposits by the bank's book-keeper without the bank-book, the bank is not liable for the book-keeper's fraud. *Manhattan Co. v. Lydig*, 4 Johns. 377 (1809). A teller may receive a special deposit of valuables. *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82 (1880). It may be a question for the jury as to whether the foreman of the works of a foreign corporation may employ workmen on long time. *Tunison v. Detroit, etc. Co.*, 73 Mich. 452 (1889). Where a bank owning railroad bonds allows its agent to exchange them for stock in a reorganized company, it is bound. *Deposit Bank v. Barrett*, 13 S. W. Rep. 337 (Ky. 1890). A caterer may hold a club responsible for food, etc., furnished to its guests under the authorized contract of the house committee. *Deller v. Staten Island, etc. Club*, 9 N. Y. Supp. 876 (1890).

A corporation is not liable for the malice of its agent in publishing a libel, unless the corporation authorized the libel or ratified it or did something from which such authority

or ratification may be implied. *Warner v. Missouri, etc. Ry.*, 112 Fed. Rep. 114 (1901). A corporation is bound by its adoption or acquiescence in the acts of an unauthorized agent the same as an individual is. *German, etc. Bank v. First, etc. Bank*, 59 Neb. 7 (1899). An agent of a corporation may sign its name to a demand of payment of money due, and may serve the same without showing written authority to make such demand. It is sufficient that the company accepted and ratified his action. *Flaherty v. Atlantic, etc. Co.*, 58 N. J. Eq. 467 (1899). A collecting agent has no power to bind the corporation by assuming a mortgage on the property which he takes in payment of a debt. *Bristol Sav. Bank v. Judd*, 116 Iowa, 26 (1902). A corporation sued for a trespass cannot compel the plaintiff to specify what officers committed the trespass. *Commonwealth v. Nunn*, 67 Pac. Rep. 342 (Colo. 1902). The attorney of a railroad company has no power to agree that a person injured by the railroad will in settlement of his claim be employed for life by the railroad. *Nephew v. Michigan, etc. Ry.*, 128 Mich. 599 (1901). The general counsel of the corporation has no authority to file papers in another

¹ *Bank of Columbia v. Patterson*, 7 Cranch, 299, 306 (1813); *Randall v. Van Vechten*, 19 Johns. 60, 65 (1821); *Haight v. Sahler*, 30 Barb. 218 (1859); *Canal Bridge v. Gordon*, 18 Mass. 297 (1823); *Dunn v. St. Andrew's Ch.*, 14 Johns. 118 (1817); *Mendham v. Losey*, 2 N. J. L. 252 (1808); *Saddle River v. Colfax*, 6 N. J. L. 115 (1821); *Anti-pæda Bapt. Ch. v. Mulford*, 8 N. J. L. 182 (1825); *Powell v. Newburgh*, 19 Johns. 284 (1821); *Chestnut Hill Turnp. v. Rutter*, 4 Serg. & R. 6 (1818); *American Ins. Co. v. Oakley*, 9 Paige, 496 (1842); *Fister v. La Rue*,

15 Barb. 323 (1853), where a contract was inferred from the acts of the corporate officers; *Bulkley v. Derby Fishing Co.*, 2 Conn., 252 (1817); *Witte v. Derby Fishing Co.*, 2 Conn. 260 (1817); *Petrie v. Wright*, 6 Sm. & M. (Miss.) 647 (1846); *Lime Rock Bank v. Macomber*, 29 Me. 564 (1849); *Bank of Metropolis v. Gutschlick*, 14 Pet. 19 (1840) (contract inferred from acts of officers); *New York, etc. R. R. v. New York*, 1 Hill. 562, 587 (1858); *Wood, Railw. Law*, pp. 454-457.

necessary that such assent and acceptance be under seal or in writing or be spread upon the records.¹ The acceptance of the con-

state whereby the corporation is made a domestic corporation in that state. *Mutual, etc. Assoc. v. Thompson*, 125 N. C. 435 (1899). In South Dakota by statute a corporation is bound by an unauthorized contract of an agent where the corporation accepts the benefit thereof. *Dederick v. Ormsby, etc. Co.*, 12 S. Dak. 59 (1899).

The following decisions are concerning railroad agents: The engineer of a railroad company may have authority to modify a construction contract or enter into a new contract. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260 (1890). The civil engineer of a railroad cannot employ a station agent. *Willis v. Toledo, etc. Ry.*, 72 Mich. 160 (1888). The engineers of a railroad company cannot bind it to an agreement to pay the construction contractors extra pay. *Woodruff v. Rochester, etc. R. R.*, 108 N. Y. 39 (1888). The construction engineer of a railroad has no power to vary the construction contract. *Campbell v. Cincinnati Southern Ry.*, 6 S. W. Rep. 337 (Ky. 1888). A person whom the railroad holds out as the general freight agent of the company may bind it by his contracts relative to freight. *Baker v. Kansas City, etc. R. R.*, 91 Mo. 152 (1887). A roadmaster of a railway has power to purchase such material as he uses, and the company is liable therefor where the material has been used. *Walker v. Wilmington, etc. R. R.*, 26 S. C. 80 (1887). A station agent may contract that goods will be delivered at a certain time. *Blodgett v. Abbott*, 72 Wis.

516 (1888). See also *Wood, Railw. Law*, pp. 444-454.

The following decisions concern miscellaneous agents and powers: An agent with power to give and indorse notes may waive notice of protest, etc. *Whitney v. South, etc. Co.*, 39 Me. 316 (1855). A resident agent of a mining company has no implied authority to borrow money on account of the corporation to pay arrears of wages due the workmen in the mines. *Hawtayne v. Bourne*, 7 M. & W. 595 (1841). An agent attending to the daily routine of the business of a corporation cannot create a general lien upon its property to secure a creditor, unless by the approval of the board of directors. *Whitwell v. Warner*, 20 Vt. 425 (1848). An agent employed to promote the interests of a corporation in every way has no authority to purchase land for it. *Bocock v. Alleghany, etc. Co.*, 82 Va. 913 (1887). Where a corporation agent buys land for the company at a certain price, and agrees that the company will pay also the vendor one-half of its profits upon sale of said land, the company is bound by this latter parol agreement. *Kickland v. Menasha, etc. Co.*, 68 Wis. 34 (1887). Persons expending money for a corporation under the direction of authorized corporate officers may hold the corporation liable. *Topeka, etc. Assoc. v. Martin*, 39 Kan. 750 (1888). An agent of a lumber company cannot pay debts due the company by boarding them out. *St. John, etc. Co. v. Cornwell*, 52 Kan. 712 (1894). A sewing-machine company's

¹ *Dedham Bank v. Chickering*, 20 Mass. 335 (1825); *Union Bank v. Ridgeley*, 1 Har. & G. (Md.) 324 (1827); *Burgess v. Pue*, 2 Gill (Md.), 11 (1844); *Apthorp v. North*, 14 Mass. 167 (1817); *Smith v. Bank of Scotland*, 1 Dow, P. C. 272 (1841); *Monu-*

moi Great Beach v. Rogers, 1 Mass. 159 (1804); *Amherst Bank v. Root*, 43 Mass. 522, 533 (1841); *Western R. R. v. Babcock*, 47 Mass. 346 (1843), and the many cases, *supra*. See also § 714, *supra*.

sideration of an unauthorized contract by the corporation, however, without knowledge of the terms of the contract or of the account upon which it is paid, is not in itself a ratification of the

agent to sell machines has no power to trade the company's horse, but ratification suffices. *Singer Mfg. Co. v. Belgart*, 84 Ala. 519 (1888). Acts of local insurance agents appointed by the general agent of a foreign insurance company are binding on such company, such acts being within the express powers given by the general agent therein to solicit or take insurance. *Kuney v. Amazon Ins. Co.*, 36 Hun, 66 (1885). In *Rice v. Peninsular Club*, 52 Mich. 87 (1883), Cooley, J., said: "A party dealing with the agent of a corporation must at his peril ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority." The club is not liable for the steward's purchases. The powers of an agent appointed for a special purpose cease when the object of his appointment is accomplished. *Seton v. Slade*, 7 Ves. 265, 276 (1802). A subordinate agent cannot employ an attorney for the company. *Maupin v. Virginia, etc. Co.*, 78 Mo. 24 (1883). Nor can he make the corporation liable for the debt of another. *Rahm v. King, etc. Co.*, 16 Kan. 277 (1876). Nor make a note for the company. *Benedict v. Lansing*, 5 Denio, 283 (1848). If the purchaser of corporate bonds knows that the agent is selling for his own purposes he is not protected. *Chew v. Henrietta, etc. Co.*, 2 Fed. Rep. 5 (1880). Secret instructions to a general insurance agent do not bind a person dealing with him. *Insurance Co. v. McCain*, 96 U. S. 84 (1877). So also as to a cashier. *Merchants' Bank v. State Bank*, 10 Wall. 604, 650 (1870). A grantor to a corporation cannot deny the authority of the corporate agent to accept the deed. *Case v. Benedict*, 63 Mass. 540 (1852). An agent who is accustomed to con-

tract for the company may bind it. *Christian University v. Jordan*, 29 Mo. 68 (1859); *Mead v. Keeler*, 24 Barb. 20 (1857). Acceptance of services known to officers binds the company. *Lee v. Pittsburgh, etc. Co.*, 56 How. Pr. 373 (1877); *aff'd*, 75 N. Y. 601. But the use of a building has been held not to constitute an acceptance of debts incurred in building it. *Ruby v. Abyssinian Soc.*, 15 Me. 306 (1839). Use of goods with knowledge is acceptance. *Smith v. Hull Glass Co.*, 11 C. B. 897, 925 (1852); *s. c.*, 8 C. B. 668 (1849). Even if the agent gave a note which is not binding. *Emerson v. Providence, etc. Co.*, 12 Mass. 237 (1815). Acceptance is presumed where a written statement is placed before a directors' meeting. *State Bank v. Comegys*, 12 Ala. 772 (1848). Satisfaction by subsequent officers is good. *Chouteau v. Allen*, 70 Mo. 290 (1879). If an agent with authority to give a note embezzles the funds the company is liable. *Bird v. Daggett*, 97 Mass. 494 (1867). A suit on a note is a ratification of its execution. *Planters' Bank v. Sharp*, 12 Miss. 75 (1844). An actuary of a bank, who is accustomed so to do, may give the note of the bank, especially where the directors acquiesce. *Creswell v. Lananhan*, 101 U. S. 347 (1879). As to insurance agents, see *Perkins v. Washington Ins. Co.*, 4 Cow. 645 (1825). Knowledge of the president of drafts by an agent, and acquiescence therein, binds the company. *Gold Min. Co. v. National Bank*, 96 U. S. 640 (1877). See § 727, *infra*, on notice; also *Lindley, Companies*, p. 159, etc. An agent's authority to act for a corporation is not terminated by the fact that the members of the board of directors or other body which appointed him have gone out of office by the expiration of their terms or by removal. *Anderson v.*

contract.¹ It is elementary that a corporation may ratify and adopt the unauthorized acts of an agent.²

B. THE FORM OF CORPORATE CONTRACTS—THE CORPORATE SEAL IS NECESSARY ONLY WHEN THE SAME INSTRUMENT BY AN INDIVIDUAL MUST BE UNDER SEAL—FORMS OF THE BODY OF THE CONTRACT; ALSO THE METHOD OF SIGNING AND SEALING—LIABILITY OF OFFICERS AND AGENTS ON CORPORATE CONTRACTS WHICH ARE INFORMALLY EXECUTED.

§ 721. *The corporate seal need not be attached to a corporate contract unless a similar contract, when made by an individual, would require a seal.*³—This is now the well-established rule, although

Longden, 1 Wheat. 85 (1816); Brown v. Somerset, 11 Mass. 221 (1814); Northampton Bank v. Pepon, 11 Mass. 294 (1814); Dedham Bank v. Chickering, 20 Mass. 335 (1825); Exeter Bank v. Rodgers, 7 N. H. 21, 33 (1834); Thompson v. Young, 2 Ohio, 334 (1825). It has been held that a mortgage of corporate property which is illegal for want of authority may be rendered valid by subsequent ratification by acts of the legislature. White Water, etc. Canal Co. v. Vallette, 21 How. 414 (1858); Shepley v. Atlantic, etc. R. R., 55 Me. 395 (1868); Richards v. Merrimack, etc. R. R., 44 N. H. 127 (1862), where an act authorizing the trustees of a mortgage to sell the mortgaged property was held to be a ratification; Shaw v. Norfolk County R. R., 71 Mass. 162 (1855); Whitney v. Union Trust Co., 65 N. Y. 576 (1875), where bonds signed by the treasurer instead of the secretary were held ratified by a subsequent act referring to them as "now a valid lien on said property." Power to act as agent of the corporation may be conferred by a general resolution. Elwell v. Dodge, 33 Barb. 336 (1861).

¹ Pennsylvania Co. v. Dandridge, 8 Gill & J. (Md.) 248 (1836); Christian

University v. Jordan, 29 Mo. 68 (1859); Hilliard v. Goold, 34 N. H. 230 (1856), and cases *supra*.

² Essex Turnp. Co. v. Collins, 8 Mass. 292 (1811); Hayden v. Middlesex Turnp. Co., 10 Mass. 403 (1813); White v. Westport Cotton Mfg. Co., 18 Mass. 220 (1822); Bulkley v. Derby Fishing Co., 2 Conn. 252 (1817); Peterson v. New York, 17 N. Y. 449 (1858); Canal Bridge v. Gordon, 18 Mass. 297 (1823); Baker v. Cotter, 45 Me. 236 (1858); Bennett v. Maryland F. Ins. Co., 14 Blatchf. 422 (1878); s. c., 3 Fed. Cas. 229; Church v. Sterling, 16 Conn. 388 (1844); Pennsylvania Bank v. Reed, 1 Watts & S. (Pa.) 101 (1841); Hayward v. Pilgrim Soc., 38 Mass. 270 (1838); Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205 (1841); Planters' Bank v. Sharp, 4 Sm. & M. (Miss.) 75 (1844); Burrill v. Nahant Bank, 43 Mass. 167 (1841); Fox v. Northern Liberties, 3 Watts & S. (Pa.) 103 (1841); New Hope, etc. Co. v. Phenix Bank, 3 Const. 156 (1850); Alabama, etc. R. R. v. Kidd, 29 Ala. 221 (1856); Everett v. U. S., 6 Port. (Ala.) 166 (1837); Medomak Bank v. Curtis, 24 Me. 38 (1844); Whitwell v. Warner, 20 Vt. 425 (1848); Trott v. Warren, 11 Me. 227 (1834); Detroit v. Jackson, 1 Doug. (Mich.) 106 (1842);

³ Quoted and approved in Fourth Nat. Bank, etc. v. Camden, etc. Co., 142 Fed. Rep. 257, 260 (1905).

formerly it was supposed that a corporation could not enter into a contract except by attaching the corporate seal to the contract itself.¹

Merchants' Bank v. Central Bank, 1 Ga. 428 (1846); *Hoyt v. Bridgewater Copper Co.*, 6 N. J. Eq. 253 (1847); *Durar v. Hudson, etc. Ins. Co.*, 24 N. J. L. 171 (1853); *Moss v. Rossie Lead Co.*, 5 Hill, 137 (1843); *Brown v. Winnissimmet Co.*, 93 Mass. 326 (1865); *Sherman v. Fitch*, 98 Mass. 59 (1867); *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315 (1873); *Moss v. Averell*, 6 Seld. 449 (1853); *Olcott v. Tioga R. R.*, 27 N. Y. 546 (1863); *Shaver v. Bear River, etc. Co.*, 10 Cal. 396 (1858).

¹ A corporate contract need not be in writing nor under the corporate seal. *Leinkauf v. Calman*, 110 N. Y. 50 (1888); *Mershon & Co. v. Morris*, 61 S. E. Rep. 647 (N. C. 1908). A corporation need not necessarily have or use a seal in making its contracts. *Muscatine Water Co. v. Muscatine Lumber Co.*, 85 Iowa, 112 (1892). A corporate contract does not require the corporate seal except where an individual contract would require the individual's seal. *Griffing Bros. Co. v. Winfield*, 43 S. Rep. 687 (Fla. 1907). "The English rule that a corporation cannot expressly bind itself except by deed, unless the act establishing it authorized it to contract in another mode, has been broken in upon, and, indeed, entirely overturned, as a general proposition, throughout the United States; and it is here well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises may as well be implied from the acts of its agents as if it had been an individual;" citing many cases. *Davenport v. Peoria, etc. Co.*, 17 Iowa, 276 (1864). See also *Bank*

of *U. S. v. Dandridge*, 12 Wheat. 64 (1827); *Gottfried v. Miller*, 104 U. S. 521 (1881); *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Hoag v. Lamont*, 60 N. Y. 96 (1875); *McCullough v. Talladega Ins. Co.*, 46 Ala. 376 (1871); *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291 (1881); *Racine, etc. R. R. v. Farmers' Loan & T. Co.*, 49 Ill. 331 (1868); *Bulkley v. Briggs*, 30 Mo. 452 (1860); *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 535 (1865); *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339 (1847); *Muir v. Louisville, etc. Canal Co.*, 8 Dana (Ky.), 161 (1839); *Henning v. U. S. Ins. Co.*, 47 Mo. 425 (1871); *Salem Bank v. Gloucester*, 17 Mass. 1 (1820); *Gloucester Bank v. Salem Bank*, 17 Mass. 33 (1820); *Foster v. Essex Bank*, 17 Mass. 479 (1821); *Smith v. Lowell Meeting-house*, 25 Mass. 178 (1829); *Limerick Academy v. Davis*, 11 Mass. 113 (1814); *Farmington Academy v. Allen*, 14 Mass. 172 (1817); *Amherst Academy v. Cowels*, 23 Mass. 427 (1828); *Kennedy v. Baltimore Ins. Co.*, 3 Har. & J. (Md.) 367 (1813); *Stone v. Berkshire, etc. Soc.*, 14 Vt. 86 (1842); *Episcopal, etc. Soc. v. Needham, etc. Church*, 18 Mass. 372 (1823); *Banks v. Poitiaux*, 3 Rand. (Va.) 136 (1825); *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813); *Randall v. Van Vechten*, 19 Johns. 60 (1821); *Gooday v. Colchester Ry.*, 17 Beav. 132 (1852); *Magill v. Kauffman*, 4 Serg. & R. 317 (1818); *Dunn v. St. Andrew's Church*, 14 Johns. 118 (1817); *Waller v. Bank of Kentucky*, 3 J. J. Marsh. (Ky.) 201 (1830); *Western, etc. Co. v. First Nat. Bank*, 9 N. M. 1 (1897); *Grubbs v. National, etc. Ins. Co.*, 94 Va. 589 (1897). *Crawford v. Longstreet*, 43 N. J. L. 325 (1881), held that, to bind a corporation under a lease for years, execution under its corporate seal is not necessary. See also, in general, *Moss v.*

It is settled law that it is not necessary to use a seal in appointing agents or entering into ordinary contracts for the corporation.¹ The supreme court of Illinois says: "The rule now is that a

Averell, 10 N. Y. 449 (1853). The corporate seal to a note is superfluous. *St. James's Parish v. Newburyport*, etc. R. R., 141 Mass. 500 (1886). On this point, see also § 761, *infra*. The word "seal," following the name of a corporation on an insurance policy, does not prevent the suit being in assumption. *Grubbs v. National, etc. Ins. Co.*, 94 Va. 589 (1897). *Contra*, *Benoist v. Carondelet*, 8 Mo. 250 (1843); *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836). The seal may be considered to be the company's signature. *Levering v. Mayor, etc.*, 7 Humph. (Tenn.) 553 (1847). See also § 722, *infra*; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205 (1841), a chattel mortgage. The officers' seal to the contract may be disregarded. *Bank, etc. v. Gutschlick*, 14 Pet. 19 (1840); *Eureka Co. v. Bailey Co.*, 11 Wall. 488 (1870); *Dubois v. Delaware, etc. Co.*, 4 Wend. 285 (1830).

¹ *Pennsylvania R. R. v. Vandiver*, 42 Pa. St. 365, 369 (1862); *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813); *Lathrop v. Commercial Bank*, 8 Dana (Ky.), 114 (1839); *Buncombe Turnp. Co. v. McCarrson*, 1 Dev. & B. 310 (1835), holding that an appointment need not be under the corporate seal; *Bates v. Bank of Alabama*, 2 Ala. 452 (1841), where the appointment of an agent was by vote of the corporation; *Maine Stage Co. v. Longley*, 14 Me. 444 (1837), holding that the fact of agency may be proved by parol. See also *Union Mfg. Co. v. Pitkin*, 14 Conn. 174 (1841); *State Bank v. Bell*, 5 Blackf. (Ind.) 127 (1839); *Brookville Ins. Co. v. Records*, 5 Blackf. (Ind.) 170 (1839); *Bridgeton v. Bennett*, 23 Me. 420 (1844), retaining an attorney proved by his statement; *Randall v. Van Vechten*, 19 Johns. 60 (1821); *Antipæda Bapt. Ch. v. Mulford*, 8 N. J. L. 182 (1825);

Perkins v. Washington Ins. Co., 4 Cow. 645 (1825); *Lathrop v. Scioto Bank*, 8 Dana (Ky.), 115 (1839); *New Haven Sav. Bank v. Davis*, 8 Conn. 191 (1830), vote of directors without evidence under seal; *Bank of Columbia v. Patterson*, 7 Cranch, 299 (1813); *Andover Turnp. Co. v. Hay*, 7 Mass. 102 (1810); *Hayden v. Middlesex Turnp. Co.*, 10 Mass. 397 (1813); *Essex Turnp. v. Collins*, 8 Mass. 292 (1811); *Wright v. Lanckton*, 36 Mass. 288 (1837); *Bancroft v. Wilmington, etc.*, 5 Houst. (Del.) 577 (1876); *Dunn v. St. Andrew's Church*, 14 Johns. 118 (1817); *Union Bank v. Ridgley*, 1 Har. & G. (Md.) 324 (1827); *Kennedy v. Baltimore Ins. Co.*, 3 Har. & J. (Md.) 367 (1813); *Garrison v. Coombs*, 7 J. J. Marsh. (Ky.) 85 (1831); *Legrand v. Hampden-Sidney College*, 5 Munf. (Va.) 324 (1817); *Bates v. Alabama Bank*, 2 Ala. 451 (1841); *Stamford Bank v. Benedict*, 15 Conn. 437, 445 (1843); *Detroit v. Jackson*, 1 Doug. (Mich.) 106 (1843); *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192 (1851); *Topping v. Bickford*, 86 Mass. 120 (1862). A contract of employment by a corporation need not be under seal. *Speirs v. Union, etc. Co.*, 174 Mass. 175 (1899). Parol evidence may prove the creation of a debt by the company. *Borland v. Haven*, 37 Fed. Rep. 394 (1888). An appeal bond given by a corporation may be signed without the corporate seal. *Campbell v. Pope*, 96 Mo. 468 (1888). Corporations may enter into contracts through agents duly authorized, and such contracts may be by writing not under seal or by parol, as though made by natural persons. See § 714, *supra*; also *American Ins. Co. v. Oakley*, 9 Paige, 496 (1842); *Watson v. Bennett*, 12 Barb. 196 (1851); *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 344 (1847); *Union Bank v. Ridgley*, 1 Har.

corporation may bind itself, in a matter within its charter powers, by a writing not under seal to the same extent as an individual may."¹ The corporate seal must be used in deeds and other instruments which would require a seal if they were the deeds or instruments of individuals.² A corporate deed twenty-five years old, reciting that it is under seal, is presumed to have been under seal, though none is present.³ A corporate deed, signed "J., President," is not sufficiently signed. A corporate seal is also necessary.⁴ A mortgage may be valid although the corporate seal is not attached thereto.⁵

& G. (Md.) 324, 413 (1827); *Hayden v. Middlesex Turnp. Co.*, 10 Mass. 401 (1813); *Shotwell v. McKown*, 5 N. J. L. 828 (1820); and an agent is not personally liable on a note signed by him as agent. *Merrick v. Burlington*, etc. P. R. Co., 11 Iowa, 74 (1860), a verbal contract made by an agent; *Buckley v. Briggs*, 30 Mo. 452 (1860); *Dunn v. St. Andrew's Church*, 14 Johns. 118 (1817). In England a contrary rule has been upheld. *Homer-sham v. Wolverhampton Waterworks*, 6 Exch. 137 (1851); *Diggle v. London Ry.*, 5 Exch. 442 (1850); *Copper Miners v. Fox*, 16 Q. B. 229 (1851); *Clark v. Cuckfield Union*, 11 Eng. L. & Eq. 442 (1852), citing and reviewing other authorities. In England, by statute 8 & 9 Vict., c. 16, § 97, directors may contract by parol on behalf of a corporation where private persons may make a valid parol contract. See also *Pauling v. London*, etc. Ry., 8 Exch. 868 (1853). *Cf. Crampton v. Varna Ry.*, L. R. 7 Ch. 562 (1872). After a contract for necessary work or goods is executed by the other party, and accepted by the corporation, it must pay for the same notwithstanding the irregularity. *Clark v. Cuckfield Union*, 11 Eng. L. & Eq. 442 (1852); *Doe v. Tainere*, 12 Q. B. 1011 (1848). *Cf. Lindley, Companies*, p. 220, etc.

¹ *Green Co. v. Blodgett*, 159 Ill. 169 (1895). An abbreviated corporate signature is sufficient and a seal is not necessary if it would not be required in a similar individual contract.

Seiberling v. Miller, 207 Ill. 443 (1904).

² See § 722, *infra*. A deed of a corporation not under seal is not a deed and is void. *Danville Seminary v. Mott*, 136 Ill. 289 (1891). The corporate seal must be used in the conveyance of corporate real estate in Texas. *Shropshire v. Behrens*, 77 Tex. 275 (1890). The corporate seal must be attached to a deed in order to make it a deed. *Allen v. Brown*, 6 Kan. App. 704 (1897). A deed by a corporation must have the corporate seal attached. *Precious, etc. Soc. v. Elsythe*, 102 Tenn. 40 (1899). In *quo warranto* against a turnpike company the burden of proof is on the company to prove its title, and deeds from other companies without seals and not acknowledged as corporate deeds are insufficient. *Lyons, etc. Co. v. People*, 29 Col. 434 (1902). A power of attorney by a corporation to an agent to execute a deed of land must be under the seal of the corporation or must be accompanied by proof that the agent was authorized to sign for the corporation. *Dodge v. American, etc. Co.*, 109 Ga. 394 (1899). A statute to the effect that private seals need not be used applies to the seal of a private corporation. *Murray v. Beal*, 23 Utah, 548 (1901).

³ *Catlett v. Starr*, 70 Tex. 485 (1888).

⁴ *Garrett v. Belmont Land Co.*, 94 Tenn. 459 (1895).

⁵ *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); *aff'd*, 95 Fed. Rep. 23. See also § 723, *infra*.

Hence the law is that a corporation may become bound by a contract which is executed in any of the following ways: by a written instrument sealed with the corporate seal, and either with or without the corporate name signed thereto;¹ by an unsealed written instrument signed with the corporate name; by a written record of a resolution of its directors;² by an unwritten resolution of its directors;³ by the oral agreements of its authorized agents;⁴ or by ratifying, acquiescing in, or accepting the benefits of contracts made in its name by unauthorized agents.⁵ Even though a note or bond is sealed with the corporate seal, it may not be considered a sealed instrument.⁶

§ 722. *Method of drafting, signing, sealing, and acknowledging a corporate deed or contract.*—A deed or contract of a corporation should be drawn so that the name of the corporation appears in the body of the instrument, and not the name of the officer or agent who signs, seals, or acknowledges it. The name of the corporation should be signed to the instrument, and this should be followed by the word “by” and by the signature of the officer or person who is executing the instrument in behalf of the corporation.⁷

Even though a corporation does not attach its seal to a mortgage, yet the mortgage is valid, unless it is shown that the corporation had a seal and that the board of directors did not authorize its omission. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); *aff'd*, 106 Tenn. 1. See also § 810, *infra*. A chattel mortgage by a corporation in Missouri need not be under the corporate seal. *Strop v. Hughes*, 101 S. W. Rep. 146 (Mo. 1907). A seal is not necessary to the legality of a chattel mortgage given by a corporation. *Burkamp v. Healey*, 72 S. W. Rep. 759 (Ky. 1903). A mortgage need not be under seal in Arkansas, a seal not being necessary to a mortgage by an individual. *Fourth National Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905).

1 See § 722, *infra*.

2 See § 714, *supra*.

3 See § 714, *supra*.

4 See §§ 716–720, *supra*, relative to the inherent powers of the president and various other corporate agents to contract. A parol contract with a corporation may be proved although

the director with whom it was made is dead. *South Baltimore Co. v. Muhlback*, 69 Md. 395 (1888).

5 See §§ 716–720, *supra*.

6 See § 761, *infra*. Stockholders who endorse a bond of a corporation may set up the five years' statute of limitations although the bond was a sealed instrument. Facts connected with the stockholders endorsing the bond may be explained by parol. *Somers v. Florida, etc. Co.*, 50 Fla. 275 (1905).

7 *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836); *Stinchfield v. Little*, 1 Me. 231 (1821); *New Haven Sav. Bank v. Davis*, 8 Conn. 191 (1830); *Hatch v. Barr*, 1 Ohio, 390 (1824); *Brinley v. Mann*, 56 Mass. 337 (1848); *Kinzle v. Chicago*, 3 Ill. 187 (1839), in which it is also held that the mode of executing an instrument by a corporation “is to affix the seal with a declaration that it is the seal of the corporation, and to verify the act by the signature of the president and secretary of the corporation.” *Koehler v. Black River, etc. Co.*, 2 Black, 715 (1862). “The appropriate form of verifying any written obliga-

The courts will hold any device or form to be the corporate seal, if there was an intent to bind the corporation, and if the device was intended for the corporate seal.¹ The corporate seal must be attached to a deed or a mortgage of real estate.²

tion to be the act of the corporation is by affixing the signatures of the president and secretary and the corporate seal." *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899). A corporation is not bound by a contract for the sale of its property, even though four or five directors and also the owner of the majority of the stock write their names on the contract under the word "accepted." Moreover, the statute of frauds applies to the transaction as affecting real estate. *Taylor v. R. D. Scott & Co.*, 113 N. W. Rep. 32 (Mich. 1907). The typewritten signature of the corporation, followed with a blank for the signature of the officer, is not complete unless the officer signs. *Richmond, etc. Co. v. Chesterfield, etc. Co.*, 160 Fed. Rep. 832 (1908). A corporation under its corporate seal and by the signatures of its president and secretary may authorize an attorney in fact to convey its land. *Long v. Powell*, 120 Ga. 621 (1904).

¹ Where a lease recites that it is given under the corporate seal, "in the absence of evidence to the contrary, the scroll or rectangle containing the word 'seal' will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure. . . . Whether a mark or character shall be held to be a seal depends upon the intention of the executant as shown by the paper." *Jacksonville, etc. Nav. Co. v. Hooper*, 160 U. S. 514 (1896). "As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation is enough, though some other seal than the ordinary

common seal of the company should be used." *District of Columbia v. Camden, etc. Works*, 181 U. S. 453, 460 (1901). The word "seal" placed opposite the signatures of the president and secretary is a sufficient corporate seal, where there is an attestation clause to that effect and a statute makes a scroll or device used as a seal upon a deed sufficient. A statute to the effect that no seal is necessary to a deed applies to a private corporation. *Ismon v. Loder*, 135 Mich. 345 (1904). A mortgage signed by an individual, followed by the word "president," and by an individual, followed by the word "secretary," is nevertheless a mortgage of the corporation if the seal is attached and the instrument recites that the corporation has caused it to be signed by the president and secretary. *Rawlings v. New Memphis, etc. Co.*, 60 S. W. Rep. 206 (Tenn. 1900). The company's name may be signed by stamp *per* an officer who signs his name after the "per." *Cadillac, etc. Bank v. Cadillac, etc. Co.*, 129 Mich. 15 (1901). The use by the board of directors of a *fac-simile* of the regular corporation's seal may be legal. *State v. Manhattan, etc. Co.*, 149 Mo. 181 (1899). Where the attestation clause is complete, a simple "(L. S.)" will be considered the seal of the corporation for that occasion. *G. V. B. Min. Co. v. First Nat. Bank, etc.*, 95 Fed. Rep. 23 (1899). A special seal may be used on a special occasion. *American Inv. Co. v. Cable Co.*, 60 S. E. Rep. 1037 (Ga. 1908). A corporation may adopt for a special occasion a seal different from its usual seal, and the letters "(L. S.)" are sufficient. *New York Life Ins. Co. v. Rhodes*, 60 S. E. Rep. 828 (Ga. 1908).

² See § 721, *supra*.

It is no longer necessary that the impression of a corporate seal shall be made upon wax or other adhesive substance—an impression

It is a criminal offense to forge a corporate seal under the New Jersey statute making it a criminal offense to forge a "character." *United States v. Andem*, 158 Fed. Rep. 996 (1908). Where the instrument recites that it is under seal it will be presumed to be a sealed instrument, especially where a seal follows the name of the officer who signs it. So held as regards the statute of limitations. *Rusling v. Union, etc. Co.*, 5 N. Y. App. Div. 448 (1896); *aff'd*, 158 N. Y. 737; *Christie v. Gage*, 2 *Thomp. & C.* 344 (1873), where the private seals of trustees of a church were held to be the corporate seal to a deed of its property. To same effect, *Johnston v. Crawley*, 25 Ga. 316 (1858); *Porter v. Androscoggin R. R.*, 37 Me. 349 (1853); *Taylor v. Heggie*, 83 N. C. 244 (1880). *Cf. Saxton v. Texas, etc. R. R.*, 4 N. M. 201 (1888); *South Baptist Church v. Clapp*, 18 Barb. 35 (1853); *Tenney v. Lumber Co.*, 43 N. H. 350 (1861). See also *Ransom v. Stonington, etc. Bank*, 13 N. J. Eq. 212 (1860); *Mill-dam Foundry v. Hovey*, 38 Mass. 417 (1839); *Stebbins v. Merritt*, 64 Mass. 27 (1852); *Sherman v. Fitch*, 98 Mass. 59 (1867); *McDaniels v. Flower, etc. Co.*, 22 Vt. 274 (1850); *Benbow v. Cook*, 115 N. C. 324 (1894); *Woodman v. York, etc. R. R.*, 50 Me. 549 (1861), where an imprint in red ink upon bonds was held valid; *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant, Ch. (U. C.) 551 (1871), where simple wafer seals used by corporations in executing a deed were held sufficient in the absence of evidence that they were not their proper corporate seals; *Hamilton v. Dennis*, 12 Grant, Ch. (U. C.) 325 (1866), in which a ribbon woven through slits in the paper, so as to appear at intervals opposite the signatures, was held sufficient; *Bates v. New York Central R. R.*, 92 Mass. 251 (1865), where,

however, it was held that a *fac-simile* printed in ink when the blank instrument was printed is a mere scroll and not a valid seal. The *fac-simile* of the seal of a corporation printed on a blank form is not the corporate seal. *McCarthy v. Metropolitan L. Ins. Co.*, 162 Mass. 254 (1894). After a decree of foreclosure, it is too late to claim that a seal printed on the mortgage was not good. *Haven v. Grand Junction, etc. Co.*, 94 Mass. 337 (1866). *Cf. Royal Bank v. Junction, etc. R. R.*, 100 Mass. 444 (1868), in which a seal printed upon bonds by direction of the officers of a corporation after they had been otherwise executed, and which purported to bear the corporate seal, was held valid. *Contra, Mitchell v. Union, etc. Co.*, 45 Me. 104 (1858). The corporation may have several seals. *Bank of Middlebury v. Rutland, etc. R. R.*, 30 Vt. 159 (1858). An official may, while out of the state, cause a new seal to be made and attach it to bonds of the corporation out of the state. *Lynde v. Winnebago County*, 16 Wall. 6 (1872). A blank wafer will do for a seal. *Brinley v. Mann*, 56 Mass. 337 (1848). A scroll has been held good. *Kansas City v. Hannibal, etc. R. R.*, 77 Mo. 180 (1882). A scroll may be a sufficient seal even though the corporation has a regular seal. *Thayer v. Nehalem Mill Co.*, 31 Oreg. 437 (1897). *Contra, Hendee v. Pinkerton*, 96 Mass. 381 (1867). A scroll will do for the corporate seal on an appeal bond. *Sarmiento v. Davis, etc. Co.*, 105 Mich. 300 (1895). The word "seal," following the name of a president, is not a sufficient corporate seal in a deed. *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339 (1897). The use of a seal may be a sufficient adoption of it as the corporate seal. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). Any seal is presumed to be the corporate seal, the

upon the paper itself being held sufficient.¹ It is not necessary that express authority, or authority under seal, be given to an officer or agent to affix the corporate seal to an instrument; such powers may be inferred from the general powers of the officer or agent, the usual course of business, and similar circumstances.²

The mere affixing of the corporate seal is of itself sufficient execution of a contract or deed, when properly affixed by a person duly authorized. No writing or further signature whatsoever is necessary.³

signature of the agent executing the instrument being proved. *Pennsylvania Nat. Gas Co. v. Cook*, 123 Pa. St. 170 (1889). Where a deed is executed by the president and secretary under their private seals, there is a flaw in the title to the land. *McCroskey v. Ladd*, 28 Pac. Rep. 216 (Cal. 1891).

¹ *Hendee v. Pinkerton*, 96 Mass. 381 (1867), holding that a distinct and visible impression of a corporate seal upon and into the substance of the paper is sufficient and valid; *Pillow v. Roberts*, 13 How. 472 (1851); *Allen v. Sullivan, etc. R. R.*, 32 N. H. 446 (1855); *Corrigan v. Trenton, etc. Co.*, 5 N. J. Eq. 52 (1845). But see, *contra*, *Farmers', etc. Bank v. Haight*, 3 Hill, 493 (1842).

² *Union Gold Min. Co. v. Bank*, 2 Colo. 226 (1873); *Merchants' Bank v. Goddin*, 76 Va. 503 (1882); *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833); *Berks, etc. R. R. v. Myers*, 6 Serg. & R. (Pa.) 12 (1820), holding that the question of authority to affix a corporate seal is for the jury; *Haven v. Adams*, 86 Mass. 80 (1862); *Gordon v. Preston*, 1 Watts (Pa.), 385 (1833), saying that power to affix a seal carries with it the power to acknowledge the execution of the instrument. See, however, *Hoyt v. Thompson*, 5 N. Y. 320 (1851), holding that the usual duties and powers of the president and cashier of a bank are not such as will justify them in affixing its corporate seal without express authority from the directors. A corporate officer may execute a mortgage for it without being authorized under the corporate seal. A mere resolution suffices. *Hop-*

kins v. Gallatin, etc. Co., 4 Humph. (Tenn.) 403 (1843); *Fitch v. Lewiston, etc. Co.*, 80 Me. 34 (1888); *New Haven Sav. Bank v. Davis*, 8 Conn. 191 (1830); *Howe v. Keiler*, 27 Conn. 538 (1858); *Hutchins v. Byrnes*, 75 Mass. 367 (1857); *Beckwith v. Windsor*, 14 Conn. 594 (1842). Members of the board of directors may affix the corporate seal to a mortgage and acknowledge the execution. *Gordon v. Preston*, 1 Watts (Pa.), 385 (1833). An employee may be directed to affix the seal. *Royal Bank v. Grand, etc. R. R.*, 100 Mass. 445 (1868), where it was affixed by the printer.

³ *Union Bridge Co. v. Troy, etc. R. R.*, 7 Lans. 240 (1872); *Clark v. Farmers', etc. Co.*, 15 Wend. 256 (1836). A deed having the corporate seal attached and purporting to be a corporate deed is presumed to be such, even though the corporate name is not signed, but it is signed only by the directors and secretary. *Graham v. Partee*, 139 Ala. 310 (1904). Under the statutes of Florida a mortgage by a corporation need not be witnessed by subscribing witnesses where the seal is attached and attested by the secretary. *International, etc. Co. v. Vause*, 46 S. Rep. 3 (Fla. 1908). Affixing the corporate seal is the regular mode of executing a corporate mortgage. *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878); *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875), where authority was given to the secretary to sign an instrument, and it was held that signature by the treasurer did not render it invalid, since the seal of the corporation was

When proof is given that an instrument was signed by the corporate officers, and that the seal attached is the corporate seal, the courts will presume that the seal was affixed by proper authority, and that the execution was duly authorized,¹ but this presumption

sufficient execution; *McDaniels v. Flower, etc. Co.*, 22 Vt. 274 (1850); *Bason v. King's Mountain Min. Co.*, 90 N. C. 417 (1884), holding that a deed concluding "in witness whereof the said corporation has caused this indenture to be signed by the president and attested by its secretary, and its common seal to be affixed," signed "G. C. W., President," with the seal affixed, is a valid common-law deed; *Shewalter v. Pirner*, 55 Mo. 218 (1874); *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543 (1869); *Union Bridge Co. v. Troy, etc. R. R.*, 7 Lans. 240 (1872), saying "*it seems*, a corporate seal being properly affixed, no signature is necessary;" *Lovett v. Steam Saw-mill Assoc.*, 6 Paige, 54, 60 (1836); *Bank of Vergennes v. Warren*, 7 Hill, 91 (1845); *Campbell v. James*, 17 Blatchf. 42 (1879); s. c., 4 Fed. Cas. 1168; rev'd on other grounds, 104 U. S. 357 (1881); *Lamson, etc. Co. v. Russell*, 112 Mass. 387 (1873); *Levering v. Mayor*, 7 Humph. (Tenn.) 553 (1847); *Memphis v. Adams*, 9 Heisk. (Tenn.) 518 (1872). Where three directors, as a committee, are authorized to make a lease, and the lease is signed by two, and the corporate seal is affixed by them, it is sufficient, the third acquiescing. *Union Bridge Co. v. Troy, etc. R. R.*, 7 Lans. 240 (1872). *Mandamus* to an officer to attach the corporate seal will be denied if there is any doubt as to the legal rights of the parties. *People v. Blackhurst*, 11 N. Y. Supp. 675 (1890). At common law a corporation signed a contract by attaching its seal thereto. *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203 (1897). See also § 761, *infra*. But see *Isham v. Bennington, etc. Co.*, 19 Vt. 230 (1847), holding that affixing a corporate seal will not excuse default in signing a

deed when signing is necessary by statute. A deed of corporate real estate signed by an agent individually does not convey title, even though the seal of the corporation is affixed. *Hutchins v. Barre, etc. Co.*, 74 Vt. 36 (1901).

¹ *Quackenboss v. Globe, etc. Co.*, 177 N. Y. 71 (1903); *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892); *McDonald v. Chisholm*, 131 Ill. 273 (1890); *Sherman, etc. Co. v. Morris*, 43 Kan. 282 (1890); *Mullanphy Sav. Bank v. Schott*, 135 Ill. 635 (1891); *Union Pac. Ry. v. Chicago, etc. Ry.*, 51 Fed. Rep. 309 (1892); *Bowers v. Hechtman*, 45 Minn. 238 (1891); *Boyce v. Montauk, etc. Co.*, 37 W. Va. 73 (1892); *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548 (1893); *Reed v. Bradley*, 17 Ill. 321 (1856); *Blackshire v. Iowa, etc. Co.*, 39 Iowa, 624 (1874); *Southern Cal. Colony Assoc. v. Bustamante*, 52 Cal. 192 (1877); *Wood v. Whelen*, 93 Ill. 153 (1879); *Mickey v. Stratton*, 5 Sawyer, 475 (1879); s. c., 17 Fed. Cas. 268; *Thorington v. Gould*, 59 Ala. 461 (1877); *Morris v. Keil*, 20 Minn. 531 (1874); *Abbott, Tr. Ev. 35*; *Canandarquia Academy v. McKechnie*, 19 Hun, 62 (1879); *Union Gold Min. Co. v. Bank*, 2 Colo. 226 (1873); *Mill-dam Foundry v. Hovey*, 38 Mass. 417, 428 (1839); *Malone v. Crescent, etc. Co.*, 77 Cal. 38 (1888); *Johnson v. Bush*, 3 Barb. Ch. 207 (1848); *Leggett v. New Jersey M. & B. Co.*, 1 N. J. Eq. 541 (1832); *Parker v. Washoe Mfg. Co.*, 49 N. J. L. 465 (1887); *Hoyt v. Thompson*, 5 N. Y. 320 (1851); *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833); *Chicago, etc. R. R. v. Lewis*, 53 Iowa, 101 (1880); *Morse v. Beale*, 68 Iowa, 463 (1886); *Bliss v. Kaweah, etc. Co.*, 65 Cal. 502 (1884); *Goodnow v. Oakey*, 68 Iowa, 25 (1885); *Evans v. Lee*, 11 Nev. 194 (1876); *Cincinnati,*

may be overthrown by proof that the seal was affixed without proper

etc. *R. R. v. Harter*, 26 Ohio St. 426 (1875); *Whitney v. Union, etc. Co.*, 64 N. Y. 576 (1875); *President, etc. v. Myers*, 6 Serg. & R. (Pa.) 12 (1820); *Adams v. Creditors*, 14 La. 454 (1840); *Darnell v. Dickens*, 4 Yerg. (Tenn.) 7 (1833); *Burrill v. Nahant Bank*, 43 Mass. 163 (1840); *Flint v. Clinton, etc. Co.*, 12 N. H. 434 (1841); *Indianapolis, etc. R. R. v. Morganstown*, 103 Ill. 149 (1882); *Solomon's Lodge v. Montmoclín*, 58 Ga. 548 (1877); *St. Louis v. Risley*, 28 Mo. 415 (1859); *St. Johns v. Steinmetz*, 18 Pa. St. 273 (1852); *Lovett v. Steam, etc. Assoc.*, 6 Paige, 54 (1836); *Bank of Vergennes v. Warren*, 7 Hill, 91 (1845); *New England, etc. Co. v. Gilbert, etc. R. R.*, 91 N. Y. 153 (1883). Upon proof that the contract was signed by the president and secretary and the seal affixed this raises a presumption that they did not exceed their power. The fact that the seal is affixed is *prima facie* proof that it was properly and not surreptitiously affixed. *Quackenboss v. Globe, etc. Co.*, 177 N. Y. 71 (1903). A corporate seal raises a presumption that the document was executed by corporate authority. *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 144 (1904). The assignment of a corporate claim signed by the president and secretary with the seal attached is presumed to have been authorized. *Watkins v. Glas*, 89 Pac. Rep. 840 (Cal. 1907). Where the corporate seal is affixed to an instrument signed by the secretary, it is presumed that the seal is the corporate seal and that the secretary attached it with authority so to do. *Bliss v. Harris*, 87 Pac. Rep. 1076 (Colo. 1906). An assignment by a corporation of a mortgage is valid *prima facie* where such assignment is signed by one of its principal officers and the corporate seal has been affixed. *Wilson v. Neu*, 95 N. W. Rep. 502 (Neb. 1901). A contract under seal and signed in its name by its officers is presumed to have been legally executed. *Wisconsin Lumber Co. v. Greene, etc. Co.*, 127 Iowa, 350 (1904). The corporate seal attached to an instrument raises a presumption that the person signing as president had authority to sign. *Collier v. Alexander*, 142 Ala. 422 (1905). A deed executed in the corporate name and under its seal and by the proper officers raises a presumption that they were authorized to execute it. *Deepwater Council, etc. v. Renick*, 59 W. Va. 343 (1906). Even though by resolution of the board of directors, the signature of the general manager is necessary to a note and the treasurer forges such signature, yet if the secretary attaches the seal and attests to the same, the note is good in *bona fide* hands. *Merchants', etc. Co. v. Lufkin, etc. Bank*, 34 Tex. Civ. App. 551 (1904). Where it is admitted that a sealed instrument is signed for the corporation by its proper officer, the presumption is that the seal was authentic. *Griffing Bros. Co. v. Winfield*, 43 S. Rep. 687 (Fla. 1907). A mortgage signed in the corporate name, by the treasurer, with the seal affixed, is presumed to have been authorized. *Nelson v. Spence*, 58 S. E. Rep. 697 (Ga. 1907). The mere fact that corporate officers have executed a deed as authorized by the board of directors does not constitute delivery. *Holmes v. Salamanca, etc. Co.*, 91 Pac. Rep. 160 (Cal. 1907). If the corporate name is signed by the president to the contract and the corporate seal affixed by the secretary, this raises a presumption that the contract was legally authorized. *Little, etc. Co. v. Federal, etc. Ry.*, 194 Pa. St. 144 (1899). Proof that the seal attached to a lease is the seal of the corporation raises a presumption that it had been attached with authority. *West Side, etc. Co. v. Connecticut, etc. Co.*, 186 Ill. 156 (1900). Where a contract is executed under the corporate seal and signed by the vice-president and

authority from the board of directors or some other duly authorized

secretary, and is within the powers of the corporation, it is presumed that they were authorized to so sign. *Neosho, etc. Co. v. Hannum*, 10 Kan. App. 499 (1900). Where the seal is attached to a promissory note of a corporation it raises a presumption that the note is legally authorized. *Bullen v. Milwaukee, etc. Co.*, 109 Wis. 41 (1901). An assignment of a cause of action by a corporation is presumed to have been authorized if it is executed by the president and attested by the secretary with the corporate seal affixed. *Texas, etc. Ry. v. Davis*, 54 S. W. Rep. 381 (Tex. 1899); *rev'd* on another point in 93 Tex. 378. Where the name of the corporation as grantor in a deed is signed by a person as treasurer and the seal is attached, it is presumed that the corporation authorized the execution of the deed. *Carr v. Georgia, etc. Co.*, 108 Ga. 757 (1899). On an appeal the corporate seal will be presumed to have been on a deed of the corporation, and hence that the deed was duly executed. *Almand v. Equitable, etc. Co.*, 113 Ga. 983 (1901). A deed which apparently has been executed by a corporation and has been signed and acknowledged by its president and secretary and its seal attached is presumed to have been duly authorized. *Ellison v. Branstrator*, 153 Ind. 146 (1899). An admission that the corporate instrument was duly executed is fatal to a defense that the persons executing it had no authority to do so, and also to the defense that the seal was not the corporate seal. *Woronieki v. Pairskiego*, 74 Conn. 224 (1901). Where it is proved that a note was signed by the proper officers of a corporation and its seal attached, this raises a presumption that the officers had authority to sign and that the note was duly executed. *Mills v. Boyle, etc. Co.*, 132 Cal. 95 (1901). A chattel mortgage of a corporation signed by its officers and with its seal attached is presumed to have been

duly authorized. *Sargent v. Chapman*, 12 Colo. App. 529 (1899). A bond executed under the corporate seal and duly acknowledged by the president is presumed to have been authorized, even though no resolutions are found in certain minutes of the board of directors. *Mutual Life Ins. Co. v. Yates Co. Nat. Bank*, 35 N. Y. App. Div. 218 (1898).

The seal is not proof *per se*. The signature of the officer must be proved. *Southern, etc. Assoc. v. Bustamante*, 52 Cal. 192 (1877). The presence of the seal raises the presumption that the contract was duly authorized. *Andres v. Fry*, 113 Cal. 124 (1896). The action of the board authorizing a deed need not be proved where the deed recites that it was executed by order of the board of directors. *Caldwell v. Morganton Mfg. Co.*, 121 N. C. 339 (1897). The seal of a corporation, like the seal of an individual, must be proved in establishing the assignment of a mortgage. *Jackson v. Pratt*, 10 Johns. 381 (1813). That the seal is the company's seal must be proved. *Den v. Vreelandt*, 7 N. J. L. 352 (1800); *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313 (1821). "A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by an officer of the corporation or other person thereunto duly authorized." *Osborne v. Tunis*, 25 N. J. L. 633, 658 (1856). A mortgage with the corporate seal attached is presumed to have been regularly sealed. It is not invalidated by proof that the directors passed no resolution authorizing the use of the seal. *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 32 W. Va. 244 (1889). The signature of the president and the seal of the corporation does not prove the deed. It is necessary to prove that it was executed by the president. *Walsh v. Barton*, 24 Ohio St. 28, 41 (1873). The execution and recording

corporate agency.¹ The corporation, by ratification and otherwise, may of a deed by a corporation is *prima facie* evidence of delivery and acceptance. *Stokes v. Detrick*, 75 Md. 256 (1892). The presence of the seal is *prima facie* evidence that the corporation duly authorized the contract. *Berks, etc. Turnp. Co. v. Myers*, 6 Serg. & R. (Pa.) 16 (1820); *Parkinson v. Parker*, 85 Pa. St. 313 (1877); and that it was affixed by competent authority. *St. John's Church v. Steinmetz*, 18 Pa. St. 273 (1852); *Solomon's Lodge v. Montmoulin*, 58 Ga. 547 (1877); *Morris v. Keil*, 20 Minn. 531 (1874); *Conine v. Junction, etc. R. R.*, 3 Houst. (Del.) 288 (1866). Where a contract is signed by the second vice-president and assistant secretary, and has the seal attached, it is presumed to have been properly executed. *Gutzeit v. Pennie*, 95 Cal. 598 (1892). Where a corporate deed is not under seal, proof must be given that the corporation authorized the deed. *Barney v. Pforr*, 117 Cal. 56 (1897). In Maine it has been held that the presence of the corporate seal on an instrument does not raise a presumption that the corporation entered into the contract. *Morrison v. Wilder Gas Co.*, 91 Me. 492 (1898). The court evidently overlooked the fact that originally a corporation signed a deed or contract by affixing its seal without any written signature whatsoever, and that consequently, upon proof that such seal was the corporate seal, the presumption arose that it was properly affixed, just as proof of the signature of the maker of a promissory note raises a presumption that the maker signed the note and was bound by it.

¹ *Koehler v. Black River, etc. Co.*, 2 Black, 715 (1862); *Parker v. Washoe Mfg. Co.*, 49 N. J. L. 465 (1888), holding also that the testimony of a single officer that he had no knowledge of any authority having been given by the corporation to execute the instrument in suit was not sufficient to over-

come the presumption of proper execution raised by the fact that the corporate seal was affixed to it. *Union Gold Min. Co. v. Bank*, 2 Colo. 226 (1873). The execution of a corporate deed, apparently perfect on its face, may be overthrown by proof that the board of directors never authorized it; that the president signed it before the description was filled in; and that the description was to be other than that which was written in. *Vica, etc. R. R. v. Mansfield*, 84 Cal. 560 (1890). Where the seal of a company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. *Lindley on Companies*, 6th edition, p. 273, states the law as follows: "It may be observed that although an instrument sealed with the corporate seal is *prima facie* valid, yet if the seal is essential to its validity, and if it be proved that the seal was improperly affixed, *e. g.*, was affixed by a person having no authority to use it, the instrument is void as a corporate act. See *Mayor, etc., Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160 (1887); *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389 (1855); *Ex parte Hanly*, 41 Ch. D. 215 (1888); *Colchester v. Lotten*, 1 V. & B. 226, 243, 244 (1813); *D'Arcy v. Tamar, etc. Ry.*, L. R. 2 Exch. 158 (1867). Compare *Ex parte The Contract Corporation*, 3 Ch. App. 105 (1867). But those persons who in practice conduct a company's business, have implied authority to use its seal for the purposes of such business. See *Ex parte Contract Corp.*, 3 Ch. App. 105 (1867), and a corporation

easily cure a defect as to the sealing.¹ The execution and delivery of an instrument by a corporation as a corporation raises the presumption that the company was regularly incorporated.²

A defect in the acknowledgment of a corporate instrument is overlooked by the courts if there is sufficient to indicate an intent to acknowledge.³ The acknowledgment is made by one of the officers

will be estopped from disputing the authority to fix the seal if negligence imputable to the corporation has conduced to the misuse of the seal and is the proximate cause of the loss. See *Mayor, etc., Staple of England v. Governor and Co. of Bank of England*, 21 Q. B. D. 160 (1887); *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389 (1855); *Bank of England v. Vagliano* (1891), A. C., p. 115, 136, 171. See also §§ 725, 808, *infra*. Where there is no statute or by-law requiring a private corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal that a resolution was passed cannot be questioned by any one claiming under or through the corporation. *Prentiss, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). Where it is proven that the proper agents of a corporation signed a deed, and the seal attached to the deed is presumed to be the corporate seal, such presumption is not overcome by proof that no vote of the directors was had authorizing the execution of the deed. *Ruffner v. Welton, etc. Co.*, 36 W. Va. 244 (1892). Although the proper signatures and seal attached to corporate contracts, deeds, and mortgages raises a presumption of authority on the part of the officers to sign, yet the want of authority may be shown. *Leggett v. New Jersey, etc. Co.*, 1 N. J. Eq. 541 (1832). Where a bank knows that a corporate note is accommodation paper it must not only prove that the note was signed by the president and treasurer, but also that they were authorized to sign or that the company received the proceeds or that there was a course of business justifying such note. *Nat.*

Bank, etc. v. Snyder Mfg. Co., 107 N. Y. App. Div. 95 (1905). A telephone corporation may by special demurrer require the plaintiff to state what officers conducted the transaction complained of. *Cherokee Mills v. Gate City, etc.*, 122 Ga. 268 (1905).

¹ *Wood v. Whelen*, 93 Ill. 153 (1879), where a mortgage executed by corporation officers under its seal without proper authority was held to be adopted by a simple resolution without again affixing the seal. See also § 810, *infra*, and *Royal Bank v. Grand Junction R. R.*, 100 Mass. 444 (1868); *St. James's Parish v. Newburyport, etc. R. R.*, 141 Mass. 500 (1886), in which the facts that two directors had examined corporate notes under seal and pronounced them genuine, and that the treasurer had paid interest upon them, were held to constitute a ratification. A court of equity may compel a corporation to affix its seal. *Missouri River, etc. R. R. v. Miami County*, 12 Kan. 483 (1874). *Mandamus* sometimes lies. *Rex v. Vice-Chancellor*, 3 Burr. 1647 (1765).

² See § 637; also *West Side, etc. Co. v. Conn., etc. Co.*, 186 Ill. 156 (1900).

³ An acknowledgment is "the act of one who has executed a deed in going before some competent officer or court and declaring it to be his act or deed." Hence, even though the notary's certificate may be insufficient it may be shown that the corporate officer, authorized to execute the deed, did actually acknowledge such execution, the statute not requiring the certificate of acknowledgment to appear upon the document. *Linderman v. Hastings, etc. Co.*, 38 N. Y. App. Div. 488 (1899). A defective acknowledg-

who executed it.¹ An acknowledgment by a corporation should show the identity of the corporation and of the officers executing the instrument, and their acknowledgment or deposition that they had executed

ment does not affect a deed as between the parties. *Marvin v. Anderson*, 111 Wis. 387 (1901). A substantial compliance with the statute relative to acknowledgments by corporations is sufficient. *Copper, etc. Co. v. Costello*, 95 Pac. Rep. 94 (Ariz. 1908). Although a statutory form of acknowledgment by a corporation calls for a statement that the person was the president, yet a statement that the person said he was president is sufficient. *State v. Coughran*, 19 S. Dak. 271 (1905).

1 The officer or agent who, in behalf of the corporation, affixes the common seal to an instrument is, in the absence of any statutory provision, deemed the agent executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by authority of the board of directors. *Bowers v. Hechtman*, 45 Minn. 238 (1891). The deed of a corporation is capable of being acknowledged. Proving the execution is not the only way of preparing it for record. *Hopper v. Lovejoy*, 47 N. J. Eq. 573 (1891). Authority to execute gives authority to acknowledge the instrument. *Wright v. Lee*, 2 S. D. 596 (1892); s. c., 4 S. D. 237. The deed is good though there is no attestation as to seal. *Smith v. Smith*, 62 Ill. 492 (1872). If the president signs the deed he is the proper person to acknowledge it. *Lovett v. Steam, etc. Assoc.*, 6 Paige, 54 (1836). The acknowledgment may be taken out of the state. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). Where a chattel mortgage statute requires an affidavit by the mortgagee or his agent or attorney

stating certain facts, and the mortgagee is a corporation, the affidavit may be made by its vice-president without reciting his authority. *American, etc. Co. v. Stolzenbach*, 68 Atl. Rep. 1078 (N. J. 1908). Where a deed of the corporation is acknowledged by individuals, instead of being proved by the officers, the recording of such deed is of no effect. *Bernhardt v. Brown*, 122 N. C. 587 (1898). An acknowledgment similar in form to that of an individual suffices. *Hoopes v. Auburn, etc. Co.*, 37 Hun, 568 (1885); aff'd, 109 N. Y. 635. Cf. *Howe, etc. Co. v. Avery*, 16 Hun, 555 (1879). See also *Kelly v. Calhoun*, 95 U. S. 710 (1877); *Frostburg, etc. Assoc. v. Bruce*, 51 Md. 508 (1879); *Muller v. Boone*, 63 Tex. 91 (1885); *Eppright v. Nickerson*, 78 Mo. 482 (1883); *City of Kansas v. Hannibal*, etc. R. R., 77 Mo. 180 (1882); *Tenney v. Lumber Co.*, 43 N. H. 350 (1861). A notary's certificate to the effect that the persons signing are known to him to be president and secretary is sufficient under the statutes of South Dakota. *Holt v. Met. Trust Co. etc.*, 11 S. Dak. 456 (1899). Under the Texas statute it is sufficient that the officer acknowledge that he executed the deed. *Zimpleman v. Stamps*, 21 Tex. Civ. App. 129 (1899). Even though the acknowledgment by an Arkansas corporation of a mortgage on land in Arkansas is in the usual common-law form, but not in accordance with the statute of Arkansas, yet any defect may be cured by statute. *Steers v. Kinsey*, 68 Ark. 360 (1900). In West Virginia a certificate of acknowledgment of a deed by a corporation which fails to show that the officer executing it was sworn and deposed to the facts required by statute is insufficient, and a record of the deed is not notice. *Abney v. Ohio, etc. Co.*,

it, and that they had been duly authorized to execute it. At common law there is no particular form for the acknowledgment of an instrument by a corporation.¹ An affidavit proving the signature of the president and the affixing of the corporate seal is a sufficient acknowledgment.² In a deed to a corporation, the acknowledgment cannot be legally taken by a notary who is a stockholder and director in the corporation and a statute validating such acknowledgments cannot have a retroactive effect.³ A mortgage should not be acknowledged before a notary public who is a stockholder in and officer of the mortgagee.⁴ The recording of a mortgage is a sufficient delivery.⁵

45 W. Va. 446 (1898). A deed may conclude with the words: "In testimony whereof the common seal of said company is hereunto affixed." *Bason v. King's Mountain Min. Co.*, 90 N. C. 417 (1884). As already stated, if the seal is attached this raises the presumption that the party executing it was authorized so to do, and hence to that extent it need not be acknowledged. *Bennett v. Knowles*, 66 Minn. 4 (1896). Proof by a witness whose name does not appear on the paper as a witness is insufficient. *Dodge v. American, etc. Co.*, 109 Ga. 394 (1899).

An approved form of attestation is:

"In witness whereof the said party of the first part has caused its name to be subscribed hereto by its president, and its corporate seal to be affixed hereunto by its secretary" [or other corporate officers, as the case may be], the day and year aforesaid.

[Seal.]

[Signatures.]

A form of proof of the deed of a corporation by the secretary is as follows:

STATE OF NEW YORK, }
County of New York. } ss.

On this ____ day of ____, in the year A. D. 19—, before me personally came ____, the secretary of ____, with whom I am personally acquainted, who, being by me duly sworn, did depose and say: that he resided in ____, and was the secretary of ____, the corporation described in and which executed the foregoing deed; that he knew the corporate

seal of said ____; that the seal affixed to the foregoing deed was such corporate seal, and was so affixed by order of the board of directors of the said ____, and that he attested to the same by subscribing his name to said deed as secretary of said company by the like order. And the said ____ further said that he was acquainted with ____ and knew him to be the president of the said ____; that the signature of the said ____ subscribed to the said deed was in the genuine handwriting of said ____, and was thereunto subscribed by like order of the board of directors of the said ____, and in the presence of him, the said ____.

____, Notary Public.

1 *Pruyne v. Adams, etc. Co.* 92 Hun, 214 (1895); *aff'd*, 155 N. Y. 629, upholding an acknowledgment by the secretary. An acknowledgment by a corporation in North Dakota must state that the officer executing the instrument acknowledged that the corporation executed it. *Gessner v. Minneapolis, etc. Ry.*, 108 N. W. Rep. 786 (N. Dak. 1906).

2 *General, etc. Co. v. Transit, etc. Co.*, 57 N. J. Eq. 460 (1898).

3 *Fugman v. Jiri, etc. Ass'n*, 209 Ill. 176 (1904). An incorporator is not competent, as a notary public, to take the acknowledgment of another incorporator to the certificate of incorporation. *People v. Bd. R. R. Comrs.*, 105 N. Y. App. Div. 273 (1905). See 96 Pac. Rep. 904.

4 *Kothe v. Krag, etc. Co.*, 20 Ind.

5 *International, etc. Co. v. Vause*, 46 S. Rep. 3 (Fla. 1908).

§ 723. *Corporate instruments made out in the name of an officer or agent instead of in the name of the corporation may be enforced by or against the corporation.*—This is now the well-established rule.¹ Thus, where a contract is made by the president in his in-

App. 293 (1898). A mortgage to a corporation is legal, even though the witnesses and the notary public who took the acknowledgment are stockholders of such corporation. *Read v. Toledo Loan Co.*, 68 Ohio St. 280 (1903). The president and chief executive officer of an investment company taking a mortgage may act as notary. *Keene, etc. Bank v. Lawrence*, 32 Wash. 572 (1903). A chattel mortgage is good although acknowledged before a notary public who was a director, treasurer and stockholder, there being nothing in the instrument to indicate that fact. *Ardmore Nat. Bank v. Briggs, etc. Co.*, 94 Pac. Rep. 533 (Okla. 1908). A contract which on its face is with a corporation, but is signed by its agent alone, may nevertheless be enforced by the corporation. *Hanks, etc. Co. v. Woodstock, etc. Co.*, 127 Ga. 108 (1906). The fact that the acknowledgment is taken before a notary who was also the vice-president of the company does not necessarily invalidate the acknowledgment. *Florida, etc. Exchange v. Rivers*, 36 Fla. 575 (1886). An acknowledgment by a corporation taken before a notary who is a stockholder is of no effect in Texas. *Bexar, etc. Assoc. v. Heady*, 21 Tex. Civ. App. 154 (1899). The assistant cashier, who is also a stockholder and director, cannot take the acknowledgment of a mortgagor to the bank. *Wilson v. Griess*, 64 Neb. 792 (1902). A notary public who is a stockholder in a corporation is not qualified to take its acknowledgment of a corporate judgment. *Betts-Evans, etc. Co. v. Bass*, 59 S. E. Rep. 8 (Ga. 1907).

¹ Where the president loans corporate funds and takes notes in his own name, the corporation is considered to be the payee. *New England, etc.*

Co. v. Gay, 33 Fed. Rep. 636 (1888); *Elwell v. Dodge*, 33 Barb. 336 (1861). A note of a corporation signed "R. J. Beatty, President," may be enforced against the corporation where it is alleged that it adopted that method of executing its notes in the ordinary course of business, and that it so executed that note. *Midland, etc. Co. v. Citizens', etc. Bank*, 34 Ind. App. 107 (1904). *Prima facie* a corporation is not liable on a contract made by an individual, even though he is described as of such corporation. *Railway, etc. Co. v. Chicago Co.*, 126 Fed. Rep. 223 (1903). Where the holder of a mortgage sends it to a bank to collect, and the mortgagor buys and sends a draft payable to the president individually, followed by the letters "Pt.", and he embezzles the funds, the mortgagor is released. *Griffin v. Erskine*, 131 Iowa, 444 (1906). The indorsement of a note by signing the corporate name, without adding by whom the name is signed, is good. *Second Nat. Bank v. Martin*, 82 Iowa, 442 (1891). A lease running to the company is good though only its officers' names were signed. *Clark v. Gordon*, 121 Mass. 330 (1876); *Carrol v. St. Johns, etc.*, 125 Mass. 565 (1878). A sealed instrument to pay money, signed by an individual's name, followed by the words "President of the New York Banking Co.," is enforceable against it. *Boisgerard v. New York Banking Co.*, 2 Sandf. 23 (1844). A corporation may enforce a contract made for its benefit by one of its officers, even though the contract was with the officer individually, where the other party knew of that fact. *Escondido, etc. Co. v. Glaser*, 144 Cal. 494 (1904). A debt to a person as secretary and treasurer of an insurance company shows on its face

dividual name, but for the corporation, and the corporation knows of the contract, and acts upon it, and partially performs it, the cor-

that it belongs to the company. *Collier v. Alexander*, 142 Ala. 422 (1905). A bond running to the treasurer may be sued on by the company. *New York, etc. Soc. v. Varick*, 13 Johns. 38 (1816). So also as to a note running to a cashier. *Baldwin v. Bank, etc.*, 1 Wall. 234 (1863); *Commercial Bank v. French*, 38 Mass. 486 (1839). Or to a manager. *Société, etc. v. Mackintosh*, 5 Utah, 568 (1888). But see 7 Utah, 35. The company is liable on an order for goods though the order is signed by an officer as such officer. *Rogers, etc. Co. v. Union, etc. Co.*, 134 Mass. 31 (1883). The case of *Farmers', etc. Bank v. Haight*, 3 Hill, 493 (1842), holds a corporation not liable on a note informally made out. See also *Steele v. Oswego, etc. Co.*, 15 Wend. 266 (1836). Suit lies against a bank on its check signed by its cashier in his own name. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326 (1820). See also *Edwards v. Cameron's, etc. Co.*, 11 Eng. L. & Eq. 565 (1852), where directors signed a note; *Olcott v. Tioga R. R.*, 27 N. Y. 546 (1863); *Bank of Brit. N. A. v. Hooper*, 71 Mass. 567 (1856); *Morrill v. Segar Co.*, 32 Hun, 543 (1884), where the secretary signed a contract; *Van Leuven v. First Nat. Bank*, 54 N. Y. 671 (1873), where the president signed; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312 (1859); *s. c.*, 13 N. Y. 309 (1855); *Many v. Beekman, etc. Co.*, 9 Paige, 188 (1841). But see *De Witt v. Walton*, 9 N. Y. 570 (1854). A cashier may transfer a note by signing his own name as cashier. *McIntyre v. Preston*, 10 Ill. 48 (1848). See also § 724, notes, *infra*. A note payable to and indorsed by "E. S. Hubbell, agent for Buffalo Colliery Company," is collectible against the company where it is shown that he was authorized by the company by its mode of doing business. *Lake Shore Nat. Bank v. Butler Colliery Co.*, 51 Hun, 63 (1889). A corporation is liable on a note signed "R., President S. & T. Co. R. R. Co.; R., Personally." *McCormick v. Stockton, etc. R. R.*, 130 Cal. 100 (1900). A note signed "Iowa National Bank, by William Daggett, V. P.," is properly signed and is not a personal obligation, even though in correspondence the word "we" is used by such vice-president. *Thilmany v. Iowa, etc. Co.*, 108 Iowa, 357 (1899). In foreclosing a vendor's lien a note given by the corporation may be shown to be a corporate note, although signed "T. R. Wagner, Secy. & Genl. Manager of the Shelby Lime & Cement Works." *Wagner v. Brinkerhoff*, 123 Ala. 516 (1899). It may be shown by parol evidence that a note signed "R. J. B., President," was a corporate note. *Second, etc. Bank v. Midland, etc. Co.*, 155 Ind. 581 (1900). Even though the name of the corporation only is signed to a note without the signature of the officer following the corporate name, yet the note is a valid obligation of the corporation. *Youngs v. Perry*, 42 N. Y. App. Div. 247 (1899). Where a corporation buys land in the name of its agent as trustee it is liable for the price thereof. *Hurst v. Am. Assoc.*, 49 S. W. Rep. 800 (Ky. 1899). A due-bill signed by an individual may be shown to have been intended as a due-bill of the company, he being the president. *Richmond, etc. R. R. v. Sneed*, 19 Gratt. (Va.) 354 (1869). An instrument for the payment of money running from a person "as manager and president" is enforceable against the corporation, although signed by the person as an individual. *Jones v. Woolley*, 2 Idaho, 790 (1891). A check signed by an individual with the corporate seal and the name of the secretary attached is not enforceable against the company, it having no

poration is bound.¹ A deed signed by the president and secretary as such is good, even though the statute requires deeds to be subscribed by the vendor.² A mortgage made in the president's name, signed by him, and sealed with his own seal, is not a legal mortgage although authorized by the corporation. It operates, however, as an equitable mortgage as regards subsequent mortgagees with notice.³ Although

benefit thereof. *Serrell v. Derbyshire*, etc. Ry., 9 C. B. 811 (1850). Where notes are made by an individual the payee cannot introduce evidence that they were in behalf of the corporation, the suit being on the notes. *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531 (1891). An accommodation note running to "F. Medhurst, commercial director," given to him by a friend, cannot be enforced by the corporation, Medhurst having defaulted and defrauded the company. *Société, etc. v. Mackintosh*, 7 Utah, 35 (1890). The corporation is not liable on a note as follows: "For value received, we, the subscribers, jointly and severally, promise to pay the plaintiffs or order, for the Boston Glass Manufactory, \$3,500, on demand," and signed by individuals as individuals. *Bradlee v. Boston, etc. Mfy.*, 33 Mass. 347 (1835). A grant to "the governors, president, and fellows of King's College, at Windsor, in the province of Nova Scotia," is *prima facie* a grant to the corporation. *King's College v. McDonald*, 2 Tham. 106 (Can. 1843). A deed to the "trustees of the First Baptist Church" passes title to the corporation. *Keith, etc. Co. v. Bingham*, 97 Mo. 196 (1888). A bill of sale to an individual, "president of" a corporation, "his executors, administrators, and assigns," does not convey title to the corporation. *Florida, etc. Co. v. Usina*, 111 Ga. 697 (1900). A company may be bound by a contract although the contract is signed in the name of an individual. *Jones v. Williams*, 139 Mo. 1 (1897). A contract drawn and signed by "S., general agent," may be shown by parol to be a corporate contract. *Lewis v. Mu-*

tual L. Ins. Co., 8 Colo. App. 368 (1896). The agreement of J. Gould, as trustee for the Missouri Pacific Railroad, that the latter will do a certain thing upon an extension being made, does not bind the latter. *Hill v. Gould*, 129 Mo. 106 (1895). Where a note is signed by the officers individually, but is really a corporate note, the officers who pay and take up the note may enforce it against the corporation. *Re Pendleton Hardware, etc. Co.*, 24 Oreg. 330 (1893). A note signed "National Forge and Iron Co., Mark Swarts, President," may be shown to be the joint note of the company and president. *Swarts v. Cohen*, 11 Ind. App. 20 (1894), classifying many authorities. See also § 810, *infra*.

¹ *Cotting v. Grant Street Elec. Ry.*, 65 Fed. Rep. 545 (1895).

² *Ismon v. Loder*, 135 Mich. 345 (1904). See 47 S. Rep. 78.

³ *Miller v. Rutland, etc. R. R.*, 36 Vt. 452 (1863). See *Hatch v. Barr*, 1 Ohio, 390 (1823), and § 721, *supra*, and § 810, *infra*. A corporate chattel mortgage is good if it runs in the corporate name, even though the president signs only his own name. *Sherman v. Fitch*, 98 Mass. 59 (1867); *Hamilton v. McLaughlin*, 145 Mass. 20 (1887). If so drawn it is immaterial as to who signs or seals. *Wiley v. Board of Education*, 11 Minn. 371 (1866), involving a bond. If the statute authorizes the trustees to convey, their personal deed suffices. *De Zeng v. Beekman*, 2 Hill, 489 (1842). Where the president has title in his name he may convey as president. *Vilas v. Reynolds*, 6 Wis. 214 (1858). A deed made before incorporation, to

a contract under seal is executed by the corporate officers in their individual names, it may be proved by parol that it was a corporation contract, and that the corporation, having adopted and ratified it and attempted to carry it out, is liable on it.¹ In Massachusetts, how-

be delivered to the corporation after incorporation, is good. *Spring, etc. Bank v. Hurlings, etc. Co.*, 32 W. Va. 357 (1889). Although the body of the deed reads, "the president, directors, etc., of," followed by the name of the corporation as grantor, the deed should be construed as the deed of the corporation. *Shaffer v. Hahn*, 111 N. C. 1 (1892). The contract is signed sufficiently to satisfy the statute of frauds where the name of the corporation appears in the body of the instrument. *Tingley v. Bellingham, etc. Co.*, 5 Wash. St. 644 (1893). Where a mortgage purports to be by a corporation, but is signed by the president, treasurer, and secretary personally, with their official titles following their names, and is acknowledged the same as they would acknowledge a personal mortgage, and the corporate seal is not attached, the mortgage is at most only an equitable mortgage, and in order to be foreclosed must be alleged to be such. *Brown v. Farmers' Supply Co.*, 23 Ore. 541 (1893). The signature to a corporate mortgage omitting one word of the name is nevertheless good, and although signed "Chas. P. Law, President of the Santa," etc., is sufficient where the corporate seal is affixed. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). A deed of corporate land properly drawn in the body of the deed, sealed with the corporate seal, and properly acknowledged, but signed "M. Brayman, President C. & F. R. R. Co.," etc., is nevertheless good. *Chouteau v. Allen*, 70 Mo. 290 (1879). *Cf.* *Taylor v. Agricultural, etc. Assoc.*, 68 Ala. 229 (1880). A corporate mortgage signed by the officers with their own names, followed by their titles and scrolls for seals, is good. *Johnston v. Crawley*,

25 Ga. 316 (1858). A mortgage signed by certain individuals as trustees of a church is not on its face a mortgage by the church. *Shackleton v. Allen, etc. Church*, 25 Mont. 421 (1901). Even though a mortgage is signed "Mary L. Byrd, President of the Kingston Lumber & Mfg. Co.," it is a valid mortgage. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); *aff'd*, 106 Tenn. 1.

¹ *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469 (1889). The corporation is bound where the president signs his name followed by the word "president," and the secretary signs his name followed by the word "secretary," the corporate seal having been also impressed upon the document in the body thereof. *Union, etc. Co. v. Robinson*, 79 Fed. Rep. 420 (1897). Where the lease in its body is to a corporation, the corporation is bound, even though it is signed "E. J. Crandall [Seal], President." *Consolidated Coal Co. etc. v. Peers*, 150 Ill. 344 (1894). A sealed contract to sell land running to the president cannot be enforced by the corporation. *Buffalo, etc. Inst. v. Bitter*, 87 N. Y. 250 (1881). It is liable on a deed to the manager. *Pickering's Claim*, L. R. 6 Ch. 525 (1871). An assignment of a lease running in its body from "George F. Baker, Treasurer," etc., of the company, and assign in the same way, is not a corporate assignment. *Norris v. Dains*, 52 Ohio St. 215 (1894). A mortgage is not enforceable against a corporation where it is drawn as a personal obligation and signed by an individual "as president." *Clark v. Hodge*, 116 N. C. 761 (1895). An assignment of a mortgage and a note belonging to a corporation by its president and secretary as follows: "We, the under-

ever, it is held that where a contract *under seal* is made, not by the corporation, but by its agent individually, the corporation cannot be sued thereon by the other party, unless it is estopped by some subsequent act or writing.¹

Questions relative to the power of certain officers to sign notes and contracts are considered elsewhere.²

§ 724. *Liability of officers and agents on corporate securities which are not properly drawn, signed, or sealed in the corporate name.*—It frequently happens that the person, with whom a corporate contract has been made, attempts to hold personally liable the officer or agent of the corporation, on the ground that such officer or agent used his own name in the body of the contract, or signed it as principal instead of using the corporate name. But the courts have quite uniformly defeated such attempts to hold the officer or agent liable. If the instrument or contract indicates that the officer or agent is acting only as agent, and if the name of the corporation appears on the instrument, the officer or agent is not liable thereon.³

signed, D. R. T., president, and C. S. B., secretary, have transferred . . . and on the part of said company have hereunto attached our names and affixed our seals," signing their names and affixing their private seals, is presumptively a corporate transfer. *Lay v. Austin*, 25 Fla. 933 (1890).

1 Congress, etc. Co. v. Worcester, etc. Co., 182 Mass. 355 (1903).

2 See §§ 715-720, *supra*.

3 Quoted and approved in *Morrison v. Baechtold*, 93 Md. 319, 329 (1901). A note stamped with the corporate seal, followed by the words "John Roach, Treasurer," is the company's note alone. *Miller v. Roach*, 150 Mass. 140 (1889). A note, "We promise to pay," and signed "San Pedro Mining and Milling Company, T. Kraus, President," cannot be enforced against Kraus personally. *Liebscher v. Kraus*, 74 Wis. 387 (1889). Even though following the corporate name to a note is the signature of the treasurer and then another name without any title, yet if he signed only as secretary that fact may be shown by parol. *Germania Nat. Bank v. Mariner*, 129 Wis. 544 (1906). It may be shown by parol evidence that a note signed

by the company followed by an individual name as "President" and another individual name as "Secretary" is a note of the corporation only. *Western, etc. Co. v. Lackman*, 88 Pac. Rep. 527 (Kan. 1907). A note signed in the company's name followed by the names of the president and secretary is not a personal obligation on their part even though the word "by" is not inserted. *English, etc. Co. v. Globe, etc. Co.*, 70 Neb. 435 (1903). A note reading "We promise," etc., and signed "Warrick Glass Works, J. Price Warrick, President," is conclusively held to be the note of the corporation alone. *Reeve v. First Nat. Bank*, 54 N. J. L. 208 (1892). It is a question of fact whether a note is that of the corporation or of an individual where in the body it is made by the corporation, but the signature is that of a person as "Gen. Supt." *Frankland v. Johnson*, 147 Ill. 520 (1893). A treasurer is not liable on a note signed as follows: "The Sanitary Milk-Supply Co., T. A. Huston, Trs." *Gleason v. Sanitary, etc. Co.*, 93 Me. 544 (1900). A note reading "We promise to pay," and signed by the corporation and also by the offi-

Especially is this the rule as between the original parties to the contract. It also is the rule as to parties taking with notice. The

cers as officers, does not render the latter liable personally. *Wilson v. Fite*, 46 S. W. Rep. 1056 (Tenn. 1897). The following indorsement on negotiable paper, "Estate of Wheeler, Wing, Executor," does not bind such executor individually, even though it does not bind the estate. *Grafton Nat. Bank v. Wing*, 172 Mass. 513 (1899). A note signed by an individual maker, with the word "President" following the signature, is at law a personal note, and the word "President," etc., is disregarded. The defendant, however, may by cross-complaint cause the note to be reformed on the ground of a mistake, and thus relieve himself from liability and render the corporation liable. *Prescott v. Hixon*, 22 Ind. App. 139 (1899). Where the body of a note does not refer to the company, and it is signed by individuals with the words "President," etc., following their names, they are liable personally on the note, but the defendants may file a cross-bill to have the note reformed so as to relieve them from personal liability. *Lawrence County Bank v. Arndt*, 69 Ark. 406 (1901). A guaranty signed by an individual in his own name, followed by the letters "Pt.," may be shown to be the obligation of the corporation only, provided the corporation might execute a guaranty and authorized the president to execute it. *Small v. Elliott*, 12 S. D. 570 (1900). A note signed by individuals as officers is *prima facie* their individual note, but it may be shown, as between the original parties, that it was really the note of a corporation. *Bush v. Gilmore*, 45 N. Y. App. Div. 89 (1899). Where the name of an individual is the same as that of a corporation of which he is president, parol evidence may show that the signature to an instrument was the signature of the company and not of the individual.

Hall v. Ochs, 34 N. Y. App. Div. 103 (1898). A note signed with the company's name per officers does not bind them personally, although the body of the note reads "We promise to pay." *Williams v. Harris*, 198 Ill. 501 (1902). Where the unissued stock of a corporation (upon its reorganization on the expiration of its charter) is issued to the president as trustee to sell from time to time, and to turn over the proceeds of the sales to the company, the fact that he gives the company a note for the same signed by him as "Trustee for Bank" does not render him liable on such note upon the bank becoming insolvent. *Neptune v. Paxton*, 15 Ind. App. 284 (1896). Where the directors sign a corporate note on the back with the words added "board of directors," it may be shown by parol evidence that they signed it as directors, and are not liable personally. *Kline v. Bank of Tescott*, 50 Kan. 91 (1892). A note signed "G. A. Colby, President Pac. Peat Coal Co., D. K. Tripp, Sec. *pro tem.*," is on its face a corporate note. *Farmers', etc. Bank v. Colby*, 64 Cal. 352 (1883); *Mott v. Hicks*, 1 Cow. 513 (1823); *Bellinger v. Bentley*, 1 Hun, 562 (1874); *Hascall v. Life Assoc.*, 5 Hun, 151 (1875); *aff'd*, 66 N. Y. 616; *Morrill v. Segar Co.*, 32 Hun, 543 (1884), the court saying: "The rule now is that, where the instrument raises on its face a question as to the personal liability of the party signing it, parol evidence is admissible to show the intention of the parties;" *Babcock v. Beman*, 11 N. Y. 200 (1854); *Whitney v. Wyman*, 101 U. S. 392 (1879); *Whitford v. Laidler*, 94 N. Y. 145 (1883), where even a lease made out to an officer as such was held not enforceable against him; *Holt v. Winfield Bank*, 25 Fed. Rep. 812 (1885), where an attempt was made to hold a president liable on an

adding of a title does not necessarily constitute such notice.¹ Thus, where a note is signed by two persons with the words "president"

ultra vires subscription; *Haight v. Sahler*, 30 Barb. 218 (1859), where also the contract was sealed; *Pitman v. Kintner*, 5 Blackf. (Ind.) 250 (1839); *Stanton v. Camp*, 4 Barb. 274 (1848); *Draper v. Mass. etc. Co.*, 87 Mass. 838 (1862); *Sharpe v. Belles*, 61 Pa. St. 69 (1869); *Hopkins v. Mehaffy*, 11 Serg. & R. (Pa.) 126 (1824), where also a seal was used, the body of the instrument being in the company's name. To same effect, *Abbey v. Chase*, 60 Mass. 54 (1850), and *Ellis v. Pulsifer*, 86 Mass. 165 (1862); *McHenry v. Duffield*, 7 Blackf. (Ind.) 41 (1843), where a due-bill was signed by a committee; *Passmore v. Mott*, 2 Binn. (Pa.) 201 (1809), where a secretary signed a ticket; *Hovey v. Magill*, 2 Conn. 680 (1818); *McWhorter v. Lewis*, 4 Ala. 198 (1842); *Means v. Swormstedt*, 32 Ind. 87 (1869); *Mann v. Chandler*, 9 Mass. 335 (1812); *Carpenter v. Farnsworth*, 106 Mass. 561 (1871). An officer is not liable personally on a note payable to him as "Sec. and Treas.," and indorsed by him likewise. *Falk v. Moebs*, 127 U. S. 597 (1888). A promissory note, "We promise to pay," etc., signed "Houston Flour-mills Co., D. P. Shepherd, President," is enforceable against the company only. *Latham v. Houston Flour Mills*, 68 Tex. 127 (1887); *Jefts v. York*, 58 Mass. 371 (1849); s. c., 64 Mass. 392 (1852); *Okell v. Charles*, 34 L. T. Rep. 822 (1876). It may be a question of fact as to whether a treasurer, in buying, bought stock for himself or the company. *Haynes v. Hunnewell*, 42 Me. 276 (1856). See also *Randall v. Van Vechten*, 19 Johns. 60 (1821), holding a committee not liable on a sealed instrument; *Stearns v. Allen*, 25 Hun, 558 (1881). Cf. *De Witt v. Walton*, 9 N. Y. 571 (1853). In support of the text see also *Dubois v. Delaware, etc. Co.*, 4 Wend. 285 (1830); *Olcott v.*

Tioga, etc. R. R., 27 N. Y. 546 (1863). See also *Lindley, Companies* (5th ed.), p. 231, etc.; *Green's Brice, Ultra Vires*, p. 754. The denial of the directors' liability on a note signed by them as directors is raised by answer, not by demurrer. *McKenney v. Edwards*, 88 Ky. 272 (1889). A note drawn by the directors as directors of the company, and sealed with the seal of the company, is not enforceable against the directors individually. *Aggs v. Nicholson*, 1 H. & N. 165 (1856). The president is not liable on bonds which he signed as president and which the corporation had power to issue. *McMasters v. Reed*, 1 Grant, Cas. (Pa.) 36 (1854); *Wilson v. Fite*, 46 S. W. Rep. 1056 (Tenn. 1897).

¹ Where a note reads "We promise to pay," etc., and is signed "D. M. Co. J. K., President," the president alone is liable. *Mathews v. Dubuque Matress Co.*, 87 Iowa, 246 (1893). A note signed in the company's name, followed by the words "B. L. Brownell, Pres.," binds him personally. *Heffner v. Brownell*, 70 Iowa, 591 (1887). So also of a note signed "C. F. Clark, Trustee Omega Lodge." *Coburn v. Omega Lodge*, 71 Iowa, 581 (1887). The trustees of an association who signed a note as trustees are personally liable thereon. *McKenney v. Bowie*, 94 Me. 397 (1900). A note signed by individual names, followed by the words "Board of Business Managers," is enforceable against them personally, although it was intended as a note of a corporation. *Richmond, etc. Works v. Moragne*, 119 Ala. 80 (1898). A note signed by a corporation and several stockholders is binding on all of them, even though the words "as stockholders" follow the individual names. *Savings Bank, etc. v. Central Co.*, 122 Cal. 28 (1898). Where an unincorporated association

and "treasurer" following their names, they are liable individually, unless the plaintiff had notice that the note was a corporate note.

becomes incorporated, a person who does not know of that fact may hold the trustees personally liable on a note signed by them, although the word "trustees" precedes their signature. *Vliet v. Simanton*, 63 N. J. L. 458 (1899). Where a note is signed by the president and secretary in their individual names, except that they add the words "President" and "Secretary" respectively, there being nothing on the face of the note to show that it is a company note, they are liable personally on the note. They will not be allowed to show that it was the intention of all parties to bind the company only, or that the money went to the company only, or that the company authorized the note; nor can they file a cross-bill to relieve themselves from the note. *San Bernardino, etc. Bank v. Andreson*, 32 Pac. Rep. 168 (Cal. 1893). In the case of *Hackemack v. Wiebrock*, 172 Ill. 98 (1898), the court held that the signers were individually liable on a note which recited "We promise to pay," and was signed "Henry Hackemack, Pres., Raythe Nagel, Secy.," to a person who took the note supposing that they were personally liable. A note, "We promise to pay," etc., signed "E. H. Close, Treas., John Clark, Pres't," without referring to the corporation, may be enforced against Close and Clark personally, although in the border of the note the company's name appears. *Merchants' Nat. Bank v. Clark*, 64 Hun, 175 (1892); affirmed in 139 N. Y. 314 (1893). A treasurer is liable personally on a note signed personally by him, although the signature is followed by the word "Treasurer." *Medberry v. Short*, 15 N. Y. Week. Dig. 227 (1882); *Tippets v. Walker*, 4 Mass. 595 (1808). A note in the form "I promise to pay," and signed by "E., Pres. & Treas. C. Co.," has been held

to be the note of E. and not of the corporation. *Davis v. England*, 141 Mass. 587 (1886); *Stinchfield v. Little*, 1 Me. 231 (1821), where a deed was to the agent; *Bruce v. Lord*, 1 Hilt. 247 (1856), holding the agent *prima facie* liable on a draft; *Mare v. Charles*, 5 El. & B. 978 (1856); *Dayton v. Warne*, 43 N. J. L. 659 (1881), involving a bond; *Sawyer v. Winne-gance Mill Co.*, 26 Me. 122 (1846), holding the company not bound by an agreement to arbitrate; *Seaver v. Curnburn*, 64 Mass. 324 (1852), involving a lease; *Drake v. Flewellen*, 33 Ala. 106 (1858), holding the secretary *prima facie* liable; *Dutton v. Marsh*, L. R. 6 Q. B. 361 (1871), where the note was, "We, the directors of the Isle of Man Slate & Flag Co., Limited, do promise to pay J. D. £1,600." The company's seal was affixed; *Tucker, etc. Co. v. Fairbanks*, 98 Mass. 101 (1867); *Barker v. Mechanics', etc. Co.*, 3 Wend. 94 (1829); *Taft v. Brewster*, 9 Johns. 334 (1812), involving a bond; *Brockway v. Allen*, 17 Wend. 40 (1837). Where a draft was drawn on an individual name, followed by the words "President Rosendale M'ng Co., New York," and accepted by him by the same signature, he is liable personally on it. *Moss v. Livingston*, 4 N. Y. 208 (1850); *Hills v. Bannister*, 8 Cow. 31 (1827). Persons signing and sealing a bond in their own names and under their own seals are individually bound, even though they intended to bind the corporation, and in the body of the instruments they are described as trustees. *Cullen v. Nickerson*, 10 Up. Can. C. P. Rep. 549 (1861). *Prima facie* a person is liable personally who signs a note as follows: "J. W. Parrott, President of Long Branch Hotel and Cottage Co." *Terhune v. Parrott*, 59 N. J. L. 16 (1896). A corporate agent who signs the corporate name to a note without

The fact that the plaintiff had brought another suit on another similar note against the corporation after the note in this case had been issued does not prove such notice.¹ A *bona fide* purchaser of a promissory note which does not disclose any corporate obligation, and is signed by the officers with their title attached, may enforce such note against the officers as individuals, if the holder has no notice of the fact that it was a corporate obligation. The fact that the name of the corporation is on the margin does not constitute notice.² The liability of officers for signing the company's name to notes and contracts without authority is considered elsewhere.³

§ 725. *Requirements by charter or by-laws that contracts shall be made by certain officers or with certain formalities—Right of party contracting with corporation to rely on proper corporate action having been taken.*—It has been held that, where the charter prescribes that corporate contracts shall be signed by certain officers, a contract that is signed by only a part of them is not enforceable,

authority is liable personally thereon. *Frankland v. Johnson*, 147 Ill. 520 (1893). An officer making a corporation note without authority is personally liable thereon. *Miller v. Reynolds*, 92 Hun, 400 (1895). Where a note reads "We promise to pay," etc., and is signed "William T. Wallis, President, Geo. T. Smith, Treasurer," they are liable personally to a *bona fide* holder. *First Nat. Bank v. Stuetzer*, 80 Hun, 435 (1894); *aff'd*, 150 N. Y. 455. See also *Keokuk Falls Imp. Co. v. Kingsland, etc. Co.*, 5 Okla. 32 (1896). The president executing an ordinary guaranty in the name of the corporation without authority is personally liable thereon. *Nelligan v. Campbell*, 20 N. Y. Supp. 234 (1892). The incorporators may be liable on a note indorsed in the name of the corporation prior to the certificate of incorporation being filed with the secretary of state in Missouri, but the allegations must be clear as to the exact dates. *Ryland v. Hollinger*, 117 Fed. Rep. 216 (1902). A note, reciting in its body that the corporation and the undersigned promise to pay, is binding on the latter individually, they actually having signed. *Nunnemacher v. Poss*,

116 Wis. 444 (1902). Where a corporation as lessee assigns the lease to trustees, the corporation is not liable for negligence in connection with the property, but the trustees are the parties to be sued. *Falardeau v. Boston, etc. Assoc.*, 182 Mass. 405 (1903). On this subject of liability see also §§ 245, 503c, *supra*, on the liability of trustees; § 705, *supra*, on the liability of promoters; § 508, *supra*, on the liability of officers of unincorporated associations; and § 888, *infra*, on the liability of committeemen.

¹ *First Nat. Bank v. Wallis*, 150 N. Y. 455 (1896). Where a note is signed by an individual followed by the words "Prest. Mt. Carmel Lgt. & Water Co.," and the corporate seal is affixed, the presumption is that he is not personally liable thereon. *Reed v. Fleming*, 209 Ill. 390 (1904).

² *Casco Nat. Bank v. Clark*, 139 N. Y. 307 (1893); *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314 (1893).

³ See §§ 682 and 715-720, *supra*. *De facto* officers are not personally liable on a corporate note issued by their authority. *Potwin v. Greenwald*, 123 Ill. App. Rep. 34 (1905).

even in *bona fide* hands.¹ But the harshness and the inconvenience of this rule have caused it to be widely departed from and practically abandoned.²

1 *Safford v. Wyckoff*, 4 Hill, 442 (1842); *Head v. Providence Ins. Co.*, 2 Cranch, 127 (1804); *Badger v. American Ins. Co.*, 103 Mass. 244 (1869); *Dawes v. North River Ins. Co.*, 7 Cow. 462 (1827); *Hill v. Manchester, etc. Co.*, 2 Nev. & M. 573 (1833); s. c., 5 B. & Ad. 866; *Corn Exchange Bank v. Cumberland Coal Co.*, 1 Bosw. 436 (1857). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. *Holcomb v. Bridge Co.*, 9 N. J. Eq. 457 (1853). A corporate deed not countersigned by the secretary as required by statute is void as against a subsequent levy of execution. *Galloway v. Hamilton*, 68 Wis. 651 (1887). Where the articles prohibit a purchase on credit, a vendor who knew it cannot recover. *Hotchin v. Kent*, 8 Mich. 526 (1860). Where the charter prescribes who may be the corporate agents for particular purposes, the provision is a limitation upon the power of the corporation, and it cannot appoint other agents for such purposes. *Washington Turnpike v. Cullen*, 8 Serg. & R. (Pa.) 517, 521 (1822). And see *U. S. Bank v. Dandridge*, 12 Wheat. 64, 113 (1827); *Royalton v. Royalton Turnp. Co.*, 14 Vt. 311 (1842); *Union Turnpike v. Jenkins*, 1 Caines, 381, 391 (1803); *Beatty v. Marine Ins. Co.*, 2 Johns. 109 (1807); *Commonwealth v. St. Mary's Church*, 6 Serg. & R. (Pa.) 508 (1821); *Conro v. Port Henry Iron Co.*, 12 Barb. 27 (1851); *Re General, etc. Co.*, 38 L. J. (Ch.) 320 (1869). See also *L. R. 14 Eq. 507*, where the general manager signed instead of two directors and the secretary. Time notes are void where the charter forbids all except demand notes. *Root v. Godard*, 3 McLean, 102 (1842); s. c., 20 Fed. Cas. 1159; *Root v. Wallace*, 4 McLean, 8 (1845); s. c., 20 Fed. Cas. 1167. The president cannot discount paper where the charter requires the board to pass on it. *Manderson v. Commercial Bank*, 28 Pa. St. 379 (1857). See also *British Assur. Co. v. Brown*, 12 C. B. 723 (1852); but here the contract, being unilateral, was held not to be within the statute; *Edwards v. Cameron's, etc. Co.*, 11 Eng. L. & Eq. 565 (1852)—an acceptance of a bill; *Halford v. Cameron's, etc. Ry.*, 16 Q. B. 442 (1851); *Andrews, etc. Co. v. Youngstown, etc. Co.*, 39 Fed. Rep. 353 (1889). A purchaser of stock in a corporation is bound to take notice of special provisions in its charter relative to liability. *Brown v. Morton*, 71 N. J. L. 26 (1904).

2 The custom of the corporation may have that effect. *Barnes v. Ontario Bank*, 19 N. Y. 152 (1859); *Bulkley v. Derby Fishing Co.*, 2 Conn. 252 (1817); *Kilgore v. Bulkley*, 14 Conn. 362 (1841); *Kenner v. Lexington, etc. Mfg. Co.*, 91 N. C. 421 (1884), holding also that the provision must be pleaded; *Witte v. Derby Fishing Co.*, 2 Conn. 260 (1817). If the corporation ratifies or receives the benefits of the contract, the contract is valid. *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875); *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *Merchants' Bank v. Central Bank*, 1 Ga. 418 (1846). Even though the charter requires corporate notes to be signed by the president and secretary, yet a note signed by the secretary alone is sufficient if that has been the custom of the company. Moreover, a pledge of property to secure the note is good, even though the note is void. *Blanc v. Germania Nat. Bank*, 114 La. 739 (1905). Where the statute requires corporate contracts to be executed in a certain

“Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs

way, a contract not so executed cannot be enforced, although probably a *quantum meruit* would lie. *Curtis v. Piedmont, etc. Co.*, 109 N. C. 401 (1891). A *bona fide* purchaser of bonds is protected against the defense that they were issued illegally and in violation of statutory provisions, the issue itself having been authorized. *Webb v. Herne Bay, L. R.* 5 Q. B. 642 (1870). A substantial compliance with a statutory provision that bills of exchange must be accepted by the corporation in a certain way is sufficient. *Halford v. Cameron's, etc. Ry.*, 16 Q. B. 442 (1851). In regard to the method in which New York religious corporations contract for the services of the minister, see *Landers v. Frank, etc. Church*, 97 N. Y. 119 (1884). A statute requiring that no contract shall be binding upon a corporation unless made in writing is held to refer wholly to contracts executory. *Foulke v. San Diego, etc. Ry.*, 51 Cal. 365 (1876); *Reuter v. Electric Tel. Co.*, 6 Bl. & B. 341 (1856). In this case an agreement of the chairman was held to have been ratified by the corporation, though the deed of settlement required the signatures of three directors to contracts of the kind in controversy. *Bargate v. Shortridge*, 5 H. L. Cas. 297 (1855). Although the statute says that deeds of a corporation shall be signed by the president, yet signature by the vice-president is sufficient. *Ballard v. Carmichael*, 83 Tex. 355 (1892). Although the statutes require contracts of corporations involving a liability of over \$100 to be in writing, and under the corporate seal, or signed by a corporate officer, yet a person performing work for the company may sue on a *quantum meruit*. *Roberts v. Deming, etc. Co.*, 111 N. C. 432 (1892). A charter provision as to certain officers signing documents may be dis-

regarded. *Re Norwich, etc. Co.*, 22 Beav. 143 (1856), where three directors did not sign as required. The provision in Pennsylvania that certain corporations shall not make certain contracts except in writing signed by two directors does not apply to contracts made out of the state, and is waived if the corporation sues on the contract; and it does not apply to a contract executed on one side. *Park, etc. Co. v. Kelly Axe Mfg. Co.*, 49 Fed. Rep. 618 (1892). Where the charter provides that property shall be purchased by five trustees, a purchase-money mortgage executed by the president and secretary, not sealed with the corporate seal and not authorized by the corporation, is void. *McElroy v. Nucleus Assoc.*, 131 Pa. St. 393 (1890). A corporate lease not *mala prohibita* nor *mala in se*, but informal in that all the statutory formalities were not complied with, supports an action for past-due rent. *Mayor, etc. v. Wylie*, 43 Hun, 547 (1887); *aff'd*, 122 N. Y. 663. But where a statute prohibited transfers of securities over \$1,000 in value by the cashier, unless the directors had previously authorized, a director taking such securities without there being a previous authorization takes nothing by the transfer and cannot recover back what he paid therefor, the corporation being in a receiver's hands. *Gillet v. Phillips*, 13 N. Y. 114 (1855). *Cf. Atkinson v. Rochester, etc. Co.*, 114 N. Y. 168 (1889). A statute providing that the president and two other members of a corporation shall sign deeds does not exclude the common-law method. *Bason v. King's Mountain Min. Co.*, 90 N. C. 417 (1884). A statute requiring corporate contracts for over \$100 to be in writing does not apply to executed contracts. *Clowe v. Imperial, etc. Co.*, 114 N. C. 304 (1894). Where the char-

of the latter.”¹ A mortgagee is not bound to inquire into the observance of the rules and regulations of the company relative to the

ter prohibits the directors making a contract for over \$250, unless a stockholders' meeting authorizes the same, a contract for \$2,000 without such authorization is void. *Georgetown, etc. Co. v. Central, etc. Co.*, 34 S. W. Rep. 435 (Ky. 1896). A provision in the charter that contracts beyond a certain amount must be executed in a certain way, or else ratified by the board of directors, is satisfied if all of the directors assent to the contract. *New York, etc. Co. v. Metropolitan Inv. Co.*, 10 N. Y. App. Div. 342 (1896). Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him. *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889). A statute providing that contracts signed by the president shall bind the company does not prevent the company being bound by an oral contract. *St. Joseph, etc. Co. v. Globe, etc. Co.*, 156 Ind. 665 (1901). Where the president has authority to make contracts, a secret agreement between him and the stockholders that he would not make certain contracts is not binding on a stranger dealing with the corporation. *Heinze v. South, etc. Co.*, 109 Wis. 99 (1901). A deed of corporate land made by the president under his own name and seal is good when the statute said “the deed of the president.” *Warner v. Mower*, 11 Vt. 385 (1839). But see *Isham v. Bennington*, 19 Vt. 230 (1847), where the deed was signed by the president and failed to recite a resolution authorizing it, and was held void. A statute authorizing a corporation to convey real estate by an agent appointed for the purpose does not exclude other means of conveyance, as by its officers. *Morris v. Keil*, 20 Minn. 531 (1874), where the deed was by a foreign corporation. And in general the ordinary contracts of the company may be made without observing this statutory provision as to what officers shall contract. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326 (1820); *Prince of Wales Ass. Co. v. Harding, El., Bl. & E.* 183 (1857); *Rockwell v. Elkhorn Bank*, 13 Wis. 653 (1861); *Merrick v. Burlington Plank-Road*, 11 Iowa, 74 (1860); *Dana v. Bank of St. Paul*, 4 Minn. 385 (1860); *De Groff v. American Linen T. Co.*, 21 N. Y. 124 (1860); *Creswell v. Lanahan*, 101 U. S. 347 (1879); *Kelley v. Mayor of Brooklyn*, 4 Hill, 263 (1843); *Moreland v. State Bank*, 1 Ill. 263 (1828); *South Carolina Bank v. Hammond*, 1 Rich. L. (S. C.) 281 (1845); *Boisgerard v. N. Y. etc. Co.*, 2 Sandf. Ch. 23 (1844). See also *Merritt v. Lambert, Hoffm.* Ch. 166 (1840), where title to land was taken in the president's name instead of the company's. Cf. *Farmers' Loan, etc. Co. v. Carroll*, 5 Barb. 613 (1849). See also *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868), where no previous authorization by the stockholders was obtained; *Agar v. Athenæum, etc. Soc.*, 3 C. B. (N. S.) 725 (1858), where a seal was required but was omitted; *Lindley, Companies*, p. 160.

¹ *Demings v. Supreme Lodge*, 131 N. Y. 522 (1892). See also *Campbell v. Argenta, etc. Co.*, 51 Fed. Rep. 1 (1892). A *bona fide* purchaser of a negotiable corporation bond is protected in assuming that the acts of the corporation and relating to its management in the issue of the bonds have been complied with. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883); *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251, where the defense was set up that the stockholders had not voted on the matter, as required by statute. The court held that the regular execution of the

call of meetings.¹ Where the seal of the company has been affixed to a mortgage by the secretary, the mortgagee need not inquire whether a quorum of the directors was present at the meeting and authorized the mortgage, nor whether the secretary was duly authorized to affix the seal, the court upholding the mortgage, although a quorum was not present when it was authorized.² Again, where a

corporate powers was conclusively presumed in favor of *bona fide* holders. Purchasers are not affected by informalities in the notice of and the conducting of meetings. *Fontaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868). It has been held that a purchaser of corporate securities may safely assume that all charter requirements in regard to votes relative to the securities have been complied with. *Royal British Bank v. Turquand*, 6 El. & B. 327 (1856); *Colonial Bank v. Willan*, L. R. 5 P. C. 417 (1874); *London, etc. Ry. v. M'Michael*, 5 Exch. 855 (1850), where the company sued for subscriptions; *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859), where the stockholders acquiesced. See also *Bank of U. S. v. Dandridge*, 12 Wheat. 64 (1827). But compare the cases under the New York statute requiring the written consent of stockholders before a mortgage can be made by certain corporations. § 779, *infra*. See also § 808, *infra*. Where directors have power to bind the company, "but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed." *Re Land Credit, etc. Co.*, L. R. 4 Ch. 460 (1869), where bills of exchange had been issued and the directors knew it and acquiesced. Where the statute requires the consent of the court to a mortgage, the mortgage cannot be foreclosed if such consent was not obtained. *Dudley v. Congregation of St. Francis*, N. Y. L. J., Sept. 2, 1891; s. c., 138 N. Y. 451 (1893).

¹ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896). Where a mortgage is approved by all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement as required by statute. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). Even though the statutory notice of a stockholders' meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. *Atlantic, etc. Co. v. The Vigilancia*, 73 Fed. Rep. 452 (1896). Although the statute requires three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), *rev'g Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894).

² *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. A mortgagee is chargeable with knowledge of the fact that the statute required three directors, and that the company only had two directors when the mortgage was authorized. *Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced. *Savage v. Miller*, 56 N. J. Eq. 432 (1897). A mortgagee need not inquire whether a resolution of the directors authorizing a mortgage, and recited therein,

person sells land to a company relying on a resolution certified to by the officers to the effect that the purchase had been duly authorized, the company cannot afterwards repudiate the purchase on the ground that the directors' meeting was irregular and no quorum present.¹

The supreme court of the United States lays down the rule as follows: "One who takes from a railroad or business corporation in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."²

These rules, however, do not apply to usurpations of authority by corporate officers. As already explained, the authority of the president, secretary and treasurer and other officers to make contracts

has been actually passed by them. *Manhattan Hardware Co. v. Roland*, 128 Pa. St. 119 (1889). Where a mortgage on its face has been regularly executed it is not necessary in a foreclosure suit to prove a resolution of the board of directors authorizing it, proof of delivery and the payment of consideration to the corporation having been given. *Reed v. Helois, etc. Co.*, 64 N. J. Eq. 231 (1903). See also §§ 768, 808, *infra*, and § 712, *supra*.

¹ *Montreal, etc. Co. v. Robert*, [1906] A. C. 196.

² *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

A *bona fide* purchaser of corporate bonds is entitled "to presume that all necessary preliminaries not required to be a matter of public record have been properly performed," and hence it is no defense that the directors met out of the state when they authorized the mortgage securing the issue. *Schultze v. Van Doren*, 64 N. J. Eq.

465 (1902). Where the board of directors have power to borrow money and issue debentures, and a debenture is issued in due form on its face, a *bona fide* holder thereof is protected, although the company had not been fully organized and no directors had been appointed and no resolutions passed by them. *Duck v. Tower, etc. Co.*, [1901] 2 K. B. 314. Where a person loans money to a corporation and pays it over to the secretary and takes the note of the company executed by the president and secretary, the note is good, even though they took the money and used it to pay for stock in another corporation. *Allen v. West Point, etc. Co.*, 132 Ala. 292 (1902). Where the secretary and treasurer and a director have been allowed to transact the business of the company and they borrow money for the company and give the company's bond and mortgage therefor, and produce a certified copy of a resolution passed by the board of directors, the lender may rely on such certified copy, even though it afterwards turns out to have been unauthorized. *Hutchison v. Rock Hill, etc. Co.*, 65 S. C. 45 (1902).

for the corporation is exceedingly limited.¹ They must have special authority from the board of directors. Hence the mere fact that they have signed the corporate name to a contract and affixed the corporate seal does not make the instrument binding on the corporation. It raises a presumption,² but this presumption may be overthrown. Consequently it is difficult to lay down definite rules as to when a corporation is and when it is not bound by a contract which apparently has been regularly executed by the corporation through its proper officers. The tendency is to hold the corporation liable, inasmuch as it selects its own officers and should be to a certain extent responsible for their acts in signing the corporate name and attaching the corporate seal to contracts. Where the charter provides that certain contracts may be made only after an act has been performed by the company, a third person may rely on the company's representation that the act has been done.³ A by-law requiring that contracts be made only by certain officers, or that certain formalities shall be observed, is of little avail as against outside parties. Persons contracting with the corporation are not bound to know of the by-law, and the courts are reluctant to invalidate a contract by reason of it.⁴

1 See §§ 712-720, *supra*.

2 See § 722, *supra*.

3 Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548 (1883), where bonds were to be issued only after a certain amount of the capital stock had been paid in; Royal British Bank v. Turquand, 5 El. & B. 248 (1855), *aff'd*, 6 El. & B. 327, where a resolution was to precede all contracts. See also *Ex parte* American, etc. Co., 3 De G., J. & S. 147 (1865), and Prince of Wales Ass. Co. v. Harding, El., Bl. & E. 183 (1857). See also Akin v. Blanchard, 32 Barb. 527 (1860); Kingsley v. New England, etc. Ins. Co., 62 Mass. 393 (1851); Union, etc. Ins. Co. v. White, 106 Ill. 67 (1883); Irvine v. Union Bank of Australia, L. R. 2 App. Cas. 366 (1877).

4 Fay v. Noble, 66 Mass. 1 (1853); Ten Broeck v. Winn, etc. Co., 20 Mo. App. 19 (1885); Walker v. Wilmington, etc. R. R., 26 S. C. 80 (1887); Bank v. Cresson, 12 Serg. & R. (Pa.) 306 (1825); Manville v. Belden, etc. Co., 17 Fed. Rep. 425 (1883); Morrill

v. Segar, etc. Co., 32 Hun, 543 (1884); Samuel v. Holladay, 1 Woolw. 400 (1869); s. c., 21 Fed. Cas. 306; Mechanics' Bank v. Smith, 19 Johns. 115 (1821). A *bona fide* pledgee of a certificate of stock is not bound to know that the corporation has a by-law giving it a lien on the stock for the debts of the stockholder of record. Just v. State Sav. Bank, 132 Mich. 600 (1903). A pledgee or transferee of a certificate of stock is not bound to take notice of a by-law giving the corporation a lien on the stock unless the by-law appears on the face of the certificate. Bank of Culloden v. Bank of Forsyth, 120 Ga. 575 (1904). The superintendent of a water-works company has inherent authority to give special rates as to water and the company is bound, even though there was a by-law limiting his authority, which by-law, however, is not known to the other party to the contract. Milledgeville, etc. Co. v. Edwards, 121 Ga. 555 (1904). A lien created by articles of association of a

A limitation by by-law that no corporate liability shall be incurred unless expressly authorized by the directors does not inval-

bank, being the same as by-laws, is not good as against a *bona fide* pledgee of the certificate of stock where the certificate does not refer to such articles of association nor to the lien. *Lyman v. State Bank, etc.*, 81 N. Y. App. Div. 367 (1903); *aff'd*, 179 N. Y. 577. A person taking a lease from the corporation, represented by its president, who had been allowed to make leases without action of the board of directors, is not bound to know that the by-laws limited the powers of the president. *Pine, etc. Corporation v. Columbia, etc. Co.*, 106 Va. 810 (1907). By-laws limiting power are not notice. *Rosenbaum v. Gilliam*, 101 Mo. App. 126 (1903). Even though a by-law requires notes to be signed by the president and countersigned by the secretary and treasurer, yet if they are signed by the latter two and endorsed by the president individually that is sufficient. *Johnson v. Waxelbaum Co.*, 58 S. E. Rep. 56 (Ga. 1907). A purchaser of goods from the manager of sales of a manufacturing company is not bound to know of the restrictions on his authority by the by-laws. *Barber v. Stromberg, etc. Co.*, 116 N. W. Rep. 157 (Neb. 1908). A person contracting with a corporation is not bound to know that a by-law requires that corporate contracts of a certain kind shall be approved by the board of directors. *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354 (1898). A person contracting with a corporation is not bound to take notice of a by-law requiring the approval of the president. *Allison v. Tennessee, etc. Co.*, 46 S. W. Rep. 348 (Tenn. 1897). A corporation which indorses a note and obtains the money thereon cannot defend against the indorsement on the ground that it was not made strictly in accordance with its by-laws. *First Nat. Bank, etc. v. Eureka, etc. Co.*, 123 N. C. 24 (1898). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to an assignment for the benefit of creditors. *Goetz v. Knie*, 103 Wis. 366 (1899). Even though the by-laws require the president and treasurer to sign notes, yet if the president and secretary have been accustomed to sign such notes, the notes so signed are valid and may be enforced. *Produce, etc. Co. v. Bieberbach*, 176 Mass. 577 (1900). A person contracting with a corporation is not bound to know that a by-law requires that corporate contracts of a certain kind shall be approved by the board of directors. *Barnes v. Black Diamond Coal Co.*, 101 Tenn. 354 (1898). A person who receives in good faith a note of the corporation is not bound to know that a by-law required the approval of two members of the executive committee to such note. *Lyndon Sav. Bank v. International Co.*, 75 Vt. 224 (1903). A by-law limiting the authority of an officer is not notice to a purchaser from such officer. *Domestic, etc. Assoc. v. Guadiano*, 195 Ill. 222 (1902). A company is bound by the customary contracts of its general freight agent though he does not obtain the approval of the president as required by the by-laws. *Medbury v. New York, etc. R. R.*, 26 Barb. 564 (1858). *Contra*, *Susquehanna Ins. Co. v. Perrin*, 7 Watts & S. (Pa.) 348 (1844). A by-law that contracts for over a year can be made by the directors only does not bind a person who, without knowledge thereof, makes a longer contract with the general manager. *Moyer v. East Shore Term. Co.*, 41 S. C. 300 (1894). The treasurer cannot make a corporate note good by his sole signature where the by-laws require the signature of the president also. *Re Millward-Cliff*

idate corporate contracts made by agents acting "within the apparent scope of the agency."¹

Cracker Co., 161 Pa. St. 157 (1894). A by-law requiring contracts to be signed by a certain officer does not invalidate a contract signed by another officer if the party contracting had no knowledge of the by-law. *Smith v. Martin, etc. Co.*, 19 N. Y. Supp. 285 (1892). If the company receives the money on a note with knowledge, it cannot set up that the note was not signed by the treasurer as required by the by-laws. *Grant v. Treadwell Co.*, 1 N. Y. App. Div. 367 (1896). The failure of the treasurer to sign a note as required by the by-laws does not avoid the note in *bona fide* hands. *National Spraker Bank v. Treadwell Co.*, 80 Hun, 363 (1894). The general manager may sell a part of the product, even though a by-law requires the consent of the president. *Cone v. Empire Plaid Mills*, 12 N. Y. App. Div. 314 (1896). Although the by-laws require the secretary to sign notes, yet, if the treasurer is accustomed to sign them, notes signed by him are good. *Milbank v. De Riesthal*, 82 Hun, 537 (1894). So also as to notes signed by the president only when the by-laws require the treasurer to sign also. *Grant v. Treadwell Co.*, 82 Hun, 591 (1894). A person contracting with a corporation is not bound to know that a by-law prohibits the officers from borrowing money except by order of the board of directors. *Arapahoe, etc. Co. v. Stevens*, 13 Colo. 534 (1889). A by-law that all notes shall be made to the order of the company may be disregarded. *Stewart v. St. Louis, etc. R. R.*, 41 Fed. Rep. 736 (1887). Secret instructions limiting the apparent power of a general manager to contract do not affect strangers. *Benesch v. John Hancock, etc. Co.*, 11 N. Y. Supp. 348 (1890). Officers intrusted with the management of the corporate business are general agents, and pri-

vate restrictions imposed by the corporation are immaterial against third persons acting on the faith of the agency. *Graffius v. Land Co.*, 3 Phila. 447 (1859). Where the by-laws provided that no contract of the corporation involving a liability of over \$500 shall be voted unless signed by the president and treasurer and sealed with the corporate seal, a lease to the corporation on a rental of over \$500, and signed by the president alone, was held to be void. In this case it seems that no proof of even an apparent authority of the president was given. *Bohm v. Loewer's, etc. Co.*, 9 N. Y. Supp. 514 (1890); *Johnston v. Milwaukee, etc. Co.*, 46 Neb. 480 (1895). A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do not know of it. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). The question of the regularity of the action of corporate agents and officers in making contracts, and more especially of waiving provisions in contracts in violation of the rules, has frequently arisen in insurance policies where provisions have been waived orally or without the consent of specified officers. *Carrugi v. Atlantic, etc. Co.*, 40 Ga. 135 (1869). An insurance policy is good although not sealed and without a clause exempting the stockholder from liability as required by the by-laws. *Re Athenæum, etc. Soc.*, 4 K. & J. 549 (1858). The same question has also arisen in regard to the contracts of municipal corporations.

¹ *Rathbun v. Snow*, 123 N. Y. 343 (1890). A by-law prohibiting any officer from creating any liability, except by direct authority of the board of directors, is not binding on a person who deals with the officers without notice of such by-law. *Lake*

A by-law requiring the signature of the secretary to notes issued by the corporation does not bind a person taking a note without actual knowledge of the by-law, especially where it has been long in disuse.¹ A party contracting with a corporation is not bound to know of restrictions in the by-laws as to the method of authorizing and executing contracts, nor is he bound to take notice that a quorum of the directors was not present when the act was authorized.²

A constitutional and statutory provision that debts shall be incurred only upon a vote of the stockholders does not apply to ordinary business debts.³ This subject of statutory or by-law requirements that the stockholders shall assent to the issue of obligations is considered elsewhere.⁴ A written statement on a contract that the

Street, etc. R. R. *v.* Carmichael, 184 Ill. 348 (1900).

¹ *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890). Even though by resolution of the board of directors the signature of the general manager is necessary to a note and the treasurer forges such signature, yet if the secretary attaches the seal and attests to the same, the note is good in *bona fide* hands. *Merchants', etc. Co. v. Lufkin, etc. Bank*, 34 Tex. Civ. App. 551 (1904).

² *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. See also § 808, *infra*.

³ *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889). Under a charter power to receive, in payment for stock, property "for the advancement of the purposes for which" the corporation was organized, a trust company may receive stock in a savings association; and even though by statute the payment of stock by property must first be authorized by the stockholders, yet if the corporation receives the stock and pledges it and receives a dividend thereon and retains it two years until it depreciates in value, it cannot then repudiate the transaction. *Southern Trust Co. v. Yeatman*, 130 Fed. Rep. 798 (1904); *aff'd*, 134 Fed. Rep. 810. Where a company takes over the property of another company and the president deliv-

ers goods in payment of debts of the latter with the knowledge and consent of the officers and directors of the purchasing company, such payments are legal, and the statutes of Pennsylvania where such corporations existed, requiring stockholders' consent to the incurring of debts, do not apply. *Curtis v. Natalie, etc. Co.*, 89 N. Y. App. Div. 61 (1903); *aff'd*, 181 N. Y. 543.

⁴ See § 808, *infra*. Even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, but a purchaser with notice cannot enforce such guaranty. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

corporation will not be liable for misrepresentations of agents is binding, unless it is shown that the corporation received the money with knowledge of such misrepresentations.¹

C. ADMISSIONS OF AND NOTICE TO THE VARIOUS OFFICERS AND AGENTS OF A CORPORATION.

§ 726. *Admissions and declarations of a director, president, cashier, general manager, treasurer, agent, or stockholder as regards the corporation.*—This subject is closely identified with the questions discussed in preceding sections. If a particular officer or agent has power to represent or contract for a corporation, he may in most cases bind the company by his admissions or declarations in regard thereto. But his power to do so must be shown.

The law is clear that the admissions of a stockholder do not bind the corporation.² The board of directors acting as a board may bind the company by admissions and declarations, but a single director cannot do so except as a special agent of the company.³

¹ *Butler v. Standard, etc. Co.*, 122 Ga. 371 (1905).

² *Polleys v. Ocean Ins. Co.*, 14 Me. 141 (1837); *Mitchell v. Rome R. R.*, 17 Ga. 574, 586 (1855); *Fairfield, etc. Co., v. Thorp*, 13 Conn. 173 (1839); *Re Kip*, 1 Paige, 601 (1829); *Soper v. Buffalo, etc. R. R.*, 19 Barb. 310 (1855); *Hartford Bank v. Hart*, 3 Day (Conn.), 491, 495 (1807); *Morrell v. Dixfield*, 30 Me. 157 (1849); *City Bank v. Bateman*, 7 Har. & J. (Md.) 104 (1826); *Magill v. Kauffman*, 4 Serg. & R. (Pa.) 317, 321 (1818); *Stewart v. Huntington Bank*, 11 Serg. & R. (Pa.) 267, 269 (1824); *Hosack v. College of Physicians*, 5 Wend. 547 (1830); *N. Y. Code Civ. Pro.*, § 839; *Angell & A. Corp.*, §§ 309, 657-660; 1 *Phill. Ev.* 487, note 134, saying, "the admissions of corporators or quasi-corporators in the United States are received or rejected upon much the same principle as governs in respect to admissions of agents." The frequently cited case of *Hartford Bank v. Hart*, 3 Day (Conn.), 491, 495 (1807), where it was offered to prove that the president and directors of a bank knew when they discounted a note that the in-

dorsement was forged, and to prove this by the confessions of said president and directors, held, that the evidence was inadmissible. The admissions of a stockholder may be admissible as against him, but not as against others. *Starr, etc. Ass'n v. North, etc. Ass'n*, 77 Conn. 83 (1904).

³ *Magill v. Kauffman*, 4 Serg. & R. (Pa.) 317 (1818), holding that while acts and declarations of trustees and agents of the congregation in their official capacities are evidence against those whom they represent, yet their statements made not in the transaction of the business of their principal are not evidence. "A fact once admitted by a corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of any one who, in reliance upon it, has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as to an individual." *O'Leary v. Board of Education*, 93 N. Y. 1 (1883). Admissions of a director who is also a member of

Neither do the admissions or declarations of the president bind the company unless he has extra powers given to him;¹ nor ordinarily

the discount board of a bank do not bind the corporation unless he was a duly authorized agent. *East River Bank v. Hoyt*, 41 Barb. 441 (1864); *aff'd*, 32 N. Y. 119. A declaration of a director that a certain person is a corporate agent does not bind the company. *Florida, etc. R. R. v. Varnedoe*, 81 Ga. 175 (1888); *Stewart v. Huntington Bank*, 11 Serg. & R. (Pa.) 267 (1824), where certain declarations of bank officers as to the disposition to be made of certain collaterals were held not evidence against the bank. Reports to stockholders and directors do not bind the company by reason of that fact. *Hall v. Mobile, etc. R. R.*, 58 Ala. 10 (1877). The company is not bound by a director's declaration that an attorney would be paid. *Hillier v. Overman, etc. Co.*, 6 Nev. 51 (1870). Nor as to the purpose of a fund. *Grayville, etc. R. R. v. Burnes*, 52 Ill. 302 (1879). See also, in general, *Peek v. Detroit, etc. Works*, 29 Mich. 313 (1874); and § 712, *supra*. A director and vice president of a bank is not presumed to have authority to bind the bank by his admissions. *Westminster Nat. Bank v. New England, etc.*, 73 N. H. 465 (1906). A declaration of a director is binding on the company when the company by its acts ratifies such declaration. *Guillaume v. Fruit Land Co.*, 86 Pac. Rep. 883 (Ore. 1906).

¹ An admission by the president at a club a few days after an accident has occurred is not binding on the company. *Cobb v. United States Engineering, etc. Co.*, 191 N. Y. 475 (1908). The admissions of the president of the construction company which is operating the road are not admissible against the railroad company which is sued for an accident. *Chattanooga, etc. R. R. v. Liddell*, 85 Ga. 482 (1890). His admissions cannot create a liability. *Spyker v. Spence*, 8 Ala. 333

(1845); *Henry, etc. Co. v. Northern Bank*, 63 Ala. 527 (1879). The statement of the president that the board of directors had passed certain resolutions is not admissible. *Childs v. Ponder*, 117 Ga. 553 (1903). An admission by an officer in the performance of his duty is binding on the corporation. *Lynchburg, etc. Co. v. Booker*, 103 Va. 594 (1905). Representations and declarations of the president who represented the company in the particular transaction are binding on it. *Marshall v. Columbia, etc. Co.*, 73 S. C. 241 (1906). In an action against a corporation for damages for conspiracy to injure plaintiff's business, the conduct and statements of the president may be shown. *American etc. Co. v. Brown*, 101 S. W. Rep. 856 (Tex. 1907). The correspondence between a person and the corporate president, secretary and treasurer on corporate business may be admissible in evidence. *Eagle, etc. Co. v. Hamilton*, 91 Pac. Rep. 718 (New Mex. 1907). Admissions of the president of a bank that it did not own a note which was assigned to it are not admissible. *Tuthill, etc. Co. v. Shaver, etc. Co.*, 35 Fed. Rep. 644 (1888). See also *City Bank v. Bateman*, 7 Har. & J. (Md.) 104 (1826), where a declaration by the president of a bank to an inferior officer, that certain money which had been brought into the bank by one of the directors was the money of the plaintiff, was held not admissible. But his admissions may prove its actual indebtedness. *Hoag v. Lamont*, 60 N. Y. 96 (1875). And as an active agent his admissions may bind the company. *Northrup v. Mississippi Val. Ins. Co.*, 47 Mo. 435 (1871); *Spalding v. Susquehanna County Bank*, 9 Pa. St. 28 (1848). So also, where the company itself first uses his admissions as evidence. *Western Union Tel. Co. v. Baltimore, etc. Tel.*

those of the secretary and treasurer;¹ nor those of a cashier, except as to matters in the ordinary course of his duties.²

The power of a superintendent to bind the company by his admissions and declarations depends on whether they pertain to his work and duties.³ The president and managing agent of a cor-

Co., 26 Fed. Rep. 55 (1885), the court saying: "A corporation can only speak through its officers and agents; and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation." The president's admissions of what is due a laborer are not good in enforcing a stockholder's statutory liability, unless he was acting as agent of the company. *Truesdell v. Chumar*, 75 Hun, 416 (1894). The statement of the president as to an accident, he not being present, is not admissible. *Lombard, etc. Ry. v. Christian*, 124 Pa. St. 114 (1889); *Ricketts v. Birmingham St. Ry.*, 85 Ala. 600 (1889). Under the Alabama statute, evidence of a person interested in the suit as to a conversation between him and the deceased president of a corporation is inadmissible. *Tabler v. Sheffield, etc. Co.*, 87 Ala. 305 (1889). See also § 716, *supra*.

¹ *Alexander v. Cauldwell*, 83 N. Y. 480 (1881); *Tripp v. New, etc. Co.*, 137 Mass. 499 (1884), where the treasurer said that a condition had been performed; *Kalamazoo, etc. Co. v. McAlister*, 36 Mich. 327 (1877), where he stated a matter relative to a salary. Admissions or declarations of a secretary as to the amount due the corporation on a mortgage are not admissible unless it is shown that he was specially authorized to make them. *Johnston v. Elizabeth, etc. Assoc.*, 104 Pa. St. 394 (1883). A statement by the treasurer in reference to a bond which he had nothing to do with, such statement not being made in connection with the business of the company, is not admissible as an admission. *Hardwick, etc. Co. v. Drenan*, 72 Vt. 438 (1900). A declaration by

the treasurer not made in connection with his duties is not admissible. *Stanton v. Baird, etc. Co.*, 32 S. Rep. 299 (Ala. 1902). The secretary and assistant treasurer of a corporation has no authority to bind the corporation by an account rendered by him to a creditor of the corporation. *Harvey v. West Side, etc. Co.*, 13 Hun, 392 (1878). The assignee of a contractor's claim against a company cannot enforce it on the ground that at the time of assignment the secretary of the company represented that it would be paid. *Barnett v. South London, etc. Ry.*, L. R. 18 Q. B. D. 815 (1887). In a suit of ejectment against a corporation, evidence that a corporate officer had tried to buy the land of plaintiff is not admissible as an admission by the corporation. *Mobile, etc. R. R. v. Cogsbill*, 85 Ala. 456 (1888). See also § 717, *supra*.

² He cannot admit that the signature of the person to whom a certificate of deposit is issued is genuine, *Merchants' Bank v. Marine Bank*, 3 Gill (Md.), 96 (1845); nor that a new company is liable for the debts of an old one, *Wyman v. Hallowell, etc. Bank*, 14 Mass. 58 (1817); nor make representations as to an indorser's responsibility, *Mapes v. Second Nat. Bank*, 80 Pa. St. 163 (1875). But he may admit to a surety that a note has been paid. *Cothecho Nat. Bank v. Haskell*, 51 N. H. 116 (1871). The admissions of a cashier in a case to which the bank is not a party are not generally binding on the bank. *Harrison County v. State Sav. Bank*, 127 Iowa, 242 (1905).

³ The admissions of a superintendent that a reward offered by his company is to go to a certain person is not binding. *Blain v. Pacific Exp. Co.*,

poration have authority to make admissions in regard to the fulfillment of contracts.¹ The above rules apply also to other agents of the corporation.² "The declarations of an agent or officer of a corporation are not admissible, except when made as a part of the *res gestae*, or in the performance of his duties as agent or officer."³ It is of course elementary law that an agent's admissions made subsequently to the transaction are not admissible.⁴

The admissions and representations made by an agent of a corporation, acting within the scope of his authority and concerning matters intrusted to him, are binding upon the corporation.⁵ There

69 Tex. 74 (1887); nor his representations as to the cost of mining. *Hanover, etc. Co. v. Ashland, etc. Co.*, 84 Pa. St. 279 (1877). But he may admit the amount of damages caused by a nuisance. *McGinness v. Adriatic Mills*, 116 Mass. 177 (1874). He may make admissions as to an assault made by an employee. *Malecek v. Tower, etc. Ry.*, 57 Mo. 17 (1874).

1 *Bullock v. Consumers' Lumber Co.*, 31 Pac. Rep. 367 (Cal. 1892). In ascertaining the terms of an oral contract a memorandum dictated by the general manager may be admissible as an admission binding the company. *Pacific, etc. Co. v. North, etc. Co.*, 46 Ore. 194 (1905). The general manager may testify as to whether a corporation is solvent or not. *Campbell v. Park*, 128 Iowa, 181 (1904).

2 Their admissions in regard to who paid for water in a ditch are evidence as to ownership thereof. *Imboden v. Etowah, etc. Co.*, 70 Ga. 86 (1883). So, also, of a conductor as to a trunk, *Morse v. Connecticut, etc. R. R.*, 72 Mass. 450 (1856); of a freight agent relative to the delivery of freight, *Lane v. Boston, etc. R. R.*, 112 Mass. 455 (1873); and of a bridge-tender as to the proper way to pass through. *Toll, etc. Co. v. Betsworth*, 30 Conn. 380 (1862); but not of a road-master as to trees that were cut down. *Coyle v. Ball, etc. R. R.*, 11 W. Va. 94 (1877); nor as to an accident after it had happened. *McDermott v. Hannibal, etc. R. R.*, 73 Mo. 516 (1881); nor

of trainmen. *Adams v. Hannibal, etc. R. R.*, 74 Mo. 553 (1881); nor of an engineer that a brakeman would be paid. *Stiles v. Western R. R.*, 49 Mass. 44 (1844); nor of a telegraph operator. *Sweatland v. Illinois, etc. Tel. Co.*, 27 Iowa, 433 (1869); nor of an engineer as to an accident. *Robinson v. Fitchburg, etc. R. R.*, 73 Mass. 92 (1856). The admissions of a contractor may bind the company. *Morris, etc. R. R. v. Green*, 15 N. J. Eq. 469 (1862). Declarations of agents made and known by the officers bind the corporation. *Toll-bridge Co. v. Betsworth*, 30 Conn. 380 (1862).

3 *Cosgray v. New England P. Co.*, 22 N. Y. App. Div. 455 (1897).

4 *Thalhimer v. Brinckerhoff*, 4 Wend. 394 (1830); *Packet Co. v. Clough*, 20 Wall. 528 (1874); *Waldele v. New York C. etc. R. R.*, 95 N. Y. 274 (1884). Declarations and admissions by the president as to past events are incompetent. *Zentner v. Oshkosh, etc. Co.*, 126 Wis. 196 (1905). The admission of the president that the corporation owes a debt is not binding, where the admission is not made in connection with the debt. *Robins, etc. Co. v. Murdock*, 69 Kan. 596 (1904).

5 Quoted and approved in *Taylor v. Sutherland, etc. Co.*, 60 S. E. Rep. 132 (Va. 1908), and *White Hall Co. v. Hall*, 46 S. E. Rep. 290 (W. Va. 1903). *Fairfield, etc. Co. v. Thorp*, 13 Conn. 173 (1839); *Stewart v. Huntington Bank*, 11 Serg. & R. (Pa.) 267 (1824); *Hayward v. Pilgrim Soc.*, 38 Mass. 270

are a large number of cases on this subject, and the question of how far the corporation is bound by the declarations of subordinate agents frequently arises in the courts. The general rule is very much the same as prevails in regard to admissions made by agents of a large business copartnership. If the admission pertained to matters within the scope of that particular agent's powers, or apparent powers, the principal is bound, otherwise it is not. Thus an inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock, must be made of officers having

(1838); *Sterling v. Marietta Co.*, 11 Serg. & R. (Pa.) 179 (1824); *Westmoreland Bank v. Klingensmith*, 7 Watts (Pa.), 523 (1838); *Harrisburg Bank v. Tyler*, 3 Watts & S. (Pa.) 377 (1842); *Farmers' Bank v. McKee*, 2 Pa. St. 321 (1845); *Hackney v. Allegheny Ins. Co.*, 4 Pa. St. 185 (1846); *Spalding v. Susquehanna County Bank*, 9 Pa. St. 28 (1848); *Crump v. U. S. Min. Co.*, 7 Gratt. (Va.) 352 (1851); *Baptist Church v. Brooklyn Ins. Co.*, 18 Barb. 69 (1854); *Deventorf v. Beardsley*, 23 Barb. 656 (1857); *Troy Ins. Co. v. Carpenter*, 4 Wis. 20 (1855); *Metropolis Bank v. Jones*, 8 Pet. 12 (1834); *Merchants' Bank v. Marine Bank*, 3 Gill (Md.), 96 (1845); *Hartford Bank v. Hart*, 3 Day (Conn.), 491 (1807); *Osgood v. Manhattan Co.*, 3 Cow. 612 (1824); *Polleys v. Ocean Ins. Co.*, 14 Me. 141 (1837); *Ruby v. Abyssinian Soc.*, 15 Me. 306 (1838); *Oldtown Bank v. Houlton*, 21 Me. 507 (1842); *Holman v. Norfolk Bank*, 12 Ala. 369 (1847); *Soper v. Buffalo*, etc. R. R., 19 Barb. 310 (1855); *Mitchell v. Rome R. R.*, 17 Ga. 574 (1855); *Toll-bridge Co. v. Betsworth*, 30 Conn. 380 (1862); *Morse v. Connecticut River R. R.*, 72 Mass. 450 (1856); *McGinness v. Adriatic Mills*, 116 Mass. 177 (1874). See also Green's *Brice, Ultra Vires*, pp. 500-504; *Wood, Railw. Law*, pp. 457-465. A railroad company building a bridge is not bound by statements of its agents as to the space between the arches where the agents have no connection with the erection of the bridge and made the statements to parties who were build-

ing rafts to float down the river. *Seaboard, etc. Ry. v. Sikes*, 60 S. E. Rep. 868 (Ga. 1908). The declaration of an engineer of a locomotive is not admissible against the railroad company in an action by a passenger for damages for an injury, the question being as to the speed at which the engine was going. *Vicksburg, etc. R. R. v. O'Brien*, 119 U. S. 99 (1886). The statement of the general agent of an insurance company, sent by it to examine into the circumstances connected with a death, to the effect that it would be better for the company to pay the policy, is not admissible in a suit on the policy. *Insurance Co. v. Malone*, 21 Wall. 152 (1874). Statements by an engineer in charge of a locomotive, made prior to an accident, as to the condition of the engine, are not admissible. *Louisville, etc. R. R. v. Stewart*, 56 Fed. Rep. 808 (1893). In the case of *Anderson v. Rome, etc. R. R. Co.*, 54 N. Y. 334 (1873), the court held that it was error to admit the declarations of admissions of a track superintendent of the defendant relative to his knowledge of a defective rail which had caused an accident. An agent of a railroad corporation has no power to alter or make admissions in variation of such contract. *Sullivan v. Louisville, etc. R. R.*, 128 Ala. 77 (1901). A party claiming a contract with a corporation cannot testify that he made it with the agent of the corporation if the agent is dead at the time of the trial. *Florida, etc. Co. v. Usina*, 111 Ga. 697 (1900).

authority to speak for the corporation.¹ The statements and admissions of soliciting agents of a packing house corporation are admissible in a suit brought by the state to oust it from doing business in the state, on the ground that it has violated the anti-trust act of the state.² Reports from officers and employees of a corporation to its executive officer in regard to an accident are privileged communications.³ But in a case involving fraud, the letters of officers of a corporation to each other may be put in evidence.⁴ Even though the minute-book is in another state, yet this does not excuse failure to produce the minutes or a certified copy thereof, and hence the statements of officers of the company as to the contents of such minute-book are incompetent.⁵ One who contracts with the authorized agent of a corporation is not a competent witness as to the contract or of the admissions and declarations of the agent, after the latter's death.⁶

§ 727. *Notice to an incorporator, stockholder, agent, superintendent, treasurer, secretary, cashier, president, or director—When does their knowledge of facts constitute a notice of those facts to the corporation—Corporate books as evidence against directors and stockholders—Notice of fraud perpetrated on the corporation.*—It is well settled that a corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators⁷

1 *Browning v. Hinkle*, 48 Minn. 544 (1892).

2 *State v. Armour Packing Co.*, 173 Mo. 356 (1903).

3 *Ex parte Schoepf*, 74 Ohio St. 1 (1906).

4 *Weiss v. Haight, etc. Co.*, 148 Fed. Rep. 399 (1906).

5 *Central, etc. Co. v. Sprague, etc. Co.*, 120 Fed. Rep. 925 (1902). See also § 714, *supra*.

6 *Central Bank, etc. v. Thayer*, 184 Mo. 61 (1904). See also § 519, *supra*.

7 Where an owner of a patent makes a contract to assign it, but afterwards, instead of doing so, forms a corporation and transfers the patent to it, the corporation is protected in its title, although the patentee was one of the incorporators and also a director of the corporation. *Davis, etc. Co. v. Davis, etc. Co.*, 20 Fed. Rep. 699 (1884). The knowledge of an incorporator, who afterwards becomes a director, of an equitable claim to real estate, is not notice to the corporation unless received by him while acting

for the corporation or under circumstances which made it his duty to inform the corporation. *Reed v. Munn*, 148 Fed. Rep. 737 (1906). Upon the reorganization of a corporation after bankruptcy the new company is not bound by the knowledge of its incorporators as to the existence of incumbrances on property purchased from the old company. *Burt v. Batavia Paper Mfg. Co.*, 86 Ill. 66 (1877). "If false and fraudulent representations are made to persons who afterwards become officers or agents of a corporation, and the corporation acts on the faith of such representations and is thereby defrauded, an action will lie in favor of the corporation for the damages thus sustained." *Iowa, etc. Co. v. American, etc. Co.*, 32 Fed. Rep. 735 (1887). Notice before incorporation to one who afterwards becomes an officer of the corporation is not notice to the latter. *Brennan v. Emery, etc. Co.*, 99 Fed. Rep. 971 (1900). Where the officers of a corporation in their individual capacity took part in

or stockholders¹ or clerk.² But the corporation has notice of facts which came to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control.³ Thus, a corporation has been charged with notice of facts which were known at the time to its agent,⁴ who had charge of the transaction, or to a local

a transaction before the corporation was formed, whereby a business was taken over by the corporation on an agreement that the title should not pass until payment was made, the corporation takes with notice of the facts. *Adams v. Roscoe, etc. Co.*, 159 N. Y. 176 (1899). Knowledge of the corporators is not notice to the corporation. *Grand Rapids, etc. Co. v. Grand Hotel, etc. Co.*, 11 Wyo. 128 (1902).

1 A company formed to purchase a patent-right is protected in its title, although some of its promoters and stockholders knew of an infirmity in the title. *Racine, etc. Co. v. Joliet, etc. Co.*, 27 Fed. Rep. 367, 375 (1886); *Housatonic Bank v. Martin*, 42 Mass. 294, 308 (1840), where it was unsuccessfully sought by a mortgagor to defeat his deed by a subsequent assignment, on the ground that members of the corporation mortgagee had knowledge of the assignment; *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393 (1842), where, in a contest over title to land, evidence was held properly excluded which depended on the fact that a party was a stockholder in a company, and constructive notice of adverse claims was thereby sought to be established against the company. See *Fairfield Sav. Bank v. Chase*, 72 Me. 226 (1881). Knowledge of stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue unless inequitable or rights of third persons have intervened. *Pacific R. R. v. Missouri Pac. R. R.*, 111 U. S. 505 (1884). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third

corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. *East St. Louis, etc. Ry. v. Jarvis*, 92 Fed. Rep. 735 (1899). A record of a stockholders' meeting showing acceptance of an auditor's report is an admission of his employment. *Clarke v. Warwick, etc. Co.*, 174 Mass. 434 (1899).

2 Knowledge of a bank clerk of the place of residence of a party chargeable as indorser is not notice to the bank. *Goodloe v. Godley*, 21 Miss. 233 (1849).

3 Quoted and approved in *Zeigler v. Valley Coal Co.*, 113 N. W. Rep. 775 (Mich. 1907).

4 "Notice to one agent of a corporation, with respect to a matter covered by his agency, must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing." *Saint v. Wheeler, etc. Co.*, 95 Ala. 362 (1892). Notice to an agent, but not in the course of his business, is not notice to the corporation. *Willard v. Denise*, 50 N. J. Eq. 482 (1892). Where the duty of an employee of an electric light company is to see that the electric current is turned off from houses that are being painted, notice to him that a house will be painted is notice to the company. *Baries v. Louisville, etc. Co.*, 85 S. W. Rep. 1186 (Ky. 1905). Notice to the attorney and president of the corporation is not notice to the corporation. *Wardlow v. Troy Oil Mill*, 74 S. C. 368 (1906). Where two corpora-

agent,¹ or superintendent.² So also as regards the higher officers of the company. Thus, the company has been charged with

tions deal with each other through a common agent, the question of notice depends upon the circumstances of each case. *Lyndon, etc. Co. v. Lyndon, etc. Inst.*, 63 Vt. 581 (1891). The corporation is given notice of a breach of trust by an attorney in fact for the transfer of stock, the attorney being one of its directors. *Tafft v. Presidio, etc. Co.*, 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). "In case of a corporation created for, and engaged in, trade or business, service of a notice on any officer or agent of the company whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is tantamount to personal service in case of a natural person." *State v. Felton*, 52 N. J. L. 161 (1889). The knowledge of an agent, whose powers are no greater than those of the master of a ship, is not notice to a corporation. *Craig v. Continental Ins. Co.*, 141 U. S. 638 (1891). In *Consolidated, etc. Co. v. Kansas, etc. Co.*, 45 Fed. Rep. 7 (1891), the court said: "Facts coming to the knowledge of an agent or an attorney while engaged about the business of his agency are, in law, presumed to be known to the principal or client." As to when a client is chargeable with knowledge of facts known to the attorney, see *Slattery v. Schwannecke*, 44 Hun. 75 (1887); aff'd, 118 N. Y.

543. A corporation taking an assignment of a patent without notice that another party was entitled to it is protected. *Averill v. Barber*, 6 N. Y. Supp. 255 (1889). Notice to a traveling salesman of a change in the firm is not notice to a corporation. *Neal v. M. E. Smith, etc. Co.*, 116 Fed. Rep. 20 (1902).

¹ Knowledge of a local insurance agent that the insured is insuring for his firm is notice to the company. *Keith v. Globe Ins. Co.*, 52 Ill. 518 (1869). Knowledge of a local agent that the insured had gone beyond the limits, and receipt of premiums thereafter, bind the company. *Wing v. Harvey*, 5 De G., M. & G. 265 (1854). Notice to insurance company of a subsequent insurance. *Schenck v. Mercer, etc. Ins. Co.*, 24 N. J. L. 447 (1854). See also, in general, as to insurance. *Troy, etc. Ins. Co. v. Carpenter*, 4 Wis. 20 (1855); *Bennett v. Maryland, etc. Co.*, 14 Blatchf. 422 (1878); s. c., 3 Fed. Cas. 229; *McEwen v. Montgomery, etc. Co.*, 5 Hill, 101 (1843). And see text-books on insurance law. "Notice to an agent of a bank, or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by such agent, acting for the corporation, within the scope of its authority, whether the knowledge of such agent was acquired in the course of the particular dealing or

² Knowledge of the general officers that an employee is incompetent is notice to the corporation, and it is liable for his negligence in running a train. *Pittsburgh, etc. Ry. v. Ruby*, 38 Ind. 294, 313 (1871). Knowledge of the company's supervising engineer that the contractors in the construction of the bridge are innocently omitting certain things is notice to the company. *Danville Bridge Co. v.*

Pomroy, 15 Pa. St. 151 (1850). Knowledge of a superintendent of an unrecorded lien is not notice to his company to which he conveys the property so subject. *Wickersham v. Chicago, etc. Co.*, 18 Kan. 481 (1877). Knowledge by the superintendent of a coal mine of a dangerous roof is notice to the company. *Quincy, etc. Co. v. Hood*, 77 Ill. 68 (1875).

notice of facts known to the treasurer,¹ secretary,² cashier,³ and man-

on some prior occasion." *Cragie v. Hadley*, 99 N. Y. 131 (1885); *Wood, Railw. Law*, pp. 457-465; *Smith v. Board, etc. Co.*, 38 Conn. 208 (1871). To this rule there are certain limitations more or less depending on the time of notice and the occasion of such notice; for example, while acting in the ordinary course of his employment as agent, notice to such agent of a corporation is notice to the corporation itself. But if such notice is given at an inopportune time, or upon an inappropriate occasion, constructive notice to the corporation may *ipso facto* be easily rebutted. *Seneca County Bank v. Neass*, 5 Denio, 329 (1848); *Holden v. New York, etc. Bank*, 72 N. Y. 294 (1878). It is well known that presumptive notice to a principal by reason of knowledge of an agent or trustee interested in concealing the fact from his principal cannot be imputed to the principal. *Curtis v. Leavitt*, 15 N. Y. 194, 195 (1857); *Commissioners v. Thayer*, 94 U. S. 631 (1876). This is equally true in the case of corporate agents. *Seneca County Bank v. Neass*, 5 Denio, 329 (1848). When the agent himself is the person charged with the fraud, notice to the principal through such an agent cannot be presumed, for it is the interest of the agent to conceal the facts from his principal. *Cave v. Cave*, L. R. 15 Ch. D. 639 (1880). Knowledge obtained by the corporate attorney and agent in another transaction does not bind the corporation. *Constant v. Rochester University*, 111 N. Y. 604 (1888); *Fairfield Sav. Bk. v. Chase*, 72 Me. 226 (1881). Notice to a bank clerk of matters not under his charge is not notice to the bank. *Goodloe v. Godley*, 21 Miss. 233 (1849).

¹ *Hotchkiss, etc. Co. v. Union Nat. Bank*, 68 Fed. Rep. 76 (1895). A bank is not bound to take notice of the fact that its treasurer is misusing guardian funds of which he is guardian, although the account was with

the bank. *Brookhouse v. Union, etc. Co.*, 62 Atl. Rep. 219 (N. J. 1905). Where the treasurer of two corporations takes the funds of one and places them with the other to make good a defalcation from the latter, the latter corporation is liable, since it is chargeable with the knowledge of its treasurer. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268 (1888). Payment to the treasurer, who enters the same on the books, is notice to the company, since the directors, if they did their duty, would know of such entry. *New England, etc. Co. v. Union, etc. Co.*, 4 Blatchf. 1 (1857); s. c., 18 Fed. Cas. 59.

² A corporation is not chargeable with notice that its secretary is indebted to it, and hence a bond given to it for his good behavior is not unenforceable by reason of a statement that he was not indebted to it. *American Bonding Co. v. Spokane, etc. Soc.*, 130 Fed. Rep. 737 (1904). Knowledge of the secretary that a vessel is being run, not by the owners, but by a third person, is notice to the corporation, and it cannot sue the owners for work done. *Ponchartrain R. R. v. Heirne*, 2 La. Ann. 129 (1847). Knowledge of the secretary that his wife, the owner of the stock, had pledged that stock, is not notice to the corporation. *Platt v. Birmingham, etc. Co.*, 41 Conn. 255 (1874). Notice to one acting for the secretary in his absence, and at his place of business, is as effectual as though given to the secretary himself. *McKenney v. Diamond, etc. Assoc.*, 8 Houst. (Del.) 557 (1889). Notice to the secretary, who is also a director, that a note given by the corporation had been assigned by the payee to another is sufficient notice. *Love v. Anchor, etc. Co.*, 45 Pac. Rep. 1044 (Cal. 1896). Where two companies have the same secretary notice to one of them is not necessarily notice to the other. *Re Fenwick, etc. Co.*, [1902] 1 Ch. 507.

³ Knowledge of the cashier and man-

ager.¹ Notice to the president of a bank may be notice to the com-

ager of a bank, acquired in the bank business, that an unrecorded deed has been made, defeats the bank's deed. *Johnston v. Shortridge*, 93 Mo. 227 (1887). Even though the president of a company fraudulently executes notes to a bank in which he is cashier, the bank is not chargeable with notice thereof. *Produce, etc. Co. v. Bieberbach*, 176 Mass. 577 (1900). Knowledge by the cashier, who is also a director and manager of the bank, that it is insolvent, is notice to the bank, and hence a person who deposits money after the bank is hopelessly insolvent may recover it back on the ground that it was fraudulently received and no title passed. *Orme v. Baker*, 74 Ohio St. 337 (1906). Even though the stockholder has transferred

his certificate, yet if the corporation has no knowledge of the fact it may acquire a lien thereafter, and prior to the time of its having knowledge, the transfer not having been made within sixty days as required by statute, and even though such stockholder is its cashier, it is not chargeable with notice on account of that fact. *Pueblo, etc. Bank v. Richardson*, 89 Pac. Rep. 799 (Col. 1907). Where the cashier is dealing with the bank himself, his knowledge is not notice to the bank, neither is the knowledge of a director whose father is interested in the transaction. *Central Bank, etc. v. Thayer*, 184 Mo. 61 (1904). It may be a question for the jury as to whether a bank has notice of facts known to its president and cashier,

1 Notice to a general managing agent was held to be notice to the corporation in *Robertson Lumber Co. v. Anderson*, 96 Minn. 527 (1905). Notice to a resident director and manager who was also the principal promoter and incorporator, is notice to the corporation. *California, etc. Co. v. Manley*, 10 Idaho, 786 (1905). Facts known to a sole manager and almost sole stockholder in a transaction for the joint benefit of the corporation and another, constitutes notice to the corporation itself. *Lea v. Iron, etc. Co.*, 147 Ala. 421 (1906). Where the general manager and secretary does the corporate business entirely as he sees fit, his knowledge of facts is notice to the corporation. *Anderson v. Kinley*, 90 Iowa, 554 (1894). A pledgee is entitled to collect the dividends, and in some instances may do so, even though the stock is not transferred to him on the books, it being shown that the officers knew of the pledge. *Guarantee Co. v. East Rome Town Co.*, 96 Ga. 511 (1895). It may be a question of fact whether a sale of property to the corporation for stock was made, even though a certificate of stock was

issued. The delivery of all the papers may have been in escrow. The knowledge of a promoter who then becomes general manager may be notice to the corporation. *Huron, etc. Co. v. Kittleson*, 4 S. D. 520 (1894). Notice prior to incorporation to a person who becomes an officer upon incorporation is not notice to the corporation, even though he transacts the business. *Taylor v. Calloway*, 7 Tex. Civ. App. 461 (1894). Although a managing director of one company is secretary of another company, yet knowledge that he has as to the latter company is not notice to the former company. *Re Hampshire Land Co.*, [1896] 2 Ch. 743. Notice to a managing director while acting as such, and affecting business under his charge, is notice to the company. *Dr. Jaeger's, etc. Ltd. v. Walker & Sons*, 77 L. T. Rep. 180 (1897). Knowledge which a managing director had in regard to real estate three years prior to the organization of the corporation is not in itself notice to the corporation. *Red River, etc. Co. v. Smith*, 7 N. Dak. 235 (1898).

pany unless he is interested on the other side of the transaction.¹ There are many conflicting decisions, however, on this subject of

which facts they learned as officers of another corporation, which sold a note to the bank. *Iowa, etc. Bank v. Sherman, etc.*, 19 S. Dak. 238 (1905). The fact that a stockholder and the secretary in a corporation are the president and the cashier of a bank is not notice to the bank of facts known to the corporation. *Iowa Nat. Bank v. Sherman, etc.*, 17 S. Dak. 396 (1903). A trust company may enforce a mortgage given to it by an executor, even though the money was used by the latter in connection with the president and cashier of the trust company for their own individual purposes illegally. *Camden, etc. Co. v. Lord*, 67 N. J. Eq. 489 (1904). A bank cannot repudiate its satisfaction of a mortgage where its president and cashier took part in another capacity in the making of a new mortgage based on such satisfaction. *Harris v. American, etc. Assoc.*, 122 Ala. 545 (1899). Where a cashier and director in a bank borrow money from the bank on their note the bank is not chargeable with notice of the relations between them. *First Nat. Bank, etc. v. Briggs' Assignees*, 70 Vt. 594 (1898). A bank may be a *bona fide* purchaser of a draft from its cashier who has notice of defenses. *Hummell v. Bank of Monroe*, 75 Iowa, 689 (1888). Knowledge of the cashier of a bank that stock received in pledge is trust stock is notice to the bank. *Loring v. Brodie*, 134 Mass. 453 (1883). See also *Second Nat. Bank v. Howe*, 40 Minn. 390 (1889). The cashier's knowledge of fraud in a note is notice to the company. *Fall, etc. Bank v. Sturtevant*, 66 Mass. 372 (1853). Notice to the cashier of acceptance of the bank to receive payment in bonds is good notice. *Branch Bank v. Steele*, 10 Ala. 915 (1846). Notice to a cashier that bank funds have been loaned is notice to the bank. *New Hope, etc.*

Co. v. Phenix Bank, 3 N. Y. 156 (1849). Where the directors acquiesce in the cashier's assumption of exclusive management of the bank's business, they will be held chargeable with knowledge of such things as by proper diligence they might and should have known as to the condition of the business. *Martin v. Webb*, 110 U. S. 7 (1884). Knowledge of the cashier that a person turning in property to the bank is insolvent is notice to the bank. *Witters v. Sowles*, 32 Fed. Rep. 762 (1887). Notice to the cashier is notice to the bank. *Bank of St. Mary's v. Mumford*, 6 Ga. 44 (1849); *Trenton, etc. Co. v. Woodruff*, 2 N. J. Eq. 117 (1838). But knowledge obtained by the cashier outside of his duties is not notice to the bank (*dictum*). *Seneca Co. Bank v. Neass*, 5 Denio, 329, 337 (1848).

¹ *Louisville T. Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896). See s. c., 174 U. S. 552. Where the president is interested on the other side of the transaction his knowledge of facts is not notice to the corporation. *Seaverns v. Presbyterian, etc.*, 173 Ill. 414 (1898). The knowledge acquired by the president of a bank while acting for himself in the interest of himself alone is not chargeable to the bank. *First, etc. Bank v. Skinner*, 10 Kan. App. 517 (1900). Notice to the president is notice to the bank in a bank transaction. *Fouche v. Merchants', etc. Bank*, 110 Ga. 827 (1900). A bank may enforce a note given by a person to the bank, even though it turns out that such note was an accommodation note, the real borrower being the president of the bank. *Richardson v. Watson*, 51 La. Ann. 1390 (1899). Where a bank knows that a stockholder has pledged his certificate of stock, the bank cannot claim a lien upon such stock for a debt incurred to the bank subse-

whether notice to the president is notice to the corporation, and in general the question may be said to turn largely on the particular facts in each case.¹ Where a corporation takes title to land through

quently by the pledgor of the stock, even though the stock is not transferred on the books, and even though the statute requires that transfers should be made only on the books of the bank. But the fact that the pledgor was the cashier of the bank is not notice to the bank, nor is the fact that the president knew of the pledge notice to the bank where he took no active part in the management of the bank and was not acting for the bank when he learned of the pledge. *Curtice v. Crawford, etc. Bank*, 110 Fed. Rep. 830 (1901). A corporation is not bound by notice to an officer while acting for himself and not for the corporation. *Aycock, etc. Co. v. First Nat. Bank of Dothan*, 45 S. Rep. 501 (Fla. 1907).

¹ The case of *Kissam v. Anderson*, 145 U. S. 435 (1892), reversed the decision below on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payments by the broker to the president. A corporation to which the principal stockholder, incorporator, and president conveys land is a purchaser with notice unless it proves the contrary. *Billings v. Aspen, etc. Co.*, 51 Fed. Rep. 338, 349 (1892). A lien of a bank on stock for a debt from a stockholder to the bank is subject to a pledge of the stock where such pledge was made before the debt was incurred, and the bank incurred the debt with knowledge of the pledge. Knowledge of the facts by the president is notice to the bank. *Curtice v. Crawford, etc. Bank*, 118 Fed. Rep. 390 (1902). A creditor who knows that stock has been paid for by property taken at an overvaluation cannot afterwards complain, and if the same person is president of both the creditor and the debtor his knowledge is

notice to the creditor. *Berry v. Rood*, 168 Mo. 316 (1902). Knowledge of the president of a trust company acquired in taking a mortgage for other parties is not notice to the trust company. *Tate v. Seceurity T. Co.*, 63 N. J. Eq. 559 (1902). Where the president of a corporation is a director in another corporation which owes money to the former, the former is chargeable with knowledge of facts known to its president. *Easton Nat. Bank v. American, etc. Co.*, 69 N. J. Eq. 326 (1905). Even though the president of a bank sells to it a note which has not a sufficient consideration, yet if the note was accepted at a meeting of the directors at which the president was not present, the bank may enforce the note. *McDonald v. Randall*, 139 Cal. 246 (1903). Knowledge of the corporate officers that they may rescind a sale of goods for fraud binds the corporation if it levied an attachment instead and thereby waived its right of rescission. *Baker v. Brown Shoe Co.*, 78 Ark. 501 (1906). A representation of the president of a national bank that the signature to a note is the genuine signature of the individual does not bind the bank. *Commercial, etc. Bank v. First, etc. Bank*, 97 Tex. 536 (1904). The president of a slate company has no power to make a time contract with a railroad to ship the product of the company over such road, and knowledge of such contract by the president is not notice to the corporation. *Bangor, etc. Ry. v. American, etc. Co.*, 203 Pa. St. 6 (1902). A bank is not given notice as to defenses to notes of a cattle company presented to the bank by its president, but in behalf of the cattle company. *Corcoran v. Snow Cattle Co.*, 151 Mass. 74 (1890). Drafts which are indorsed to the corporation by its president, who held

its incorporators, and all of them as well as the president had constructive or actual knowledge of a flaw in the title, the corporation

them individually, are collectible by the corporation as a *bona fide* holder, notwithstanding its president had notice of defenses. *Levy, etc. Co. v. Kauffman*, 114 Fed. Rep. 170 (1902). A corporation purchasing a note from another corporation is not notified of defenses thereto by the fact that the president of the selling corporation was superintendent of the buying corporation, it appearing that he did not manage the financial affairs of the latter. *Newman v. Aultman, etc. Co.*, 51 S. W. Rep. 198 (Tenn. 1899). Knowledge which a trustee of a railroad mortgage receives as trustee binds another company in which he is president and superintendent. *New York, etc. R. R. v. New York, etc. R. R.*, 52 Conn. 274, 280 (1884). Notice to the president that stock is held in trust is notice to the company. *Porter v. Bank of Rutland*, 19 Vt. 410 (1847). Notice to the president of a bank that the village is being sued for damages due to the bank's sidewalk is notice to the bank. *Port Jervis v. First Nat. Bank*, 96 N. Y. 550 (1884). See also *Gold Min. Co. v. National Bank*, 96 U. S. 640 (1877). Knowledge of the president that a person who is turning property in to the bank is insolvent is notice to the bank. *Getman v. Second Nat. Bank*, 23 Hun, 498 (1881). See also *Central, etc. Bank v. Levin*, 6 Mo. App. 543 (1879); *First Nat. Bank v. Fricke*, 75 Mo. 178 (1881). Cf. *First Nat. Bank v. Sherburne*, 14 Bradw. (Ill.) 566 (1884). Notice to the president and certain stockholders who are sent to investigate for the corporation is notice to the corporation. *U. S. v. San Pedro, etc. Co.*, 4 N. M. 225 (1888). Knowledge of a president in regard to property which he sells to the company is not notice to the company. *Barnes v. Trenton, etc. Co.*, 27 N. J. Eq. 33 (1876). Where it was attempted to impute to a cor-

poration the knowledge of its president of a prior unrecorded conveyance, it was held this could not be done where the knowledge was general and not specific or official. *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381 (1851); s. c. on appeal, *sub nom.* *General Ins. Co. v. U. S. Ins. Co.*, 10 Md. 517 (1857). Knowledge by the president of outstanding equities to land mortgaged by him to the corporation is not notice thereof to the company. *Winchester v. Baltimore, etc. R. R.*, 4 Md. 231, 239 (1853). Notice to a stockholder who is also president of another company is not notice to the latter. *First Nat. Bank v. Anderson*, 28 S. C. 143 (1888). The company is bound to take notice of the extent of a power of attorney given by a third person to its president. *Mechanics' Bank v. Schaumberg*, 38 Mo. 228 (1866). The knowledge of the vendor of personalty to a corporation that a chattel mortgage exists is not necessarily notice to the corporation, although he becomes its president and general manager. It is for the jury to decide whether there are not *bona fide* stockholders who would be injured by such a result. *International, etc. Co. v. McMorran*, 73 Mich. 467 (1889). Knowledge of one who is president of a railroad and also of a bank, where the bank discounts paper for the railroad, is notice to the bank if he took part in its action. *Waynesville Nat. Bank v. Irons*, 8 Fed. Rep. 1 (1881); and see the note. Notice to a member of a copartnership is not notice to a corporation of which that member is president. *Miller v. Illinois, etc. R. R.*, 24 Barb. 312 (1857). The president and treasurer who stand by and allow another to purchase property without saying that the company has a claim thereon bind the company thereby. *Mihills Mfg. Co. v. Camp*, 49 Wis. 130 (1880).

thereby had similar notice.¹ Where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.² A corporation is chargeable with notice that a party selling a patent to it obtained the patent by fraud, where the corporate agent making the purchase was informed of the same.³ Where an attorney in fact for the sale of a patent causes his friends to organize a corporation, and then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement.⁴ In general the test turns on whether the corporate agent received the knowledge in the regular course of business. Knowledge by an officer, derived as an individual and not while acting officially for

Knowledge of a president and director of a transfer of stock is notice to the company. *Factors', etc. Co. v. Marine, etc. Co.*, 31 La. Ann. 149 (1879). Knowledge of a vice-president is not notice to the company. *Fisher v. Murdock*, 13 Hun, 485 (1878). Although the president and cashier are the discount committee and discount a note which is indorsed by the president, the bank is not charged with notice that the note was given for an illegal purpose. *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225 (1896). The fact that the maker of a note tells the president of a bank, at the office of another company in which they are both directors, that a certain note was fraudulent, is not notice to the bank although it afterwards discounts the note. *Washington Nat. Bank v. Pierce*, 6 Wash. 491 (1893). Where the president of a bank purchases for the bank a note from a corporation in which he is a director, the bank is chargeable with notice of defenses to the note known to the vendor of the note. *Traders' Nat. Bank v. Smith*, 22 S. W. Rep. 1056 (Tex. 1893). Knowledge acquired by an attorney, as attorney, of the execution of a mortgage, is chargeable to a corporation which takes a subsequent mortgage, where the attorney is the president of the corporation. *Willard v. Denise*, 50 N. J. Eq. 482 (1893). A bank is not chargeable with knowledge of the fact that its president, in depositing money to his individual credit, was depositing trust funds. *Re Plankinton Bank*, 87 Wis. 378 (1894). Where the president of a corporation sells property to it, the corporation is not chargeable with notice of defects in the title known to him. *Higgins v. Lansingh*, 154 Ill. 301 (1895). Where the treasurer of a corporation is also vice-president of a bank, and draws out the funds of the former, taking in payment a draft running to himself individually, the bank is not chargeable with notice of a diversion of the corporate funds to his own use. *Gunster v. Scranton Illuminating, etc. Co.*, 181 Pa. St. 327 (1897).

1 *Simmons, etc. Co. v. Doran*, 142 U. S. 417, 436 (1892).

2 *National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co.*, 73 Fed. Rep. 491 (1896). See also § 663, *supra*.

3 *Vulcan, etc. Co. v. American, etc. Co.*, 70 N. J. Eq. 588 (1906).

4 *Young Reversible, etc. Co. v. Young Lock-Nut Co.*, 72 Fed. Rep. 62 (1896).

the corporation, cannot operate to its prejudice, and will not be imputed to it.¹ Where there is a common agent, and he alone represents both parties, both are bound by his undisclosed knowledge, but if one of the parties is a corporation, and is represented by other officers, the corporation is not bound by the agent's knowledge.²

The corporation is sometimes chargeable with knowledge of facts which are known to one of its directors;³ but there are so many

¹ *Casco Nat. Bank v. Clark*, 139 N. Y. 307 (1893); *Merchants' Nat. Bank v. Clark*, 129 N. Y. 314 (1893). Concerning notice to an officer who is acting as a third party, and not for a company, see also *First Nat. Bank v. Tompkins*, 57 Fed. Rep. 20 (1893). Where the same persons are officers of a corporation and trustees for the benefit of its creditors, notice to them as such officers is not notice to them as trustees. *New York Security, etc. Co. v. Lombard Inv. Co.*, 65 Fed. Rep. 271 (1895). Notice to an officer who is personally interested is not notice to the corporation. *Victor, etc. Co. v. National Bank*, 15 Utah, 391 (1897). A corporation is not chargeable with notice of the fact that the parties conveying property to it for stock are doing so in breach of trust, even though such parties are directors in the corporation. This rule will be applied, especially where the beneficiary has been guilty of laches. *Whittle v. Vanderbilt, etc. Co.*, 83 Fed. Rep. 48 (1897).

² *Taylor v. Felder*, 59 S. E. Rep. 844 (Ga. 1907).

³ A corporation is chargeable with notice of facts known to its directors whereby the corporation acquired title to a large property from the bondholders of a foreclosed company. *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197 (1892). Notice to a director is not notice to the company except "in the business to which the knowledge is material through the agency of such director acting either alone or as one of the board." *Butrick v. Nashua, etc. R. R.*, 62 N. H. 413 (1882). The knowledge of a patentee

that a label claims more than is correct is not notice to a corporation which purchased, owns, and operates the patent, although he is a director. *Lawrence v. Holmes, etc.*, 45 Fed. Rep. 357 (1891). A bank may be chargeable with notice of a fraud perpetrated by some of its directors in issuing the stock of another corporation and taking notes therefor and endorsing the notes and discounting them with the bank. *State Bank of Indiana v. Mentzer*, 125 Iowa, 101 (1904). Where every director knew of the president's agreement with a person to continue work on a mine owned by the corporation, the corporation is bound. *Davis v. Brown, etc. Co.*, 110 N. W. Rep. 113 (S. Dak. 1906). The fact that a director in a bank negotiates the sale of commercial paper to it does not charge the bank with notice of defenses to the paper. *Koehler v. Dodge*, 31 Neb. 328 (1891). If a director act in behalf of a bank in a transaction of which the bank takes the benefit, the bank is chargeable with a knowledge of all the director's acts in such transaction. *Smith v. South Royalton Bank*, 32 Vt. 341 (1859). Notice to a director who is acting as a special agent is notice to a bank. *Fulton Bank v. Benedict*, 1 Hall (N. Y.), 480, 557 (1829); *Farmers' Bank v. McKee*, 2 Pa. St. 318 (1845). Notice to three trustees and superintendent of repairs for a corporation that the water from the bank building was not properly conducted away is notice to the corporation. The "jury may presume that the trustee did his duty by communicating to the corporation the

exceptions to this rule that the only safety lies in a study of the cases themselves.¹ Even though a director purchases a mortgage for

knowledge he had obtained, and which it was material that the corporation should know." *Winne v. Ulster*, etc. Inst., 37 Hun, 349 (1885). Knowledge of a firm dissolution imparted to the board by a director at a regular meeting is notice to the bank. *Bank of Pittsburgh v. Whitehead*, 10 Watts (Pa.), 397 (1840). In *Re Carew's Estate Act*, 31 Beav. 39 (1862), where a director and local manager of a bank obtained possession of certain acceptances without consideration, had them discounted by the bank, and carried to his account, which was largely overdrawn, the bank was held to have notice sufficient to prevent its being a *bona fide* owner. Notice once given to a board of directors is notice to its successor, although the individuals constituting it are all different. *Mechanics' Bank v. Seton*, 1 Pet. 299, 309 (1828). A director who, as attorney for the company, takes an acknowledgment of a mortgage to it, binds the company with notice when he had previously taken an acknowledgment of an unrecorded deed. *Fairfield Sav. Bank v. Chase*, 72 Me. 226 (1881). *Contra*, *Houseman v. Girard*, etc. Assoc., 81 Pa. St. 256 (1876).

¹ Although three of a body of city commissioners who have defrauded the city by a conspiracy in expending money are directors in a bank which advanced the money to the city, yet the bank may collect, it being proved that these three did not attend directors' meetings in reference to the matter, and did not act for the bank in any way in regard to it. *Mayor, etc. v. Tenth Nat. Bank*, 111 N. Y. 446 (1888). See also *National Park Bank v. German, etc. Co.*, 53 N. Y. Super. Ct. 367 (1886). Knowledge by a director of a bank is not necessarily notice to the bank. *Home, etc. Bank v. Peoria, etc. Soc.*, 206 Ill. 9 (1903). Where two companies have a director

in common and he brings about the loan of money by one to the other, the lending company is not chargeable with notice of the facts known to such director that the borrowing company intended to use the money *ultra vires*. *Re David Payne & Co., Ltd.*, [1904] 2 Ch. 608. Knowledge of directors of defects in the title to property which they are selling to the corporation is not notice to the corporation. *Schneider v. Sellers*, 98 Tex. 380 (1905). Notice to a director is not notice to the company. *Luling, etc. Co. v. Lane, etc. Co.*, 109 S. W. Rep. 445 (Tex. 1908). Knowledge of a majority of the directors that an unauthorized note has been given is not notice to the company. *Edwards v. Carson Water Co.*, 21 Nev. 469 (1893). Notice to a director of a bank, acquired by him not in the bank's business, but privately, is not notice to the bank. *Black v. First Nat. Bank*, 96 Md. 399 (1903). Knowledge of a director who sells a note to his bank that there is a defense to the note is not notice to the bank. *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123 (1894). Where two of fifteen directors sell land to the corporation, their knowledge of a prior vendor's lien is not notice to the corporation. *Bang v. Brett*, 62 Minn. 4 (1895). Knowledge of a director that a note is tainted with illegal gambling is not notice to the bank, although he recommended it for discount. *Shaw v. Clark*, 49 Mich. 384 (1882). The fact that a cashier who discounts a note for a corporation payee is also a director in the latter is not notice to the bank of facts known to the corporation payee. *First Nat. Bank v. Loyhed*, 28 Minn. 396 (1881). Knowledge of a director that a member of a firm in which the director is also a member has withdrawn therefrom is not notice to the corpo-

a corporation it is not chargeable with his knowledge of equities against the mortgage, where such knowledge was not acquired by him while acting for the corporation.¹

ration. But it was proved that the director had no management of the corporate affairs. *Powles v. Page*, 3 C. B. 16, 24, 81 (1846). Where a director causes his bank to discount a note which he holds as an indorsee, the bank is not chargeable with knowledge of facts which he knows and which would defeat payment. *Loomis v. Eagle Bank*, 1 Disney (Ohio), 285 (1859); *Louisiana State Bank v. Senecal*, 13 La. 525 (1839). Where a board of bank directors discounted a note for one of their number, who had knowledge of fraud in its inception, the maker was held liable on the ground that the knowledge of the director which was not communicated to any other director could not be considered notice to the bank. *Terrell v. Branch Bank at Mobile*, 12 Ala. 502 (1847). And see *Lucas v. Bank of Darien*, 3 Ala. (O. S.) 280, 321 (1830); *Washington Bank v. Lewis*, 39 Mass. 24 (1839); *Commercial Bank v. Cunningham*, 41 Mass. 270, 276 (1841); *First Nat. Bank v. Christopher*, 40 N. J. L. 435 (1878). Where a director had knowledge that certain bills which were discounted at the bank had been given originally as accommodation paper, but was not present when the board discounted them, and did not communicate his knowledge to any one, the bank was not regarded as having notice. *Farmers', etc. Bank v. Payne*, 25 Conn. 444 (1857); *Westfield Bank v. Cornen*, 37 N. Y. 320 (1867). But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the latter is affected with his knowledge. *National Security Bank v. Cushman*, 121 Mass. 490 (1877); *Bank of U. S. v. Davis*, 2 Hill, 451, 464 (1842). Cf.

North River Bank v. Aymar, 3 Hill, 262, 274 (1842).

Notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. And even knowledge of the president that certain deposits were only to be drawn in a certain manner was held not to be knowledge of the bank so as to render it liable when such money had, unknown to the president, been wrongfully withdrawn. *Fulton Bank v. New York, etc. Canal*, 4 Paige, 127, 136 (1833). Knowledge of directors in a matter of their own in which they are not acting for the corporation is not notice to the latter. So held in a patent case where this defect of actual or constructive notice enabled the legal title to prevail over the equitable. *Davis, etc. Wheel Co. v. Davis, etc. Wagon Co.*, 20 Fed. Rep. 699 (1884). An insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises will not be charged with constructive notice of such deed by the fact that the grantor and mortgagor was, at the date of the deed and execution of the mortgages, a director in the insurance company. *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54, 61 (1856). Knowledge of a director, acquired by reading a notice thereof in a newspaper, that a firm has dissolved and that certain partners are no longer liable, is not notice to the corporation; he did not acquire the knowledge nor was it given to him for the corporation. *National Bank v. Norton*, 1 Hill, 572 (1841). On a question as to the ratification by a company of the unauthorized act of its president, where it is necessary to show knowledge on the part of the

¹ *Gilkeson v. Thompson*, 210 Pa. St. 355 (1904).

A corporation has notice of facts which are known to all its officers and stockholders, and especially to a contracting firm that owns the corporation and uses it to carry on the firm's business.¹

Where railroad property purchased at foreclosure sale is transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals holds that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors."²

company, it is not enough to show an individual knowledge on the part of the minority of the board of trustees, even if a knowledge by all of them in their individual capacity, and not acting as a board, would be sufficient. *Yellow Jacket, etc. Co. v. Stevenson*, 5 Nev. 224 (1869). A corporation is not chargeable with any knowledge of a deed which a director discovers on examining the record unofficially. *Farrell Foundry v. Dart*, 26 Conn. 376 (1857). Notice to a director, not constituted an organ of communication between the parties, that a promissory note was made to be discounted for a special purpose, is not notice to the bank, although the director was present when the note was discounted. *Custer v. Tompkins County Bank*, 9 Pa. St. 27 (1848). Knowledge by a director of a deed drawn by him professionally is not notice to the corporation whose subsequent deed of the same property is first recorded. *Armstrong v. Abbott*, 11 Colo. 220 (1888). Notice of an unrecorded lien does not come to the corporation by the fact that a stockholder had notice and that he afterwards became an officer. *The Admiral*, 1 Fed. Cas. 178 (1856). Knowledge of a director that a bill purchased by the company is accommodation on the part of the drawee is not knowledge of the company if the director took no part in the purchase. *Re Peruvian Ry.*, L. R. 2 Ch. App. 617 (1867). Knowledge acquired by a director while acting as a member of the firm which sells a note to the company is not notice to the com-

pany. *Atlantic, etc. Bank v. Savery*, 82 N. Y. 291 (1880). Corporations having common directors or officers are not chargeable with knowledge of each other's transactions and condition. *Re Marseilles Extension Ry.*, L. R. 7 Ch. App. 161 (1871). See also, in general, *Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243 (1882); *West Boston Sav. Bank v. Thompson*, 124 Mass. 506 (1878). Where the president of a corporation is vice-president and manager of a bank, and obtains money from the latter in the name of the former, but for his own use, the bank cannot recover from the corporation, the officers of the bank being cognizant of the transaction. *Trapp v. Fidelity Nat. Bank*, 101 Ky. 485 (1897).

¹ *Holly Mfg. Co. v. New Chester, etc. Co.*, 48 Fed. Rep. 879 (1891). Where suit is brought by a riparian owner to enjoin a riparian owner higher up the stream from diverting the water, and the latter pending the suit conveys his rights to a corporation organized for that purpose, and owns all its stock, such corporation is bound, although not a party to the suit. *Miller & Lux v. Rickey*, 146 Fed. Rep. 574 (1906); *aff'd*, 152 Fed. Rep. 11 and 22. See also § 663, *supra*.

² *Vilas v. Page*, 106 N. Y. 439, 465 (1887). See also ch. XL, *supra*. Where the officers of a bank use its funds to buy property which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may fol-

A director cannot claim to be a *bona fide* purchaser of bonds upon their issue by the corporation. He is bound to know what transpires in the meetings of the board of directors.¹ Where a company sells land to its president and secretary, they are charged with knowledge of facts known to the company, the latter having been present at the meetings.² The question sometimes arises whether a director or officer of a corporation is chargeable with notice of all facts contained in the corporate books. The general rule is that he is not chargeable with actual knowledge of such entries,³ but such en-

low the stock or the property, at their option. *Farmers', etc. Bank v. Kimball Milling Co.*, 1 S. D. 388 (1890). A consolidated company takes with notice of facts known to one of the companies consolidated. *Joy v. St. Louis*, 138 U. S. 1 (1891). A tripartite agreement relative to a right of way through a park binds the successors of one of the companies. *Joy v. St. Louis*, 138 U. S. 1 (1891).

1 *Greenville Gas Co. v. Reis*, 54 Ohio St. 549 (1896). The directors' minute-book is evidence against a director. *Allison v. Coal Creek, etc. Co.*, 87 Tenn. 60 (1888); *First Nat. Bank v. Tisdale*, 84 N. Y. 655 (1881); *Leonard v. Faber*, 52 N. Y. App. Div. 495 (1900). See also § 714, *supra*.

2 *Rapley v. Klugh*, 40 S. C. 134 (1893).

3 "There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder." Hence, in an action by the corporation for an accounting, the books of the company are not competent evidence to establish the account and hold him liable. *Rudd v. Robinson*, 126 N. Y. 113 (1891). A director who sells his stock to another director who is treasurer, may collect a check given in payment, even though the check is signed by the latter as treasurer of the company. *Fillebrown v. Haywood*, 190 Mass. 472 (1906). In a suit by the corporation to hold its president liable for unauthorized acts, the principle that the directors

are chargeable with notice with what is in the books is not applicable. *Pacific, etc. Works v. Smith*, 93 Pac. Rep. 85 (Cal. 1907). General entries upon the ledger of the corporation do not charge a director with notice thereof, unless it is proved that he had access to the ledger or control over it. *Leonard v. Faber*, 52 N. Y. App. Div. 495 (1900), the court stating that corporate books, such as the stock-book and minute-books containing records in which third parties are not interested, are evidence of the facts set forth in them both in favor and against the corporation, but that account books showing transactions between the corporation and third persons are similar to account books of other parties and are admissible only as admissions by the corporation.

In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant. *Hayden v. Williams*, 96 Fed. Rep. 279 (1899). As against the officers of the company it may be proved by the books of the company that they had converted to their own use the funds of the company illegally. *Saranac, etc. R. R. v. Arnold*, 167 N. Y. 368 (1901). One who is a stockholder, director, and vice-president is chargeable with knowledge of entries on the corporate books. *First Nat. Bank v. Tisdale*, 18 Hun, 151 (1879); *aff'd*, 84 N. Y. 655. See also ch. XXX,

tries may be admissible in evidence against him in suits brought by strangers.¹ They are not admissible as evidence, however, as against

supra. One who is a stockholder and also director is as fully bound by entries in them as a partner is by entries in the partnership books. *Montgomery v. Exchange Bank*, 6 Atl. Rep. 133 (Pa. 1886). The books of the company are not, *per se*, evidence against a director. *Powell v. Conover*, 75 Hun, 11 (1894). See § 55, *supra*. A director sued by a stockholder for negligence in not attending to his duties is not presumed to have knowledge of all that is shown by the books of the company. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). A director is bound to take notice of calls, and cannot set up that he had no actual notice. *Speller, etc. Co. v. Geiger*, 147 Pa. St. 399 (1892). Directors of an insolvent bank obtaining a preference are bound to know that the bank is insolvent. *James Clark Co. v. Colton*, 91 Md. 195 (1900). Even though a corporation is insolvent, yet, if the directors believe it is solvent, although in financial distress, they may loan money to the corporation and take securities as collateral thereto, and they are not bound to know that the corporation is insolvent. *Converse v. Sharpe*, 161 N. Y. 571 (1900). A discussion of what constitutes insolvency of a corporation, and stating that the directors are bound to know the condition of business, is given in *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7 (1891). Where the president discounts a note for the company and pays in the money therefor, he is a *bona fide* holder of it. *Hitchings v. St. Louis, etc. Co.*, 68 Hun, 33 (1893). Knowledge imparted to the corporation is not notice to its president, who buys a note from it. *Peckham v. Hendren*, 76 Ind. 47 (1881). The rule that a bank is estopped by the statement of its cashier to a surety that

his principal had paid the note is not applicable where the surety is a director of the bank, for he will be conclusively presumed to know whether payment was made. His knowledge will also be imputed to a firm which was the security and of which he was a member. *Merchants' Bank v. Rudolf*, 5 Neb. 528 (1877). See also § 714, *supra*. A director cannot hold the president liable on a loan by the former to the corporation made on representations of the condition of the corporation. *Hubbard v. Wearre*, 79 Iowa, 678 (1890).

1 The books of a company are "competent as evidence so far as related to any entries legitimately contained in them, and so far as they were relevant to the issues on trial" in an action by creditors to hold a director liable, under the New York statute, for making a false report. *Huntington v. Attrill*, 118 N. Y. 365 (1890). In a suit against a director to enforce a statutory liability, a creditor cannot prove his debt by the books of the company unless he proves that the director had access to or was familiar with such books. *Minor v. Crosby*, 76 N. Y. App. Div. 561 (1902). Corporate books are admissible in evidence to show money received as against a corporate officer on trial for embezzlement, even though the entries were not made by him. *Humphrey v. People*, 18 Hun, 393 (1879). So far as the rights of third persons are concerned directors are bound to know the condition of the business of the company as shown by its record books. *Mamerow v. National, etc. Co.*, 206 Ill. 626 (1903). In an action against the president for damages for false representations it need not be proved that he had actual knowledge of the falsity of the statements in regard to corporate affairs, inasmuch as he was bound to know thereof.

strangers.¹ In a criminal proceeding against a corporate officer the corporate books are not evidence unless he has been connected with them or the entries therein.²

The minutes of a meeting of a corporation are admissible to show what took place as against members who attended the meeting.³

A stockholder is chargeable with notice of entries on the corporate books if made in his presence and he personally assented

Norvell v. Pye, 95 S. W. Rep. 666 (Tex. 1906). The president is not guilty of larceny merely because a clerk embezzled funds paid in by a customer. *State v. Carmean*, 126 Iowa, 291 (1905). The minutes of a directors' meeting are evidence of who were present and what was done, so far as a suit between the corporation and one of those who were present is concerned. *Olney v. Chadsey*, 7 R. I. 224 (1862). A director and vice-president is chargeable with knowledge of what is on the corporate records. *First Nat. Bank v. Tisdale*, 84 N. Y. 655 (1881). *Quære*, as to entries in miscellaneous corporate books. *Billings v. Trask*, 30 Hun, 314 (1883). The entries in the books of a business corporation during the period of his directorship are admissible in evidence against one who has been a director in the corporation, and as such took part in its affairs. *Bedford v. Sherman*, 68 Hun, 317 (1893). In a suit by a vendee of bank stock against the vendor for false representations, the vendor, even though he is vice-president and managing director of the bank, is not chargeable with knowledge of all that the bank books contain, except so far as he had such knowledge. *Baker v. Mathew*, 115 N. W. Rep. 15 (Iowa, 1908). See 111 S. W. Rep. 902; 85 N. S. Rep. 530.

¹ Books and records of the corporation are not evidence in its behalf, except as memoranda used in connection with oral testimony. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641 (1905). The secretary and treasurer may identify the cash book,

journal and ledger of a corporation, even though he did not make the entries therein. Entries in such books may be shown as admissions on the part of the corporation in a suit between it and a third party. *Matter of Randall*, 90 N. Y. App. Div. 192 (1904). A corporation cannot prove the sale of its treasury stock by entries in its own books. *Jacobs v. Morgenthaler*, 112 N. W. Rep. 492 (Mich. 1907). The title of the corporation to a horse may be shown by its records and the testimony of its officers. *Jaquith Co. v. Shumway's Estate*, 69 Atl. Rep. 157 (Vt. 1908). A person contracting with a corporation is not bound to know what is contained in the corporate records. *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 684 (1885); *aff'd*, 133 U. S. 534. Entries in the corporation books of matters relating to any property or right claimed by them can never be evidence for them unless made so by act of the legislature. They are not admissible in favor of the corporation as against strangers. *Graville v. New York, etc. R. R.*, 34 Hun, 224 (1884). See also 15 Wend. 256, note; *Wait, Insolv. Corp.*, § 528. *Cf. Leonard v. Faber*, 52 N. Y. App. Div. 495 (1900). As between claimants to the property of a corporation, the corporate records are not admissible as evidence to show the title of the corporation. *Dolan v. Wilkerson*, 57 Kan. 758 (1897).

² *People v. Burnham*, 120 N. Y. App. Div. 388 (1907).

³ *Booth v. Dexter, etc. Co.*, 118 Ala. 369 (1895).

thereto.¹ The books of the corporation are evidence in a suit against a stockholder on a call, even though the entries are not proved to be correct by the person actually making them.²

But "a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers."³ In general, however,

¹ See Abbott's Tr. Ev., p. 53.

² *Sigua, etc. Co. v. Brown*, 171 N. Y. 488 (1902). See also § 55, *supra*.

³ So held where a stockholder in a telegraph company sued it for negligence in sending a message. *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256 (1890), aff'g 44 Hun, 532. In a suit by a corporation against one of its stockholders for debt, the books of the corporation are not admissible as evidence against him. *Trainor v. German-American, etc. Ass'n*, 204 Ill. 616 (1903). Where a director knows that the corporation has made a contract he is bound to take notice of its contents, but the same rule does not apply to a stockholder. *Watts v. Bucknall*, [1903] 1 Ch. 766. A stockholder is not chargeable with knowledge of corporate contracts of which as a fact he knows nothing. *Tarbox v. Gorman*, 31 Minn. 62 (1883). Minutes of the directors have been held to be evidence against a subscriber to disprove certain defenses set up by him to his subscription. *Bedford R. R. v. Bowser*, 48 Pa. St. 29 (1864). The cases of *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393, 398 (1842), and *Graff v. Pittsburgh, etc. R. R.*, 31 Pa. St. 489, 495 (1858), hold that a stockholder present and assenting to an entry on the corporate books is bound by it. But *Hill v. Manchester, etc. Co.*, 5 B. & Ad. 866 (1833), per Parke, B., holds that corporate minutes are not admissible on behalf of the company in a suit against it by one of its stockholders. Corporate books are not only evidence of corporate acts when they are to be proved, but are to the same extent

evidence against stockholders who are chargeable with knowledge of their contents. *Blake v. Griswold*, 103 N. Y. 429 (1886); *Billings v. Trask*, 30 Hun, 314 (1883). As between stockholders, the books of a corporation and sworn copies thereof are competent evidence to show the acts of a corporation. *Hubbell v. Meigs*, 50 N. Y. 480 (1872). See also *Lindley, Companies*, p. 312; *Black v. Shreve*, 13 N. J. Eq. 455 (1860); *Haynes v. Brown*, 36 N. H. 545 (1858); *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365 (1868). Where a person is merely in possession of bank stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound to have knowledge of the facts in possession of the corporation or its officers. *Baker v. Woolston*, 27 Kan. 185, 189 (1882). A pledgee of stock who takes no part in the stockholders' meetings is not chargeable with notice of a lien which the corporation has on property which he purchases. *Baker v. Woolston*, 27 Kan. 185 (1882). The books of a fraternal lodge are admissible in evidence against the members in an action by the lodge. *Union Pacific Lodge, etc. v. Bankers' Surety Co.*, 113 N. W. Rep. 263 (Neb. 1907). A stockholder in one company which is consolidated with another cannot hold a stockholder in the latter liable for misrepresentations that the latter was in a prosperous condition where there was no concealment and the stockholder could have examined into the condition of the latter and perhaps

a stockholder is bound to take notice of the by-laws,¹ but the purchaser of stock is not, unless they appear on the face of the certificate of stock.² In a suit by stockholders to dissolve and wind up the corporation, the books of the company are not admissible as, against them, being mere declarations in its favor.³ Where a party owns all the stock of another corporation, it has been held that he is chargeable with notice of entries upon its books.⁴ A stockholder in a corporation that is carrying on a patent litigation is not bound by its admissions as affecting subsequent litigations.⁵

The question of serving notice or papers upon corporations in judicial proceedings is discussed elsewhere.⁶ The publication of a notice in a newspaper is not notice, unless the party notified is proved to have read the notice.⁷

The important principle of law that a person taking from a corporate officer corporate obligations in payment of a personal debt of such officer is not a *bona fide* holder of the same is considered elsewhere.⁸

did so. *Pigott v. Graham*, 93 Pac. Rep. 435 (Wash. 1908).

1 See § 4a, *supra*. A stockholder is chargeable with notice of the by-laws. *Richardson v. Devine*, 193 Mass. 336 (1907).

2 See § 11, *supra*.

3 *Matter of Dittman*, 65 N. Y. App. Div. 343 (1901).

4 *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa, 364 (1893).

5 *American, etc. Co. v. Phoenix, etc. Co.*, 113 Fed. Rep. 629 (1902).

6 See § 752, *infra*.

7 See § 119, *supra*. Though the company takes a newspaper, the announcement therein of a dissolution of part-

nership is not notice to it. *Vernon v. Manhattan Co.*, 22 Wend. 183 (1839), *aff'g* 17 Wend. 524. *Cf.* 1 Hill, 578, n. *Contra*, *Bank of South Carolina v. Humphreys*, 1 McCord (S. C.), 388 (1821); *Martin v. Walton*, 1 McCord (S. C.), 16 (1821). Notice in a newspaper taken by an individual is not notice. *Rawley v. Horne*, 3 Bing. 2 (1825). But if contained in a newspaper taken by a marine insurance company, and is marine news, and the president knew the fact involved, the company has notice. *Green v. Merchants' Ins. Co.*, 27 Mass. 402 (1830).

8 See § 293, *supra*.

CHAPTER XLIV.

RATIFICATION, ACQUIESCENCE, OR LACHES AS A BAR TO A STOCKHOLDER'S ACTION HEREIN.

§ 728. Introductory.

729. Laches, acquiescence, or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy—Right of the corporation itself to complain.

730. Express ratification herein—Ratification by the majority is binding when on the minority—Transferee of stock

that has been voted in favor of the act cannot complain.

§ 731. Stockholder chargeable with laches only after he has a full knowledge of the facts.

732. Silent acquiescence while changes are taking place is laches and is a bar to a suit—What length of time constitutes laches herein—Statute of limitations.

733. Miscellaneous applications of the doctrine of laches herein.

§ 728. *Introductory.*—When a stockholder brings an action to remedy the frauds, *ultra vires* acts, or negligence of a director or third person, the most common and dangerous defense that he has to encounter is the defense that he has been guilty of laches in bringing his action. Like the defense of contributory negligence—a modern principle of law that defeats many actions for negligence—so the defense of laches, acquiescence, or ratification has sprung up to defeat stockholders' actions herein. The principles which govern, define and explain this defense have become well settled. They form the subject of this chapter.

§ 729. *Laches, acquiescence, or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy—Right of the corporation itself to complain.*—It has already been shown that a stockholder may bring an action to remedy frauds, negligence, or *ultra vires* acts. As regards the frauds and negligence of corporate officers, it is well settled that laches is a good defense to a stockholder's action herein. In reference to *ultra vires* acts, however, which are *mala prohibita* or *mala in se*, there is more difficulty. It is very clear that no assent or acquiescence of the stockholders can validate such acts.¹

¹ See *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 186 (1879), where the court said: "A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them." A contract in which the directors are interested, where it is void by statute, cannot be enforced on the ground of waiver by the corporation. *Barton v. Port Jackson*,

But it is a different question to determine whether, after long acquiescence, the stockholder may take advantage of the invalidity of such acts. As regards acts *mala prohibita*—that is, acts expressly prohibited by statute—the stockholder may be barred by laches from complaining thereof, since the state, through its attorney-general, may protect the interests of the public.¹ The stockholder, however, may sue on the ground that unless the evil is corrected the state may forfeit the corporate franchises.² As regards acts *mala in se*, probably the rule will depend on the circumstances of the case. If the stockholder has participated in the act or knowingly accepted the benefit thereof, the court will not aid him, since he who comes into equity must do so with clean hands.³ Thus, where a lease of a railroad is *ultra vires*, a bill in equity filed by one of the parties to the contract will not lie to set it aside. The court will aid neither party, they being *in pari delicto*.⁴ When, however, a stockholder has not participated or knowingly accepted the benefit of corporate contracts which are *mala in se*, there would seem to be no reason why mere delay on his part in bringing suit to set aside such acts should be fatal to his bill.⁵

etc. Co., 17 Barb. 397 (1854). "Void" cannot be construed as "voidable" in a statute which is enacted from public policy, and not for the benefit of parties only. *Rex v. Hipswell*, 8 B. & C. 466 (1828), concerning a statute against binding out children. For a collection of the cases on *ultra vires* acts as *mala prohibita* and *mala in se*, see an article in *The Counsellor*, vol. 4, p. 151.

¹ See *Stewart v. Erie, etc. Transp. Co.*, 17 Minn. 372 (1871); and *Gray v. Chaplin*, 2 Russ. Ch. 127 (1826), where the court held that the stockholder cannot claim that the public is wronged. If a public right is to be enforced, it must be at the suit of those to whom the protection of public rights belongs. *Of. Ashbury, etc. Co. v. Riche*, L. R. 7 H. L. 653 (1875); s. c., L. R. 9 Exch. 224, 262. That which is forbidden by statute cannot be ratified. *Nellis Co. v. Nellis*, 62 Hun, 63 (1891); *Taylor v. Chichester, etc. Ry.*, L. R. 2 Exch. 356 (1867). The state may at any time object. *Alexander v. Searcy*, 81 Ga. 536 (1889).

² *Manderson v. Commercial Bank*, 28 Pa. St. 379 (1857), where discounts were being improperly made.

³ See § 39, *supra*. A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder by being a stockholder is estopped from complaining, and is presumed to have had knowledge of the facts from the time when he became a stockholder. *Coquard v. National L. S. Co.*, 171 Ill. 480 (1898).

⁴ *St. Louis, etc. R. R. v. Terre Haute, etc. R. R.*, 145 U. S. 393 (1892).

⁵ A stockholder may object to the voting of overissued stock in the hands of the party to whom it was originally issued, even though he voted to issue such stock, and he may maintain an action to have the stock canceled. *Haskell v. Read*, 68 Neb. 107 (1903).

As to the corporation itself, the fact of its participating in an act which is merely beyond the powers of a corporation, but is not prohibited by statute or pernicious in itself, may not be a bar to recovery upon the contract.¹ A suit in equity lies at the instance of a railroad corporation that has guaranteed negotiable bonds of another railroad corporation to have such guaranty canceled and suits upon the guaranty restrained, because of facts not appearing upon the face thereof and because otherwise the bonds may pass into *bona fide* hands.² Where a director is one of the committee appointed by the board of directors to settle claims against the corporation, and he buys some of the claims, he must turn them in at the price he paid; and even though the stockholders and directors intended to allow him the profit, yet this does not estop the corporation from objecting.³

In Massachusetts the supreme court has recently held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors and officers approved the transaction when it was carried out, it appearing that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.⁴

The supreme court of the United States, however, subsequently

¹ Bath Gas Light Co. v. Claffy, 151 N. Y. 24 (1896).

² Louisville, etc. Ry. v. Louisville Trust Co., 174 U. S. 552 (1899).

³ Kroegher v. Calivada, etc. Co., 119 Fed. Rep. 641 (1902). A corporation may purchase its own stock, and if it purchases such stock from a director the sale may be valid, but the price is not binding and the director will be allowed only what the stock is reasonably worth. Even though the stockholders for two years, with full knowledge of the facts, do not object,

the corporation may defend against the agreed price, but may be obliged to pay what the stock was worth. Oliver v. Rahway, etc. Co., 64 N. J. Eq. 596 (1903). See also § 38, *supra*, and §§ 766a, 848g, *infra*.

⁴ Where a person buys all the stock of a corporation for about \$613,000, and some real estate for about \$175,000, and sells the former to a corporation formed by him for that purpose, for \$2,500,000 par value of stock, having also an actual value of \$2,500,000, and sells the real estate for

passed on the same transaction and held very properly that the corporation could not complain at all, and that it would not be allowed to repudiate its consent to an issue of stock for property, and to charge a single stockholder therefor, when thirteen-fifteenths of its stock were parties receiving the benefit of the transaction, especially where any such repudiation would be for the benefit of the guilty and innocent alike.¹ Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the costs of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six years' statute of limitations.² Even though promoters turn in property at a very high value, yet if all the parties were aware of all the facts a receiver of the corporation cannot hold the promoters liable.³ A fraudulent decree of foreclosure may subsequently be attacked by the corporation itself

\$750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said: "That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder

and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315 (1905), the court refusing to follow *Old Dominion, etc. Co. v. Lewisohn*, 136 Fed. Rep. 915, involving the other issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued.

1 *Old Dominion, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908).

2 *Pietsch v. Milbrath*, 123 Wis. 647 (1904).

3 *Tompkins v. Sperry, etc. Co.*, 96 Md. 560 (1903). Even though the stockholders of a bank assent to notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor. *Coddington v. Canaday*, 157 Ind. 243 (1901). See also § 701, *supra*. These subjects,

after it has passed into other hands, even though the officers, directors and stockholders who were such at the time of the foreclosure acquiesced therein.¹ But a contract between a corporation and all its stockholders cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby.²

§ 730. *Express ratification herein—Ratification by the majority is binding when on the minority—Transferee of stock that has been voted in favor of the act cannot complain.*—There are in general two ways in which a stockholder may be said to have ratified an act of the directors which he is attempting to enjoin or set aside. The ratification may be by vote or by an express agreement or statement to that effect, or it may be by such laches or acquiescence as will amount to an implied ratification.³ Cases involving the defense of an express ratification rarely arise, since the courts are not open to a stockholder who expressly agrees to an alleged illegal act being done by the corporation and then comes into court to have it set aside.⁴ However, provision in a contract of subscription to the

however, are fully discussed elsewhere. See §§ 46, 47, *supra*.

1 *Pacific R. R. of Mo. v. Missouri*, etc. Ry., 111 U. S. 505 (1884).

2 *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); s. c., 198 U. S. 561. Where all the stockholders acquiesce, the corporation itself cannot complain. *Home, etc. Co. v. Barber*, 67 Neb. 644 (1903). A corporation claiming the benefit of transactions of its president on its money and credit, but the profit of which he has kept, cannot maintain suit therefor if it has ratified the same. *North Chicago Railroad v. Chicago*, etc. Co., 150 Fed. Rep. 612 (1907).

3 Thus, in *Evans v. Smallcombe*, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court said: "Consent might be either express or might be inferred from the acquiescence of the shareholders after full knowledge of the transaction which was in excess of the powers of the directors." See also *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 187 (1879).

4 As an instance of express ratification, see *Allen v. Wilson*, 28 Fed. Rep. 677 (1886); *Butterfield v. Cowing*, 112

N. Y. 486 (1889); *Burden v. Burden*, 159 N. Y. 287, 304 (1899). A stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto where she afterwards disposes of part of the new stock so issued. *Hoene v. Pollak*, 118 Ala. 617 (1898). Where a reorganization has been completed, and a voting trust established and a release to the reorganization committee executed by the certificate holders, one of the certificate holders cannot hold them liable in damages on the ground that as trustees of the voting trust they controlled the board of directors and had mismanaged the new corporation, it appearing that they did not constitute a majority of the board of directors and that in managing the corporation they acted as stockholders and directors, and not as a reorganization committee. *Lawrence v. Curtis*, 191 Mass. 240 (1906). Although on a consolidation the president of one of the companies takes a large amount of the new common stock for services, yet, if the stockholders knew all

stock of the company whereby the subscriber waives notice of all contracts between the promoters and the company is not binding on the stockholder if such waiver is tricky and fraudulent.¹

A general resolution at a stockholders' meeting approving all acts of the directors and officers, such acts not being specified nor the minutes thereof read to the meeting, is not a ratification of the same.²

A vote of the stockholders ratifying all the acts of the directors does not ratify acts which are not fully explained to the stockholders.³ A difficult question arises when a majority of the stockholders vote an approval or ratification of questionable acts of the directors. A board of directors and a majority of the stockholders cannot condone an actual fraud in the way of a sale of corporate property to directors, where it is to the advantage of the corporation to have the sale set aside.⁴ On the other hand, even though a lessor

about it and agreed that he should have the stock, they cannot afterwards hold him liable therefor. *Rusling v. Moses*, 47 Atl. Rep. 1054 (N. J. 1901). Cf. §§ 652, 662, 681, *supra*.

1 *Greenwood v. Leather, etc. Co. Ltd.*, [1900] 1 Ch. 421. Where the promoters paid to a person who is to act as chairman of the directors, and his firm who underwrote ten thousand shares, a commission of twelve thousand shares, the court held that ten thousand of the twelve thousand was for the use of his name and only two thousand shares for the commission, and hence he was liable at the instance of an investor in the stock to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. *Cackett v. Keswick*, [1902] 2 Ch. 456. See also § 160, *supra*.

2 *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904). Where a corporation has illegally transferred property to a director a resolution to

recover back part of it is not a ratification as to the remaining part. *Mobile, etc. Co. v. Gass*, 142 Ala. 520 (1905).

3 *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). See also § 731, *infra*.

4 *Kessler & Co. v. Ensley Co.*, 129 Fed. Rep. 397 (1904). See § 740, *infra*. A majority of the stockholders in interest cannot ratify the officers unlawfully taking for their own use its moneys in excess of their salaries or the value of their services. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). Where directors are interested in a contract with a corporation a minority stockholder may insist on the contract being a reasonable one, even though a majority of the stockholders have approved it, it appearing that those particular directors constituted a majority of the board and also owned a majority of the stock. *Booth v. Land, etc. Co.*, 68 N. J. Eq. 536 (1905). Cf. §§ 649, 662, *supra*. Unreasonable salaries voted by a majority of the directors to themselves as officers are not legal, even though the officers own a majority of the stock, and even though the prosperity of the corporation and the value of its stock have increased. *Jacobson v. Brooklyn, etc. Co.*, 134 N. Y. 152 (1906). Where in order to increase its apparent reserve directors

railroad and a lessee railroad have directors in common and they compromise as to which company shall have the benefit of a saving in interest by the refunding of the bonds of the lessor, yet if a majority of the stockholders of the lessor ratify the agreement, the minority cannot complain, unless it is shown that the ratification was obtained by fraud or concealment.¹

A board of directors cannot release one of their number from liability for wasting the funds of the company.²

of an insurance company borrow money and purchase worthless stock of another corporation, they are personally liable therefor to a receiver of the former, even though the stockholders ratified the transaction, it appearing that the directors controlled the stockholders' meeting. *Bowers v. Male*, 111 N. Y. App. Div. 209 (1906); *aff'd*, 186 N. Y. 208. A statutory liability of a director for voting for the payment of a dividend out of capital was enforced in *Siegman v. Kissel*, 62 Atl. Rep. 941 (N. J. 1906), by a minority stockholder, even though a majority of the stockholders were opposed to the suit. Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. *Goodell v. Verdugo, etc. Co.*, 138 Cal. 308 (1903), the court saying, "the publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid." That the majority cannot bind the minority in such cases, see also *Hazard v. Durant*, 11 R. I. 195 (1875).

1 *Continental Ins. Co. v. New York, etc. R. R.*, 187 N. Y. 225 (1907). *Cf.* §§ 649, 662, *supra*. Even though

the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 807 (1903). The court further said: "In *Leavenworth v. Chicago Ry. Co.*, 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case of *Nye v. Storer*, 168 Mass. 53, and *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." Where a majority of the stockholders and also the directors have ratified a sale by a pledgee of property of the corporation a minority stockholder cannot cause the sale to be set aside, inasmuch as the pledgor might have originally consented to the sale. *Macon, etc. R. R. v. Shailer*, 141 Fed. Rep. 585 (1905).

2 *Gilbert v. Finch*, 173 N. Y. 455

Where by the charter the directors' fees are limited, they cannot by appointing one of their number managing director increase his fees, and any increased fees of any of the directors may be recovered back, even though the stockholders in a general meeting had ratified the payment.¹ Where the board of directors have purchased at an excessive price real estate in which the dominating directors are personally interested, the latter may be held liable at the instance of a stockholder. Ratification of the transaction at a stockholders' meeting, which the dominating directors control, does not validate the transaction.²

If, however, the complaining stockholder participated in the act complained of, he cannot afterwards complain.³ Thus a stockholder

(1903). See *Galery v. National Exch. Bank*, 41 Mich. 169 (1879). See also §§ 669, 683, *supra*.

¹ *Boschoek, etc. Co. Ltd. v. Fuke*, [1906] 1 Ch. 148.

² *Klein v. Independent, etc. Assoc.*, 83 N. E. Rep. 434 (Ill. 1907).

³ See §§ 39, 40, *supra*, and § 735, *infra*. Acquiescence and ratification of the guaranty by one railroad of stock and bonds of another railroad, the stock and bonds being owned by directors of the former company, is a bar to an action to set the same aside. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). "The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied." *Wormser v. Metropolitan Street Ry.*, 184 N. Y. 83 (1906). A stockholder who by proxy takes part in a meeting extending the corporate existence cannot deny the validity of such extension. *Callahan v. Chilcott, etc. Co.*, 37 Col. 331 (1906). Even though the corporation makes loans *ultra vires*, yet an officer who takes part therein cannot complain. *Bixler v. Summerfield*, 210 Ill. 66 (1904). A stockholder may object to the voting of overissued stock in the hands of the party to whom it was originally issued, even though he voted to issue

such stock, and he may maintain an action to have the stock canceled. *Haskell v. Read*, 68 Neb. 107 (1903). Stockholders who have participated in a contract between the corporation and its officers cannot complain thereof. *Clark v. Pittsburgh, etc. Co.*, 184 Pa. St. 188 (1898). "Property delivered under an illegal contract cannot be recovered back by any party in *pari delicto*." *Harriman v. Northern Securities Co.*, 197 U. S. 244 (1905). In Story, *Equity Jurisprudence*, 13th ed., sec. 298, it is said, "in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not, in equity, material. The reason is that the public interest requires that the relief should be given, and it is given to the public through the party." A stockholder cannot hold a director liable for the company's exchanging accommodation paper with another company, where such stockholder was himself a director when the practice commenced and acquiesced therein. *Davenport v. Crowell*, 65 Atl. Rep. 557 (Vt. 1907). Where there are but a few stockholders in a corporation and without any formal corporate action they turn a part of the capital stock into preferred stock and thereafter divide the profits among themselves

cannot object to a lease as being *ultra vires*, where he has accepted pecuniary benefits thereunder, such as selling the privilege to sub-

without declaring technical dividends with the knowledge and consent of all the stockholders, no one of them nor the corporation itself can subsequently complain and defeat a suit by one of them for the amount so credited to him on the books, corporate creditors not being injured. *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274 (1904). The court said: "In the present case we apply this doctrine to the non-observance of legal forms respecting the creation of preferred stock, the abandonment by preferred stockholders of voting powers, the resignation of directors, the reduction of the number of directors from six to three, and the apportionment of dividends as between the stockholders entitled thereto. In respect to these matters the jury was fully justified in finding that unanimous consent of the stockholders of the defendant company had been given, and had been acted on in good faith by the plaintiff and others concerned during a course of years, and that plaintiff could not be restored to the *status quo ante*, were the assent of his fellow stockholders and of the company to be now withdrawn." A director who objects to an increase in the salaries of the officers, but participates in their re-election from year to year, cannot maintain a suit to hold them liable. *Klein v. Independent, etc. Assoc.*, 83 N. E. Rep. 434 (Ill. 1907). A stockholder who votes for an act cannot afterward complain of it. *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262 (1893). Stockholders who participate in an alleged fraudulent reorganization cannot complain. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). A stockholder who votes for the purchase of property from a director cannot afterwards complain. *Barr v. Pittsburgh Plate Glass Co.*, 51 Fed. Rep. 33 (1892).

See also ch. XXXIX, *supra*. A director who has voted for a sale cannot as a stockholder object. *Holton v. Wallace*, 66 Fed. Rep. 409 (1895). A stockholder who, as secretary, signed certificates of stock, cannot claim that they were watered stock, and hence that they cannot be voted at a meeting called to ratify a sale of property to a director. *Wisner v. Delhi, etc. Co.*, 46 La. Ann. 1223 (1894). Although a stockholder voted in favor of an *ultra vires* lease, yet, if the corporation has repudiated the lease, the estoppel is destroyed and the stockholder's suit may continue. *Memphis, etc. R. R. v. Grayson*, 88 Ala. 572 (1890). See also ch. XL, *supra*. A stockholder in a corporation which is acting practically for the profit of another corporation cannot, after he expressly assents to such an arrangement, object thereto. *Hart v. Mt. Pleasant, etc. Co.*, 97 Iowa, 353 (1896). A stockholder who has participated in a consolidation cannot object thereto as being irregular. *Bradford v. Frankfort, etc. R. R.*, 142 Ind. 383 (1895). Parties taking part in an extension of the road cannot object that the charter amendment authorizing it was unconstitutional. *Jones v. Concord, etc. R. R.*, 67 N. H. 119 (1891); s. c., 67 N. H. 234. See also, in general, *Steger v. Davis*, 8 Tex. Civ. App. 23 (1894). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder and who signs the mortgage, cannot do so. *Perry v. Pearson*, 135 Ill. 218 (1890). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. *Arkansas, etc. Co. v. Farmers', etc. Co.*,

scribe for stock, the lease not being prohibited by statute nor evil in itself. The New York court of appeals said: "Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it, or be denominated merely an acquiescence or an election, or the assumption of a position inconsistent with an attack, makes no essential difference here."¹ A shareholder who knows of the payment of a dividend out of the capital stock *ultra vires* and receives and retains such dividend is estopped from maintaining an action to compel the directors to replace it. While the corporation itself is not estopped by the participation, knowledge or acquiescence of the shareholders, yet the latter may be.²

Moreover, a stockholder who holds stock which has been voted in favor of the act complained of cannot bring suit as the holder of that stock.³ A purchaser or pledgee of stock cannot complain

13 Colo. 587 (1889). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. *Farmers' L. & T. Co. v. San Diego, etc. Co.*, 45 Fed. Rep. 518 (1891). See also, in general, *Branch v. Jesup*, 106 U. S. 468, 476 (1882); *U. S. v. Union Pac. R. R.*, 98 U. S. 569, 612 (1878). If all of the directors and stockholders know of a sale of property by a director to the corporation and do not object, and use the property, the transaction cannot be set aside. *Battelle v. Northwestern, etc. Co.*, 37 Minn. 89 (1887). A bondholder who is a party to the reorganization plan, under which and as part of which the foreclosure sale is held, cannot object to the legality of the sale. *Crawshay v. Soutter*, 6 Wall. 739 (1867). Knowledge of stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue, unless inequitable, or rights of third persons have intervened. *Pacific R. R. v. Missouri Pac. R. R.*, 111 U. S. 505 (1884). A stockholder in an old and new company who aids in the latter's improvement of property purchased by it from the former, and is instrumen-

tal in bringing about the sale and purchase, is estopped from objecting to the validity of the sale. *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 116 Ill. 170 (1886). A person who sells property to a director to be paid for partly in the stock of a corporation cannot afterwards object that the director was disqualified from reselling the property to the corporation. *Mackey v. Burns*, 16 Col. App. 6 (1901), the court holding also that even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction, where he had himself moved that the stock be so issued.

¹ *Wormser v. Metropolitan Street Ry.*, 184 N. Y. 83 (1906).

² *Towers v. African, etc. Co., Ltd.*, [1904] 1 Ch. 558.

³ See § 40, *supra*, and § 735, *infra*; *Re Syracuse, etc. R. R.*, 91 N. Y. 1 (1883). *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (1903). Even though the vendors of property to a newly formed corporation receive an excessive price therefor in fully paid stock, yet if it is a closed transaction the

of mismanagement and loss of funds which all the stockholders corporation cannot thereafter hold them liable for the overvaluation, notwithstanding the corporation thereafter sells other stock to the public at par for cash without disclosing the transaction. *Old Dominion Copper, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908), the court saying: "At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land." The court said also that under the decisions a purchaser of stock from the vendors would have no claim excepting, of course, for actual fraud, and that the theory that the corporation is not bound until an independent board of directors passes upon the transaction has no basis in the decisions, and the court distinguished *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, aff'g 5 Ch. D. 73, on the ground that in the latter case the purchase was not completed until the stock had been taken by the public in ignorance of the facts. A railroad company has no legal power to subscribe for the stock of a land company nor become accommodation endorser of the latter's note, even though all the stockholders assent thereto, but a stockholder cannot complain, where the owner of his stock at the time of the act consented thereto, excepting that a mere authorization prior to his purchase of his stock will not sustain acts done after suit commenced by him, objecting to the same. *McCampbell v. Fountain, etc. R. R.*, 111 Tenn. 55 (1903). Where a mining company has sold all its property with the consent of the stockholders, a subsequent purchaser of the stock cannot complain. *Boldenweck v. Bullis*, 90 Pac. Rep. 634 (Col. 1907). Where a corporation has purchased all the assets of another corporation and issued stock in payment of the same, the stockholder in the former who became a stockholder after the transaction, cannot maintain a suit to have the issue declared void, especially where there is no offer to return the property. *Buford v. Keokuk, etc. Co.*, 69 Mo. 612 (1879), aff'g 3 Mo. App. 159. The purchaser of stock which was issued to directors cannot complain that the directors were guilty of fraud in the issue. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). In *Brown v. Duluth, etc. Ry.*, 53 Fed. Rep. 889 (1893), the court refused to interfere where the transferee of the stock took with notice. The court said: "The complainant, as their transferee, is in no better situation than they are. He has no greater rights than his transferrers as regards a remedy invalidating the transaction. The maxim *in pari delicto* applies, and a court of equity will not aid him. He cannot bring suit in behalf of other stockholders against the corporation or other parties participating in the issue, as his own title is tainted with the same fraud." A purchaser of stock which was voted in favor of a reorganization scheme cannot object to the scheme as being *ultra vires*, there being nothing illegal *per se* in it. *Hollins v. St. Paul, etc. R. R.*, 9 N. Y. Supp. 909 (1889). A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state—Pennsylvania. *Wood v. Corry, etc. Co.*, 44 Fed. Rep. 146 (1890). Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stock-

acquiesced in prior to his purchase or pledge.¹ Where the stock-

holders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. *Schilling, etc. Co. v. Schneider*, 110 Mo. 83 (1892). A stockholder who purchases his stock after the acts complained of took place cannot compel another stockholder to repay to the company dividends which he has received, due to contracts by which the company had sold coal to a railway company, for which railway company such latter stockholder was purchasing agent. *Clark v. American Coal Co.*, 86 Iowa, 436 (1892). As to whether this same principle—that stock which has participated in a fraudulent act cannot afterwards be the basis of a suit to set aside that fraud—should be applied to bonds, so far as enforcing the covenants of the mortgage is concerned, such covenants being waived by a former owner of the bonds which complainant now owns, see *Belden v. Burke*, 147 N. Y. 542 (1895). In regard to this case and the famous litigation in which it was but a part, see § 766, *infra*. In Alabama it is held that, if the stock passes into *bona fide* hands, the *bona fide* holder may object to the fraudulent or *ultra vires* act, even though the stock itself was tainted with the fraud by reason of being held by one of the guilty parties at the time of the act. *Parsons v. Joseph*, 92 Ala. 403 (1891). But the weight of authority holds that if the stock purchased is tainted with the fraud—that is to say, if the persons guilty of the act complained of owned that stock when they did the act—no action will lie by a *bona fide* transferee of that stock. *Ffooks v. Southwestern Ry.*, 1 Sm. & G. 142 (1853). A transferee of stock that was voted in favor of the act cannot complain. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). Where a private corporation, with the consent of all its stockholders of record, agrees with its

creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife, and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. *Marbury v. Stone*, 17 N. Y. App. Div. 352 (1897); *aff'd*, 160 N. Y. 701. A purchaser of stock from a director may join in bringing suit against the directors for negligence to the injury of all the stockholders, even though the director knew of such negligence when he sold the stock. *Warren v. Robinson*, 25 Utah, 205 (1902). Where a corporation has sold all its property with the consent of all its stockholders the transaction cannot subsequently be attacked by a subsequent purchaser of stock. *City of Spokane v. Amsterdamsch, etc.*, 22 Wash. 172 (1900). A purchaser of stock which has assented to the corporation purchasing its own stock cannot complain. *Hodge v. United States Steel Corp.*, 53 Atl. Rep. 601 (N. J. 1902); *rev'd* on another point in 64 N. J. Eq. 807 (1903). Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute, the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. *Boston, etc. R. R. v. Graham*, 179 Mass. 62 (1901).

¹ *Erny v. Schmidt Co.*, 197 Pa. St. 475 (1901).

holder, with full knowledge, has accepted the benefit of an act, he cannot complain thereafter.¹

The defense of an implied ratification is more difficult to establish. An implied ratification is generally spoken of as laches. It is the subject of the remainder of this chapter.²

§ 731. *Stockholder chargeable with laches only after he has a full knowledge of the facts.*—Laches is a defense only when the stockholder, with a full knowledge of the facts, has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense.³ Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence.⁴ For instance, an American

¹ London Assur. Co.'s Case, 5 De G., M. & G. 465, 481 (1854). See also *Weed v. Little Falls, etc. Co.*, 31 Minn. 154 (1883). A party who has invested \$15,000 in obtaining a bridge franchise and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former \$15,000 out of \$80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue \$95,000 in bonds, \$80,000 in preferred stock, and \$60,000 in common stock for building the bridge at a cost of \$71,000; but if the former takes his \$15,000 preferred stock and keeps it for six years, he cannot then complain. *Jutte v. Hutchinson*, 189 Pa. St. 218 (1899). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue of stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders, who under protest subscribe for the new stock and then wait eighteen months before commencing

legal proceedings, are estopped from objecting. *Post v. Beacon, etc. Co.*, 84 Fed. Rep. 371 (1898). See also § 732, *infra*.

² See *First Nat. Bank v. Drake*, 29 Kan. 31 (1833), for a definition of ratification.

³ See the leading case of *Cumberland Coal Co. v. Sherman*, 30 Barb. 553 (1859), quoting from *Lewin on Trusts*; and the equally important case of *Hoffman, etc. Co. v. Cumberland, etc. Co.*, 16 Md. 456 (1860).

⁴ *Gilman, etc. R. R. v. Kelly*, 77 Ill. 426 (1875). Where the president, who is also a director, of an investment company waives security for a loan and takes securities of small value in exchange therefor, causing the loss of the loan, he may be held personally liable at the instance of a stockholder, and if the doubtful securities cannot be returned their value may be ascertained. The statute of limitations and laches do not commence to run until the stockholder has discovered the facts. *Brinckerhoff v. Roosevelt*, 143 Fed. Rep. 478 (1906). A delay of four years may be excused by the fact that the complainant did not know the facts until three months before he instituted suit. *Kessler v. Ensley Co.*, 129 Fed. Rep. 397 (1904). Where the stockholder relied on the officers and they deliberately kept her

stockholder in an English corporation is not estopped from complaining of an unfair, illegal scheme of reorganization, merely because he did not oppose it before it was sanctioned by the English courts in accordance with the English statute, where it is shown that he did not know anything about it.¹ Where, however, the facts would be well known to any intelligent man, and the means of knowledge are open to the stockholder, he is chargeable with knowledge from the date when he should have ascertained the facts.² To avoid

in ignorance and refused to allow the trustees of her estate to examine the books, and they ascertained the facts only by a bill in equity, there is no laches. *Von Arnim v. American Tube-works*, 188 Mass. 515 (1905). Where a minority stockholder had no notice of meetings and no opportunity to examine the books he is not barred by laches from complaining of a misappropriation of money by the directors, provided he brings suit within a reasonable time after he learns the facts. Even though he is barred by laches as to one cause of complaint this is no bar as to other causes of complaint. *Joy v. Ft. Worth, etc. Co.*, 24 Tex. Civ. App. 94 (1900). The lapse of time without knowledge or means of knowledge is no bar. *Fox v. Robbins*, 62 S. W. Rep. 815 (Tex. 1901). Where there is not a full disclosure at a stockholders' meeting the members present are not bound by their assent. *Ives v. Smith*, 3 N. Y. Supp. 645 (1888).

¹ *Bank of China v. Morse*, 168 N. Y. 458 (1901).

² A delay of eight years is not excused by an allegation that the complaining stockholder was informed of the fact only a few weeks prior to the commencement of the suit, especially where the facts were sufficient to put him on inquiry. On the other hand, the statute of limitations does not apply. *Edwards v. Mercantile, etc. Co.*, 124 Fed. Rep. 381 (1903). Means of knowledge are equivalent to knowledge. *Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882). "Means of knowledge, plainly within reach of stockholders by the exercise of the

slightest diligence, is in legal effect equivalent to knowledge." *Jesup v. Illinois Cent. R. R.*, 43 Fed. Rep. 483 (1890). In a suit by a stockholder in a mining company to set aside an alleged fraudulent scheme by which the property was operated for the benefit of a railway company and finally abandoned, the delay of the plaintiff for five years after the slightest inquiry would have caused him to know of the facts is fatal. *Loomis v. Missouri, etc. Ry.*, 165 Mo. 469 (1901). Thirteen years' delay in attacking a consolidation as not being in compliance with statutory provisions is a bar. "Whatever is sufficient to excite attention, and put the party on his guard and call for inquiry, is notice of everything to which the inquiry would have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." It is immaterial whether the court declare the consolidation void or voidable. *Leavenworth County v. Chicago, etc. R. R.*, 18 Fed. Rep. 209 (1883). Quoted and approved in *Cole v. Birmingham, etc. Ry.*, 143 Ala. 427 (1905). *Taylor v. South, etc. R. R.*, 13 Fed. Rep. 152 (1882), the court saying: "The means of knowledge are the same thing in effect as knowledge itself. . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." See also *Kelly v. Newburyport, etc. R. R.*, 141 Mass. 496 (1886). In *Phosphate, etc. Co. v. Green*, L. R. 7 C. P. 43 (1871), it was

the defense of laches, the complainant must allege and prove what he did, and in what respects he was diligent. The mere allegation that he did not discover the facts sooner is insufficient.¹

Constructive notice, however, does not apply to a case of fraud, and constructive notice cannot relieve a party from responsibility for a fraud.² It is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books.³ Moreover, it is the well-established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay.⁴ Mere delay is not laches, but is strong evidence of acquiescence. Laches is based upon estoppel where new rights have arisen.⁵

held that to show assent and acquiescence it is not necessary to prove the acquiescence of each individual shareholder. It is enough to show circumstances which are reasonably calculated to satisfy the court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry.

1 *Cutter v. Iowa Water Co.*, 128 Fed. Rep. 505 (1904). Cf. § 733, *infra*; rev'd on another point in 140 Fed. Rep. 986.

2 *Converse v. Blumrich*, 14 Mich. 121 (1866); *Wilde v. Gibson*, 1 H. L. Cas. 623 (1848).

3 *Re Agriculturists', etc. Co.*, L. R. 1 Ch. App. 161, 511 (1866), where the court said: "It is no part of the duty of a shareholder to look into the management of the business. . . . It is enough to show that they might have become acquainted with the management of their affairs. It must be shown that they did so." *Ryan v. Leavenworth, etc. Ry.*, 21 Kan. 365 (1879). Also *Holmes v. Newcastle, etc. Co.*, L. R. 1 Ch. D. 682 (1875), holding that knowledge of a sale of property is not knowledge of an illegal dividend from the proceeds. See also *Spackman v. Evans*, L. R. 3 H. L. 171 (1868); *Houldsworth v. Evans*, L. R. 3 H. L. 263 (1868).

4 *Evans v. Smallcombe*, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court saying: "Lapse of time alone certainly would not make valid that which at the beginning was invalid. . . . Length of time may in many cases materially assist in establishing the presumption of acquiescence in an act which requires a confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one." *Ashhurst's Appeal*, 60 Pa. St. 290 (1869), where, however, the court says that "acquiescence is presumed from delay."

5 *Montgomery, etc. Co. v. Lahey*, 121 Ala. 131 (1899). A person who buys stock in a corporation for the purpose of attacking a consolidation of that corporation, which consolidation took place six months previous to his purchase, will be denied relief where the former record owner of the stock had notice of the meetings leading up to the consolidation and made no objection, ninety-five per cent. of the stockholders having voted for the consolidation and large transactions in the new stock and changes in the property having taken place in the meantime. *Beling v. American, etc. Co.*, 65 Atl. Rep. 725 (N. J. 1907).

A compromise or settlement, or receipt of the benefits of a fraudulent or *ultra vires* act, does not estop a stockholder from complaining, where he was not fully informed of the facts at the time of such compromise, settlement, or receipt of the benefits thereof.¹

§ 732. *Silent acquiescence while changes are taking place is laches and is a bar to a suit*—*What length of time constitutes laches herein*—*Statute of limitations*.—After a stockholder has knowledge of or is chargeable with knowledge of an *ultra vires*, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter.² As to what will constitute a reason-

¹ "A receipt of money as a part of the earnings of a corporation is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the money came from such business." *Central, etc. Bank v. Walker*, 66 N. Y. 424, 429 (1876). Where a corporation owns all of its bonds, excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet if that settlement was caused by misrepresentations as to the value of the securities, he is not bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be allowed to participate the same as the bondholder who did not turn in his bonds. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). Where a suit to set aside a forfeiture of stock by the corporation, on the ground of fraud, is compromised, the same stockholder cannot eight years thereafter file another suit to set aside the assessment on the ground of frauds un-

known to him when the first suit was compromised. *Marks v. Evans*, 62 Pac. Rep. 76 (Cal. 1900). See also § 730, *supra*.

² Quoted and approved in *Stoddard v. Decatur, etc. Co.*, 184 Ill. 53 (1900), and *McCampbell v. Fountain, etc. R. R.*, 111 Tenn. 55 (1903). Where the stockholders of a telephone company do not object to a sale of its property to another company it is presumed that they acquiesce. *Badger, etc. Co. v. Wolf River, etc. Co.*, 120 Wis. 169 (1904). Where stock is sold by the corporation for non-payment of an assessment, levied at a meeting of the board of directors, where a quorum is not present, the sale may be set aside, unless the stockholders have acquiesced in the sale and the stock has passed into *bona fide* hands. *Hatch v. Lucky Bill Min. Co.*, 25 Utah, 405 (1903). Where the funds of a mining corporation are exhausted, and the stockholders refuse to advance money to continue work on a leasehold and it is forfeited and thereafter the president becomes interested in a new leasehold of the same mine, and it develops into a valuable mine, one of the stockholders who refused to advance further funds cannot complain. *Hall v. Nash*, 33 Colo. 500 (1905). Even though an officer sells corporate property without authority, yet if the stockholder does not object until the price advances, he cannot hold the officer liable. *Tevis v. Hammersmith*, 81 N. E. Rep. 614 (Ind. 1907). In *Twin Lick Oil Co. v. Marbury*, 91 U. S.

able time depends on the circumstances of the case. The length of time during which a stockholder may delay in bringing his suit varies with each case, according to the circumstances of that case. The court requires that reasonable promptness be exercised so that large investments of new money or changes in the ownership of the stock or property may not be prevented or jeopardized by an unreasonable delay on the part of a stockholder in objecting to the transaction. Many illustrations of this principle of law are given in the notes below.¹

587 (1875), Mr. Justice Miller gives a clear statement of the law, herein. *Taylor v. South, etc. Ry.*, 13 Fed. Rep. 152 (1882); *Fredericks v. Pennsylvania Canal Co.*, 109 Pa. St. 50 (1885); *Nashua, etc. R. R. v. Boston, etc. R. R.*, 27 Fed. Rep. 821, 826 (1886).

1 Where the trustee sells trust property to himself personally, and the *cestuis que trust* are cognizant thereof and do not object for several years, they cannot set the transaction aside. *Hoyt v. Latham*, 143 U. S. 553 (1892). See also *Foster v. Mansfield, etc. R. R.*, 146 U. S. 88 (1892). A stockholder, who delays nearly four years before complaining of a consolidation, which he alleges was *ultra vires*, will not be granted any relief. *Dimpfel v. Ohio & M. Ry.*, 110 U. S. 209 (1884), aff'g 9 Biss. 127. In the case of *St. Louis, etc. R. R. v. Terre Haute, etc. R. R.*, 145 U. S. 393 (1892), where a suit by the lessor of a railroad to set aside an illegal lease failed, the court said: "And so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by laches." A creditor who for six months does not object to a transfer of all the property of his insolvent debtor to a corporation to carry on the business for the benefit of all the creditors, cannot set the transaction aside, all other creditors having assented thereto. *Imperial, etc. Co. v. Longbottom*, 143 Fed. Rep. 483 (1906). A director or a corporation in which a director is interested may purchase corporate property from trustees to

whom an embarrassed corporation has conveyed the same to pay its debts, and return the remainder to such latter corporation, and especially is a stockholder estopped from complaining after four years' delay, with knowledge of the facts, large improvements having been made and the value of the property having greatly increased. *Kessler & Co. v. Ensley Co.*, 141 Fed. Rep. 130 (1905); aff'd, 148 Fed. Rep. 1019. Eight weeks' delay, with full knowledge, in objecting to a consolidation of one tobacco company with another is a bar to a suit in equity to set it aside. *Dana v. American, etc. Co.*, 65 Atl. Rep. 730 (N. J. 1907). A stockholder in a street railway cannot object that it has sold all its property to another company for stock in the latter where ten years have elapsed and he has known all about it for two years and the property has passed into still other hands. *Cole v. Birmingham, etc. Co.*, 143 Ala. 427 (1905). A statute that dissenting stock shall be appraised is not applicable where no appraisal proceedings are had, and hence the owner may claim new stock in exchange therefor, even though considerable time has elapsed. *Douglass v. Concord, etc. R. R.*, 72 N. H. 26 (1903). Even though a bridge company, which has made a long-time contract with a railroad company, and which has the same officers and directors and majority stockholders as the railroad company, modifies the contract so as to reduce the income of the bridge company, yet if for nineteen years

There has been considerable doubt and difficulty in determining whether the statute of limitations will be applied by a court of

the minority stockholders of the bridge company acquiesce therein, such modification is legal. *Pittsburg, etc. Ry. v. Dodd*, 115 Ky. 176 (1903). A stockholder cannot object to a lease of the corporate property on the ground that the stockholders' meeting authorizing it was not properly called, where he takes no action for a year, and in the meantime the lessee invests large sums of money. *Hill v. Atlantic, etc. R. R.*, 143 N. C. 539 (1906). Where a stockholder waits more than two years before objecting to a consolidation of railroads, in the meantime millions of dollars having been invested, relief will be denied, especially where the company offers to pay the full value of the stock. *Spencer v. Seaboard, etc. Co.*, 137 N. C. 107 (1904). Fourteen years' delay by stockholders in complaining that a construction company had the same directors as the railroad company is fatal. *Rice v. Shealy*, 71 S. C. 161 (1905). Thirty days' delay is not a bar, even though the plaintiff waited for further developments and until something absolutely fraudulent was done in a scheme to freeze out minority stockholders. *Jacobus v. Diamond, etc. Co.*, 94 N. Y. App. Div. 366 (1904). A stockholder's suit to vacate a foreclosure decree seven years after it was entered and three years after a decision that he was entitled to make the application, the property in the meantime having passed into *bona fide* hands, is too late, his claim being that he was a stockholder in a company that was consolidated with another company and that the property of his corporation was sold on the foreclosure of a mortgage of the latter, which mortgage was executed prior to the consolidation. *Atlantic Trust Co. v. New York, etc. Co.*, 75 N. Y. App. Div. 354 (1902). Where for six years an issue of stock for

services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto, and the party receiving the stock used a large portion of it to interest other persons in the company, and even though the stock so issued to him was \$125,000, being one-half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the company. *Calivada, etc. Co. v. Hays*, 119 Fed. Rep. 202 (1902). Five years after a corporation has sold all its property to another corporation, and received the consideration, it cannot maintain a bill to set aside the sale as *ultra vires*, the rights of third parties having intervened in the meantime. *Bear Valley, etc. Co. v. Savings, etc. Co.*, 117 Fed. Rep. 941 (1902). A stockholder cannot, after ten years' delay, maintain a suit to cancel stock issued for patents, and to compel the holder of such stock to refund dividends thereon, the transaction having been spread on the records of the company and open to the stockholders. An allegation that the patents were of no value is insufficient, even though the constitution of the state (Missouri) required that stock be issued only for "money paid, labor done, or money or property actually received," there being no allegation that the patents were known to be valueless at the time. *Kimbell v. Chicago, etc. Co.*, 119 Fed. Rep. 102 (1902). Where a stockholder delays for a year in complaining of a sale of corporate property to two of the directors, and innocent third parties have acquired rights in the property in the meantime, the stockholder's remedy is barred by laches. *Snow v.*

equity to cases of this nature. It has been held in England that

Boston, etc. Co., 158 Mass. 325 (1893). See § 733, *infra*. Although a shoe company employs as selling agents a firm in which the president and general manager of the corporation is a member, yet where this has been done for nine years without objection, a stockholder cannot claim for the corporation the benefit of the firm's profits from such contract. *Warren v. Para, etc. Co.*, 166 Mass. 97 (1896). Where a person buys land for \$24,000, and afterwards becomes a director and then sells it to the corporation for \$80,000, a majority of the board being disinterested, the company cannot, nine years afterwards, claim that it should pay only the then market value of the land. *Higgins v. Larsingh*, 154 Ill. 301 (1895). Delay for two years on the part of one who claims he is entitled to come into a reorganization is fatal. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 119 N. Y. 15 (1890), the purchaser having denied any reorganization agreement during that time. A stockholder who objects, but waits from October 17 to March 7, and then at the annual meeting tries to have action taken, is not guilty of laches. *Byrne v. Schuyler, etc. Co.*, 65 Conn. 336 (1895). A stockholder who is also a director cannot complain of a diversion of funds by the manager arising from an unauthorized "swapping" of checks, and is barred of relief where he had known of its continuance for two years. *Streight v. Junk*, 59 Fed. Rep. 321 (1893).

Where for twenty-seven years no stockholder has complained of a lease of the property of the company to a lessee, although the lessee owned a majority of the stock of the lessor, it is too late to complain. *Wolf v. Pennsylvania R. R.*, 195 Pa. St. 91 (1900). A lease will not be set aside, even though a majority of the directors of the lessor are interested in the lessee, and even though after the lease was

made they became stockholders and directors of the lessee, it being shown that the lessor had a floating and bonded debt and had no funds, and had never paid a dividend, and that as a result of the lease the stock advanced fifty per cent. in value, and the complaint is not made until eighteen months after the lease was made. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and a delay of three or four years, during which others became creditors of the new corporation and the latter becomes insolvent, will bar his claim for an equitable lien on the assets. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). Where one of the partners in a firm organized to locate, develop, and operate mines does not turn in to the firm a mine located by him, but transfers the same to the corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money, and the stock may have passed into other hands, the court will refuse relief on the ground that the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. *Curtis v. Lakin*, 94 Fed. Rep. 251 (1899). Two years' delay on the part of a stockholder in complaining of a mortgage given by the corporation to raise money to pay a debt due to the president is fatal, even though the president had originally agreed to require payment only out of sales of property by the corporation. *Wills v. Porter*, 132 Cal. 516 (1901). The failure of a stockholder to discover for nearly six years a sale of corporate property to one of the di-

the statute will be applied to a corporate action to compel a directors is not laches. *Morgan v. King*, 27 Colo. 539 (1900). Where minority stockholders started a suit in the federal court to set aside a sale of the property of the company to another corporation, but did not bring in as a party defendant a railway company which was about to issue securities, in accordance with contracts with the two companies, and afterwards start a suit in the state court for the same relief, and bring in the railway company as party defendants, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). A stockholder is not guilty of laches in applying for an injunction against the ratification by the stockholders of an *ultra vires* sale of the corporate property by the board of directors, even though the sale was made by the directors on April 5th and the injunction was not applied for until June 4th, two days before the date of the meeting of the stockholders to ratify the sale. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). See *s. c.*, 22 Mont. 430 (1899). A delay of several years in attacking the issue of stock and a consolidation is fatal. *Drake v. New York, etc. Co.*, 26 App. Div. 499 (1898). Even though a company, organized to manufacture and sell soap, buys and sells soap, yet the stockholders who are guilty of laches cannot complain of the act as *ultra vires*. *Petrolia Mfg. Co. v. Jenkins*, 29 N. Y. App. Div. 403 (1898). Where for a long time an irrigation company acquiesces in a certain construction of an agreement to furnish water, and such construction is equitable, a stockholder cannot object, even though some of the directors are interested personally. *Foster v. Bear Valley Irr. Co.*, 65 Fed. Rep. 836 (1895). A stockholder who delays nine years before intervening in a foreclosure suit cannot then intervene after the sale is completed and the money ready for distribution. *Boston, etc. Trust Co. v. American Rapid Tel. Co.*, 67 Fed. Rep. 165 (1895). Where the directors of a failing linen-manufacturing corporation sell a part of the plant for stock of a knit-goods manufacturing corporation, a stockholder who does not complain for two years cannot hold the directors liable for his share of the property so exchanged for stock. *Pinkus v. Minneapolis Linen Mills*, 65 Minn. 40 (1896). Where the directors sell unissued stock at a discount to a party who resells part of it to a director other stockholders cannot, ten years afterwards, hold him liable. *Keeney v. Converse*, 99 Mich. 316 (1894). Four years' delay in bringing suit to compel a corporate officer to account for property purchased by him at an execution sale is fatal. *Horbach v. Marsh*, 37 Neb. 22 (1893). A stockholder who for two years knows that an illegal salary is being paid cannot afterwards object. *Brown v. De Young*, 167 Ill. 549 (1897). Even though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. *Stetson v. Northern Inv. Co.*, 104 Iowa, 393 (1898). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. *Cullen v. Coal Creek, etc. Co.*, 42 S. W. Rep. 693 (Tenn. 1897).

A reorganization agreement cannot be successfully attacked by stockholders two years after it was made, especially where the stockholders do not offer to pay the debt due nor the expenses of foreclosure, and where "the relief they ask under their bill, if granted, would not only be valueless

rector to pay over to the corporation money received by him as a to them and other stockholders, but would saddle the company with a vast debt of nearly \$25,000,000, wholly due, and bearing a high rate of interest." *Carey v. Houston, etc. Ry.*, 52 Fed. Rep. 671 (1892). Three years' time having elapsed before a stockholder ascertained a fraudulent sale of the company's stock by the directors to themselves, relief will be denied where that sale has been of great benefit to the remaining stock. *Squair v. Look-out Mountain Co.*, 42 Fed. Rep. 729 (1890). Thirteen years' delay by stockholders in complaining of a gift of town lots to the town by a committee of the stockholders upon the dissolution of the corporation is fatal. *Norton v. Kellogg*, 41 Fed. Rep. 452 (1890). A delay of twenty years in complaining that a lease taken by the company was due to the fact that a part of the directors were interested in the stock and bonds of the lessor company is fatal. *Jesup v. Illinois Cent. R. R.*, 43 Fed. Rep. 483 (1890). Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the five per cent. Four years' delay is no bar. *Sabre v. United, etc. Co.*, 156 Fed. Rep. 79 (1907).

viduals, especially as new stockholders are continually coming in. *St. Paul, etc. Ry. v. Sage*, 49 Fed. Rep. 315 (1892). Eleven and one-half years is no bar to a stockholder's suit to set aside illegal bonds and a mortgage, where no attempt was made to enforce the bonds. *Chicago v. Cameron*, 120 Ill. 447 (1887). Eleven years' delay is fatal to a complaint that another corporation has purchased a majority of the stock of the corporation in which the complainant stockholder holds stock. *Alexander v. Searcy*, 81 Ga. 536 (1889). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97 (1892). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorporation, the object of the consolidation being different from that of the original corporation, yet where the stockholder delays applying to the court for nearly a year, and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedy is barred. *Rabe v. Dunlap*, 51 N. J. Eq. 40 (1893). Where a fraudulent foreclosure was made on April 5th, and the fraud became known on June 5th, and suit was brought in September, the suit may be main-

Laches is a bar to a suit against a corporation the same as against indi-

bribe, and that the statute begins to run from the time when the tained, no one having been prejudiced by the delay. *Ex-Mission, etc. Co. v. Flash*, 97 Cal. 610 (1893). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. *Burgess v. St. Louis County R. R.*, 99 Mo. 496 (1890). Where a pledgee bank, having a right to sell at private sale and without notice, sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. *Raymond v. Palmer*, 41 La. Ann. 425 (1889). Laches is a bar. *Moore v. Silver, etc. Co.*, 104 N. C. 534 (1890). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. The stockholder then can only recover the value of his stock and past dividends. *Deposit Bank v. Barrett*, 13 S. W. Rep. 337 (Ky. 1890). Where a stockholder delays in bringing a suit for an unreasonable length of time for the purpose of ascertaining whether the act complained of will be profitable to him, his suit to set aside the act will fail. *Boyce v. Montauk, etc. Co.*, 37 W. Va. 73 (1892). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money; and the stockholders knew of the condition of things, but made no effort to prevent a sale; and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently be-

comes very valuable. *Osborne v. Monks*, 21 S. W. Rep. 101 (Ky. 1893). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. *Warren v. Bigelow Blue Stone Co.*, 74 Hun. 304 (1893). A hotel company having bought a competing hotel and paid for it in stock and held the property for two years, a stockholder cannot have the purchase set aside. *Steger v. Davis*, 8 Tex. Civ. App. 23 (1894). In *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894), it was held that where two corporations, having contract relations, are controlled by the same board of directors and a fraud is committed, the delay and acquiescence of a minority director did not prevent his suing to remedy the fraud. *Of.* 93 N. W. Rep. 1024. Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for ten years is fatal. *U. S. etc. Co. v. Reed*, 2 How. Pr. (N. S.) 253 (1885).

See also *Downes v. Ship*, L. R. 3 H. L. 343 (1868); *Ashhurst's Appeal*, 60 Pa. St. 290 (1869); *Zabriskie v. Hackensack, etc. R. R.*, 18 N. J. Eq. 173 (1867); *Nashua, etc. R. R. v. Boston, etc. R. R.*, 27 Fed. Rep. 821, 826 (1886); *London, etc. Assoc. v. Kelk*, L. R. 26 Ch. D. 107 (1884); *McLoughlin v. Detroit, etc. Ry.*, 8 Mich. 100 (1860); *Gray v. Chaplin*, 2 Russ. Ch. 126 (1826), where the stockholder had acquiesced forty-seven years in an *ultra vires* lease. In *Mills v. Central R. R.*, 41 N. J. Eq. 1, 9 (1886), it was very properly held that a delay of fifty-four days was no bar, and also that a failure to vote against the act was no bar. In *Gifford v. New Jersey R. R. & T. Co.*, 10 N. J. Eq. 171 (1854),

corporation discovers the facts.¹ In the United States the courts

a delay of twenty years was held to be a bar. In the following cases the court held delay to be a bar: *Peabody v. Flint*, 88 Mass. 52 (1863), the delay being three and a half years; *Gregory v. Patchett*, 33 Beav. 595 (1864), six years; *International, etc. R. R. v. Bremond*, 53 Tex. 96 (1880), two years; *Graham v. Birkenhead, etc. Co.*, 2 Macn. & G. 146 (1850), eighteen months; *Kitchen v. St. Louis, etc. Ry.*, 69 Mo. 224 (1878), five years; *Boston, etc. R. R. v. New York, etc. R. R.*, 13 R. I. 260 (1881); *Ashhurst's Appeal*, 60 Pa. St. 290 (1869), seven years; *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607 (1882), four years; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322 (1884); *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886); *Re Pinto Silver Min. Co.*, L. R. 8 Ch. D. 273 (1878); *Royal Bank v. Grand Junction R. R.*, 125 Mass. 490 (1878); *Re Magdalena, etc. Co.*, 6 Jur. (N. S.) 975 (1860), where a delay of two years was held a bar; *Brotherhood's Case*, 31 Beav. 365 (1862), twelve years; *Hervey v. Illinois, etc. Ry.*, 28 Fed. Rep. 169 (1884); *Thompson v. Lambert*, 44 Iowa, 239 (1876); *Vigers v. Pike*, 8 Cl. & F. 562, 650 (1840); *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859); *Allen v. Willson*, 28 Fed. Rep. 677 (1886). *Of. Boardman v. Lake Shore, etc. Ry.*, 84 N. Y. 157 (1881); *Badger v. Badger*, 2 Wall. 87 (1864); *Harwood v. Railroad Co.*, 17 Wall. 78 (1872); *Kochdale Canal Co. v. King*, 2 Sim. (N. S.) 78 (1851); §§ 161, 162, 198, *supra*. Seventeen years' delay bars the right of preferred stockholders to reach a fund which was to be given them as a com-

promise by first bondholders, a foreclosure by second bonds having subsequently followed. *Sullivan v. Portland, etc. R. R.*, 94 U. S. 806 (1877). Five years' delay in attacking a consolidation is too late. *Bell v. Pennsylvania, etc. R. R.*, 10 Atl. Rep. 741 (N. J. 1887). But a delay of eleven years and a half was held not fatal to a stockholder's action to set aside an *ultra vires* issue of bonds, where the railroad had been abandoned, the bonds never dealt in nor enforced, and the complainant had in view the removal of the lien, and intended to proceed and construct the road. *Chicago v. Cameron*, 120 Ill. 447 (1887). Four years' delay in suing to set aside an *ultra vires* assignment of property held fatal. *Descombes v. Wood*, 91 Mo. 196 (1887). Where a corporation is insolvent, and turns in its property at a fair price to a creditor whose debt is also secured by the guaranty of the president of the corporation, and the creditor at once sells the property to the president at an advanced price, a stockholder who delays suit for two years, during which time the property becomes valuable and the president, who purchased, dies, is barred from complaining. *Hancock v. Holbrook*, 40 La. Ann. 53 (1888). Laches bars the right of preferred stockholders to object to an *ultra vires* lease. *Emerson v. N. Y. etc. R. R.*, 14 R. I. 555 (1894), *aff'g* *Boston, etc. R. R. v. New York, etc. R. R.*, 13 R. I. 260 (1881). Three years' delay is fatal to a stockholder's suit to hold the president liable for illegal acts, where the former was also treasurer. *Dunphy v. Traveller Assoc.*,

¹ *Metropolitan Bank v. Heiron*, L. R. 5 Exch. D. 319 (1880). The statute of limitations is no bar to an action against a director for fraud, when notice of the fraud came only to the directors, part of whom were also implicated. *Re Fitzro- etc. Co.*, 50 L. T.

Rep. 144 (1884). The statute of limitations does not begin to run against a promoter who takes a secret profit until the facts are known to the stockholders. *Re Sale, etc. Co.*, 77 L. T. Rep. 681 (1897), reversed on another point in 78 L. T. Rep. 368 (1898).

often apply to a suit, brought to remedy the frauds, *ultra vires* acts, or negligence of directors, the regular statute of limitations.¹ It

146 Mass. 495 (1888). A lease of corporate property may be ratified by one hundred days' delay of the company in repudiating it, the lessee in the meantime expending money thereon. *Hoosac, etc. Co. v. Donat*, 10 Colo. 529 (1888). A lessor railroad cannot, nineteen years after the lease, sue in equity to set aside the lease as *ultra vires*. Laches is a bar. *St. Louis, etc. R. R. v. Terre Haute, etc. R. R.*, 33 Fed. Rep. 440 (1888); *aff'd*, 145 U. S. 393 (1892). Ten years' delay bars an action by a stockholder to set aside a fraudulent foreclosure of a mortgage given by the company. *Foster v. Mansfield, etc. R. R.*, 36 Fed. Rep. 627 (1888); *aff'd*, 146 U. S. 88 (1892). A lease of a water company's property to an ice company, with the privilege to the stockholders of the former to take stock in the latter, will not be set aside at the instance of stockholders who did not offer to take such stock until too late, and who delayed complaining until after the ice company proved a success. *Shaaber's Appeal*, 17 Atl. Rep. 209 (Pa. 1889). The time consumed by the guilty officers in legal proceedings to collect their gains is not included in the time which constitutes laches on the stockholders' part. *Davis v. Gemmell*, 70 Md. 356 (1889). See *Davis v. Gemmell*, 73 Md. 530.

¹ *Watts's Appeal*, 78 Pa. St. 370 (1875). See also *Taylor v. South, etc. R. R.*, 13 Fed. Rep. 152 (1882). As to California, see *Dannmeyer v. Coleman*, 11 Fed. Rep. 97 (1882), holding that under the statute in California the three-years' limitation to actions based on fraud after discovery thereof applies to directors' frauds herein. But see *Philippi v. Philippe*, 115 U. S. 151 (1885); *Twin Lick, etc. Co. v. Marbury*, 91 U. S. 587 (1875); *Moyle v. Landers*, 21 Pac. Rep. 1133 (Cal. 1889); s. c., 83 Cal. 579 (1890). See,

in general, *Coit v. Campbell*, 82 N. Y. 509, 514 (1880); *Farnam v. Brooks*, 26 Mass. 212, 242 (1830); *Godden v. Kimmell*, 99 U. S. 201, 210 (1879); *Preston v. Preston*, 95 U. S. 200 (1877); *Badger v. Badger*, 2 Wall. 87. (1864); *Meador v. Norton*, 11 Wall. 442 (1870); *Bowman v. Wathen*, 1 How. 189 (1843); *Beckford v. Wade*, 17 Ves. Jr. 87 (1805). The statute of limitations is a bar to an action against directors for negligence in allowing overdrafts and illegal loans. *Williams v. Halliard*, 38 N. J. Eq. 373, 383 (1884). An action against a third person to recover money paid by the corporation to him for stock must be brought within six years or it is barred by the statute of limitations. *Pierson v. McCurdy*, 33 Hun. 520 (1884); *aff'd*, 100 N. Y. 608. But in *Pierson v. Morgan*, 20 Abb. N. Cas. 428 (N. Y. 1887), and *Brinckerhoff v. Bostwick*, 99 N. Y. 185 (1885), the ten-year statute was applied to fraud. In a suit brought by the attorney-general under the statutes of New York to hold directors liable for waste or neglect, several directors cannot be joined where the cause of action against one is not the same cause of action as against another. Each director is liable only for his own acts or omissions, unless he had knowledge from which he might reasonably have prevented a loss. An allegation in the alternative that a director participated in an act or was negligent in not ascertaining it will not save such complaint. Moreover the remedy against some of the directors may be in equity while as against others it may be at law. If there is a concurrent remedy at law and in equity the statute of limitations will be applied by a court of equity. *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908). The statute of limitations may constitute a bar to an action by the corporation

is established law that where equity and law have concurrent jurisdiction of a case, equity will apply the statute of limitations.¹

against its secretary for funds appropriated by him. *Landis v. Saxton*, 105 Mo. 486 (1891). A bondholder who did not participate in a reorganization cannot complain thereof on the ground of fraud where the statute of limitations relative to fraud is a bar. *Griffith v. Seattle, etc. Ry.*, 36 Wash. 627 (1905). Where promoters buy property with a view to organizing a corporation to take it over, and it is taken over with a purchase-money mortgage nearly equal to the price paid, together with a large bonus of stock, yet even though they are the only stockholders, if thereafter the balance of the capital stock was sold to outsiders to whom misrepresentations were made as to the cost of the land, the promoters are liable to the corporation for their profits. The suit must be at law and is barred by the six-years' statute of limitations. *Pietsch v. Milbrath*, 123 Wis. 647 (1904). The six-years' statute of limitations runs against an action to hold a director liable for investing corporate funds in the stock of another company. *Re Lands Allotment Co.*, [1894] 1 Ch. 616. An action by a receiver to recover money from directors is barred in six years, but a similar action by a stockholder, being in equity alone, is barred in ten years, in New York. *Mason v. Henry*, 83 Hun, 546 (1895); *aff'd*, 152 N. Y. 529. The

statute of limitations does not run as against the president's misappropriation of funds, where the delay was due to his misrepresentations. *Coxe v. Huntsville Gas Light Co.*, 106 Ala. 373 (1895). The statute of limitations at law applies, since it is a legal right that is being enforced in equity. As to negligence the time is within six years from the negligent act, in Tennessee. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six-years' statute of limitations is a bar to a stockholders' suit to hold them liable, no fraud being alleged. *Whitwam v. Watkin*, 78 L. T. Rep. 188 (1898). Directors guilty of malfeasance are held liable as trustees on the insolvency of the company, but the statute of limitations may be a bar. *Boyd v. Mutual Fire Assoc.*, 116 Wis. 155 (1903). The statute of limitations is the only bar to a stockholders' suit to compel an officer to return funds which he has misappropriated. *Montgomery, etc. Co. v. Lahey*, 121 Ala. 131 (1899). A suit by a promoter to compel the delivery of stock to him on the ground that without his consent and knowledge an incorporation made in accordance with his contract had been abandoned and a new one adopted from which he had been

¹ *Baker v. Cummings*, 169 U. S. 189 (1898). A stockholder's suit to hold a majority stockholder liable for converting the corporate property to himself is barred, if the statute of limitations is a bar against the corporation itself bringing such suit. *Bates v. Boyce's Estate*, 135 Mich. 540 (1904). The statute of limitations may apply to a suit in equity for fraud, and will begin to run when the fraud is discovered. *Figge v. Bergenthal*, 130

Wis. 594 (1906). Even in equity the six-years' statute of limitation will be applied in a suit against directors for purchasing corporate property. *Barry v. Moeller*, 68 N. J. Eq. 483 (1904). Where there are concurrent remedies at law and in equity against directors, the statute of limitations at law is applied in equity. *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).

Where there are a series of transactions between the president and the company, the statute of limitations does not begin to run until his official connection ceases.¹ Laches is no bar where the illegal acts continue up to the date of the suit.² If the running of the statute has been stopped as to one complaining stockholder it is stopped as to all.³ In general a court of equity will apply the statute or will not apply it, as may seem most just, and will even shorten the time.⁴

The statute of limitations may not be a bar to a receiver's action excluded is a suit for breach of trust and not for fraud, and hence the statute of limitations applicable to the latter is not a bar. *Farris v. Wirt*, 16 Col. App. 1 (1901). A stockholders' suit to hold a director liable for purchasing property of the corporation is a suit for breach of trust and not for a fraud separate from such breach, and hence a statute of limitations applicable to the former is the one applicable to such a case. *Morgan v. King*, 27 Colo. 539 (1900).

1 *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa. 1898). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. *National Bank, etc. v. Wade*, 84 Fed. Rep. 10 (1897).

2 *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904).

3 *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 194 (1885); *Cox v. Stokes*, 156 N. Y. 491 (1898). See also *Richmond v. Irons*, 121 U. S. 27 (1887). But see *Ashley's Case*, L. R. 9 Eq. Cas. 263 (1870); also § 163, *supra*.

4 *Sullivan v. Portland, etc. R. R.*, 94 U. S. 806, 811 (1876). See also many cases in previous notes in this section and *Ernest v. Croysdill*, 2 De G., F. & J. 175 (1860); *Re Exchange Banking Co.*, L. R. 21 Ch. D. 519 (1882). A part owner in a mining claim placed in the

hands of a trustee for development, cannot, if he has abandoned it, claim an interest therein eight years thereafter, even though the statute of limitations is ten years. *Patterson v. Hewitt*, 195 U. S. 309 (1904). Where the directors of a national bank know that excessive loans are being made to its president and others and they take no steps to reduce the loans or prevent their increase, and the bank becomes insolvent, they are liable for losses thereby incurred, and such liability may be enforced by a suit in equity, even though a suit at law will be barred by the statute of limitations. The fact that such a director could not attend to his duties by reason of ill health is no excuse. *Rankin v. Cooper*, 149 Fed. Rep. 1010 (1906). A delay of eight years is not excused by an allegation that the complaining stockholder was informed of the fact only a few weeks prior to the commencement of the suit, especially where the facts were sufficient to put him on inquiry. On the other hand, the statute of limitations does not apply. *Edwards v. Mercantile, etc. Co.*, 124 Fed. Rep. 381 (1903). A dividend paid out of capital may be recovered back by a receiver at any time within six years after such payment if the stockholders did not know that the dividend was paid out of capital, but a court of equity will not apply the statute of limitations as regards officers and directors receiving such dividend. *Mills v. Hendershot*, 70 N. J. Eq. 258 (1905).

to recover back from directors a salary which was paid in breach of trust.¹

§ 733. *Miscellaneous applications of the doctrine of laches herein.*—The ratification of an act which the stockholder might have complained of does not authorize or ratify in advance a repetition of that act.² A stockholder's right to object to a director's act can be exercised by him alone.³ A stockholder who has been guilty of laches cannot base his suit on the objections of other stockholders who were not guilty of laches.⁴ The question of whether the majority may bind the minority on this subject of ratification is considered elsewhere.⁵

The fact that an officer of the company took part in a swindling scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme.⁶ But the acquiescence of a stockholder bars an action by any transferee of that stock.⁷ A stockholder who became such after the charter had been amended, authorizing a consolidation, cannot complain.⁸

If neither the defendants nor others have been induced by the delay to act upon the matters which are complained of, laches may not be a bar to the stockholder's action.⁹ There is a difference of opinion as to whether it is necessary to allege that the stockholders have been free from acquiescence or laches.¹⁰ The question of laches

¹ *Ellis v. Ward*, 137 Ill. 509 (1890), holding that the statute of limitations is no bar, and that a court of equity is governed by the rules of laches instead. Directors are not technically trustees, and hence the statute of limitations relative to trustees is not applicable to a suit by a receiver against them for misfeasance. *Boyd v. Mutual Fire Assoc.*, 116 Wis. 155 (1903). Directors may set up the statute of limitations as against a receiver suing them for negligence. *Emerson v. Gaither*, 103 Md. 564 (1906). Where for ten years a receiver does not bring suit against the directors for negligence, the suit is barred by laches. *Ex parte Baker*, 67 S. C. 74 (1903).

² *Irvine v. Union Bank of Australia*, L. R. 2 App. 366 (1877); *Bloxham v. Metropolitan Ry.*, L. R. 3 Ch. 337, 354 (1868).

³ *Taylor v. Chichester, etc. R. R.*, L. R. 2 Exch. 356, 378 (1867).

⁴ *Beling v. American, etc. Co.*, 65 Atl. Rep. 725 (N. J. 1907).

⁵ See § 730, *supra*, and §§ 669, 683, *supra*.

⁶ *Farrow v. Holland Trust Co.*, 74 Hun, 585 (1893). See also §§ 649–651, 656, *supra*.

⁷ See §§ 40, 730, *supra*, and § 735, *infra*.

⁸ *Colgate v. United States, etc. Co.*, 67 Atl. Rep. 657 (N. J. 1907).

⁹ *Whitman v. Bowden*, 27 S. C. 53 (1887).

¹⁰ *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196 (1889), holds that it is not. *Cf. Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882). The plaintiff must allege that the officers have committed a breach of trust, and though requested the corporation refuses to act or is controlled by the wrongdoers, and that he has been diligent in prosecuting his remedy. *Von Arnim v. American Tubeworks*, 188 Mass. 515

should be raised by answer and not by demurrer.¹ In New Jersey it has been held that a stockholder must allege that neither he nor any prior owner of his stock has acquiesced in the acts complained of, where the amount of the stock owned by him is very small, comparatively.²

Delay due to the fact that a bill had previously been filed and dismissed on technical grounds is not laches.³ And a suit by one signer of a reorganization agreement, to enforce it, prevents laches being charged against other signers who do not commence suit until a long time subsequently.⁴ Where all the other stockholders consent to the company buying property owned by one of the directors, a stockholder who was present and does not object cannot complain.⁵ The assent of a few minor stockholders whose stock was given to them may be presumed, in case they have not objected to an agreement whereby some of the stockholders sell their stock to the others

(1905). To avoid the defense of laches, the complainant must allege and prove what he did, and in what respects he was diligent. The mere allegation that he did not discover the facts sooner is insufficient. *Cutter v. Iowa Water Co.*, 128 Fed. Rep. 505 (1904); rev'd on another point in 140 Fed. Rep. 986.

1 A demurrer is not the proper way to raise the question of laches. *Zebble v. Farmers' L. & T. Co.*, 139 N. Y. 461 (1893); *Sage v. Culver*, 147 N. Y. 241 (1895). Cf. *Crumlish v. Shenandoah Valley R. R.*, 28 W. Va. 623 (1886). The complainant need not allege that he did not take part in the transaction, but the question of laches may be raised by demurrer. *George v. Central R. R. etc. Co.*, 101 Ala. 607 (1894). The bill for relief from fraud perpetrated a long time prior thereto must explain in detail the reason of the delay. Laches may be raised by demurrer. *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898). The question of laches may be raised by demurrer where the complaint sets forth the facts which involve laches. *Mott v. N. Y. etc. Co.*, 29 N. Y. Misc. Rep. 39 (1899).

2 *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901).

3 *Miner v. Belle Isle Ice Co.*, 93 Mich. 97 (1892). See 96 Pac. Rep. 528.

4 *Cox v. Stokes*, 156 N. Y. 491 (1898).

5 *Steinway v. Steinway*, 2 N. Y. App. Div. 301 (1896); aff'd, 157 N. Y. 710, and in 163 N. Y. 183. A stockholder who takes part in and assents to the action of a stockholders' meeting which authorizes a sale of the property to another corporation in exchange for stock of the latter to be issued to stockholders of the former cannot afterwards object thereto and demand cash, even though his assent was only by refraining from voting against the proposition. *Carr v. Rochester, etc. Co.*, 207 Pa. St. 392 (1904). A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata*. The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of \$25 worth of stock cannot enjoin a sale by those owning ninety-three per cent. of the entire capital stock. Such a sale is valid, although there were directors in common. *Pitcher v. Lone, etc. Co.*, 39 Wash. 608 (1905).

and take their pay from the corporation itself and resign their offices and substitute new parties as directors.¹ The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.² A stockholder who does not attend a meeting is not bound to know that it ratified an illegal sale of property to a director.³ Ratification does not arise from the mere fact that the directors' minutes were ratified at a stockholders' meeting.⁴

If it is evident that the stockholder waited to see whether the unauthorized act would be profitable to the corporation, the court will refuse to grant him any relief.⁵ So also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed, or money expended, or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred.⁶ Thus where a stockholder delays four months after full

¹ *Raymond v. Colton*, 104 Fed. Rep. 219 (1900).

² *McFadden v. Leeka*, 48 Ohio St. 513 (1891). A stockholder is not bound to attend a meeting and vote against an illegal merger. *Douglass v. Concord, etc. R. R.*, 72 N. H. 26 (1903). Failure to attend a corporate meeting is not a waiver of objections thereto. *Matter of Empire State, etc.*, 53 N. Y. Misc. Rep. 344 (1907). A stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who thereby acquired control of the company. *Morris v. Stevens*, 173 Pa. St. 563 (1897). Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon between them, it is legal that the consideration be a right extended by the new company to the old stockholders to demand partly paid up stock of the new company within a limited time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such a case to attend the meeting

and vote against it if he objects. It is no excuse that he was ill or abroad or negligent in dissenting, under the English statute. *Burdett-Coutts v. True Blood, etc. Ltd.*, [1899] 2 Ch. 616.

³ *Kessler & Co. v. Ensley Co.*, 129 Fed. Rep. 397 (1904).

⁴ *Ives v. Smith*, 8 N. Y. Supp. 46 (1889). See also § 730, *supra*.

⁵ *Story, Eq. Jur.*, § 1539a; *Kitchen v. St. Louis, etc. Ry.*, 69 Mo. 224 (1878); *Gregory v. Patchett*, 33 Beav. 595 (1864); *Atchison, etc. R. R. v. Fletcher*, 35 Kan. 236, 250 (1886); *Banks v. Judah*, 8 Conn. 145 (1830); *Watts's Appeal*, 78 Pa. St. 370 (1875); *Sheldon, etc. Co. v. Eickemeyer, etc. Co.*, 90 N. Y. 607 (1882); *Boyce v. Montauk, etc. Co.*, 37 W. Va. 73 (1892). Quoted and approved in *Steger v. Davis*, 8 Tex. Civ. App. 23 (1894).

⁶ See § 732, *supra*; also *Houldsworth v. Evans*, L. R. 3 H. L. 263, 276 (1868). Delay of eight months held fatal. *Great Western Ry. v. Oxford, etc. Ry.*, 3 De G., M. & G. 341 (1853). See also *Boston, etc. R. R. v. New York, etc. R. R.*, 13 R. I. 260 (1881); *Aurora, etc. Soc. v. Paddock*, 80 Ill. 263 (1875); *Stewart v. Erie, etc. Transp.*

knowledge before objecting to a consolidation, and in the meantime the new securities are daily changing hands in the open market, and the business is being consolidated in such a way as to render a separation increasingly difficult, he is guilty of laches, and cannot complain.¹ But delay after the damage is done, and while the complaining stockholder served as a director in the hope of bettering things, is not a bar.² A defendant in a foreclosure suit cannot object to a sale on the ground that it did not comply with the federal statute, where he took no appeal and made no objection until after the sale had been confirmed.³ Under the New York statutes a suit by a bank against its president for loaning money on worthless securities survives his death.⁴

An *ultra vires* or fraudulent act cannot be ratified by the majority so as to bind the minority;⁵ neither can it be ratified by the board of directors.⁶ The proper rule is that such a transaction should be approved by a majority in interest of the stockholders, at a meeting called for that purpose, and that even then a court of equity has

Co., 17 Minn. 372 (1871); *Goodin v. Evans*, 18 Ohio St. 150 (1868). In *Covington, etc. R. R. v. Bowler*, 9 Bush (Ky.), 468 (1872), however, the court held that a delay of six years was not a bar to the stockholder's remedy; and the court said that "merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money or to alter their condition, and thereby render it unconscientious for him to enforce his rights." But see *Pacific R. R. of Mo. v. Missouri Pac. Ry.*, 111 U. S. 505 (1884), reversing 12 Fed. Rep. 641, holding that delay pending appeal is not fatal. See also §§ 161, 162, *supra*. A stockholder who lies by and allows his corporation, which is not a success, to be merged with other property into a new company, payment being made in stock of the latter company, and the enterprise proves a success, cannot cause to be set aside an assessment to pay a debt incurred for expenses in bringing about such results. *Taylor v. North Star, etc. Co.*, 79 Cal. 285 (1889).

¹ *Dana v. American Tobacco Co.*, 69

Atl. Rep. 223 (N. J. 1908), *aff'g* 65 Atl. Rep. 730.

² *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895).

³ *National, etc. Co. v. Nevada, etc. Syndicate*, 112 Fed. Rep. 44 (1901).

⁴ *Seventeenth, etc. Bank v. Webster*, 67 N. Y. App. Div. 228 (1901). A cause of action against a director of a national bank for misconduct survives his death. *Allen v. Luke*, 141 Fed. Rep. 694 (1906).

⁵ See § 730, *supra*, and § 740, *infra*. *Bassett v. Fairchild*, 132 Cal. 637 (1901).

⁶ See § 730, *supra*. Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is no bar to such suit for the balance. A release by the board of directors is no defense. *Gilbert v. Finch*, 72 N. Y. App. Div. 38 (1902); *aff'd*, 173 N. Y. 455. See also §§ 649, 652, 662, *supra*.

power to set the transaction aside, at the instance of a dissenting stockholder, if it is unfair, and if he is prompt in his application to the court. A court, however, may authorize its receiver to compromise such claims.¹

Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him.²

Where a stockholder in a foreign corporation appeals in a suit to enjoin it from selling its assets, his remedy to preserve the *statu quo* on appeal is not *mandamus*, but an injunction from the supreme court.³

1 See § 701, *supra*. The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders, where such contract is a fair one, even though some of the stockholders dis-

sent. *People v. Anglo-American, etc. Assoc.*, 66 N. Y. App. Div. 9 (1901); s. c., 169 N. Y. 606.

2 *Manhattan Hardware Co. v. Ro-* land, 128 Pa. St. 119 (1889).

3 *Hitchcock v. Rohnert*, 144 Mich. 362 (1906).

CHAPTER XLV.

PARTIES, PLEADINGS, ETC., IN SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION—SUITS BY OR AGAINST THE CORPORATION IN GENERAL.

A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.

- § 734. Jurisdiction of the court—Jurisdiction of the federal courts in such cases—Jurisdiction over foreign corporations—When is the remedy in equity and when at law?—The complainant in equity must sue in behalf of himself and all other stockholders—The results of the suit belong to the corporation.
735. Parties plaintiff—Who may bring the suit—Unregistered transferees — Trustees — Pledgees — Stock that has voted in favor of the act—Small stockholders — Corporate creditors — Receiver.
736. Rule when the plaintiff stockholder sues in the interest of a rival company, or purchases stock for the purpose of bringing suit.
737. Ninety-fourth rule in federal courts against suits by transferees.
738. Parties defendant herein—The corporation — Directors — Third persons—The receiver.
739. Complainant's bill must not improperly join two or more causes of action herein.
740. Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so—Ninety-fourth rule of the federal courts on this subject—Request to receiver.

- § 741. When such an allegation may be omitted.
742. Miscellaneous allegations of the complaint.
743. Prayer for relief.
744. Property received under the act objected to must be returned upon that act being set aside.
745. Injunction restraining the corporate officers and others from doing specific acts.
746. Appointment of a receiver — Injunction against corporate officers acting at all—Removal of directors by the court or corporation.
747. Miscellaneous remedies.
748. The complaining stockholder controls the conduct of the suit—Right of other stockholders to come into the suit—Compromise and discontinuance—Costs and disbursements—Similar suits elsewhere.
749. No contribution among the directors.

B. SUITS BY OR AGAINST THE CORPORATION IN GENERAL.

750. The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with by the courts—Intervention by stockholders.
751. Suits by and against the corporation—Must be in corporate name.
752. Service on a domestic corporation—Appearance—Answer—Proofs.

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| <p>§ 753. Allegation and proof of incorporation.</p> <p>754. Confession of judgment.</p> <p>755. Injunction and contempt.</p> <p>756. Contempt and sequestration.</p> <p>757. Foreign corporations may sue and be sued—Stockholders' suits against foreign corporations—Garnishment—Statute of limitations—Usury.</p> | <p>§ 758. Service in suits against a foreign corporation.</p> <p>759. Jurisdiction of the federal courts—"Dummy" corporations—Residence of corporations—Jurisdiction where service is on an officer temporarily in the state—Federal corporations.</p> |
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A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.

§ 734. *Jurisdiction of the court—Jurisdiction of the federal courts in such cases—Jurisdiction over foreign corporations—When is the remedy in equity and when at law?—The complainant in equity must sue in behalf of himself and all other stockholders—The results of the suit belong to the corporation.*—There has been some difficulty in determining whether the federal courts have jurisdiction of a stockholder's suit herein when the corporation and such directors as must be made parties are citizens of the same state, even though the complainant stockholder is a resident of another state. Inasmuch as the suit is for the benefit of the corporation, it has been claimed that the non-residence of the stockholder is insufficient to give jurisdiction. The federal courts have decided, however, that such jurisdiction exists, and it is in these courts that a large proportion of these suits are brought.¹ The supreme

¹ Dodge v. Woolsey, 18 How. 331 (1855); Barnes v. Kornegay, 62 Fed. Rep. 671 (1894); Greenwood v. Freight Co., 105 U. S. 13 (1881); Pond v. Vermont Valley R. R., 12 Blatchf. 280 (1874); s. c., 19 Fed. Cas. 976, the court holding also that the complainant might omit as party plaintiff a stockholder residing in the state of the corporation. See also Hatch v. Chicago, etc. R. R., 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799; Foote v. Linck, 5 McLean, 616 (1853); s. c., 9 Fed. Cas. 366; Bell v. Donohoe, 17 Fed. Rep. 710 (1883), holding that the court has no jurisdiction if the stockholder and one of the defendants, a third person who is alleged to have defrauded the corporation, are citizens of the same state. See also Burke v. Flood, 1 Fed. Rep. 541 (1880). A suit in the federal court by a non-resident stockholder is not collusive to the extent of affecting the jurisdiction of the federal court, even though resident stockholders contribute to the expense. Consumers', etc. Co. v. Quinby, 137 Fed. Rep. 882 (1905). A non-resident stockholder may bring suit in the federal court, and such suit is not deemed collusive, unless it is shown that there is an agreement between him and the company in reference thereto. Mills v. City of Chicago, 143 Fed. Rep. 430 (1906); aff'd, 204 U. S. 321. The act of congress that the federal court shall not have jurisdiction in a suit by an assignee of a chose in action where the assignor could not sue in the federal court, does not apply to a purchaser of a certificate of stock in a suit to restrain *ultra vires* acts. Consumers', etc. Co. v. Quinby, 137 Fed. Rep. 882 (1905). A non-resident stockholder in an Illinois gas corporation may maintain a bill in equity in the federal court to enjoin a city in

court holds that a New Jersey stockholder in a New York corporation may file a bill in equity in the United States court to set aside

Illinois from illegally reducing gas rates, the gas company being made also a party defendant, and the question of whether a request by the stockholder to the gas company to bring suit was collusive, will not be determined on demurrer. *Mills v. City of Chicago*, 127 Fed. Rep. 731 (1904). A non-resident stockholder may maintain a suit in the federal court, even though resident stockholders contribute towards the maintenance of the suit. *New Albany Waterworks v. Louisville, etc. Co.*, 122 Fed. Rep. 776 (1903). In a stockholder's suit in behalf of the corporation, the corporation is considered a party plaintiff on the question of federal jurisdiction. *Lucas v. Milliken*, 139 Fed. Rep. 816 (1905). A pledgee of the stock of a stockholder who lives in the same state as the corporation itself, cannot maintain a suit in the United States court against the corporation for a receiver and a distribution of the assets, the corporation being insolvent. *Gorman-Wright Co. v. Wright*, 134 Fed. Rep. 363 (1904). In a suit by a minority stockholder to hold a majority stockholder liable for bringing about a foreclosure of the corporate property and a purchase of the same, the corporation must be made a party defendant, and hence he cannot bring the suit in the federal court, if such minority stockholder and the corporation are citizens of the same state. *Redfield v. Baltimore, etc. R. R.*, 124 Fed. Rep. 929 (1903). A corporate creditor who does not question the jurisdiction of the federal court for sixteen months, during which time a receiver has sold the property and creditors' claims proved, cannot then question such jurisdiction on an issue of fact. *Briggs v. Traders' Co.*, 145 Fed. Rep. 254 (1906). In a stockholder's suit in the federal court to remove a fraudulent lien, the corporation will be considered as of the same state as

the complainant, unless Rule 94 has been complied with. *Gage v. Riverside T. Co.*, 156 Fed. Rep. 1002 (1906). Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the five per cent. Four years' delay is no bar. *Sabre v. United, etc. Co.*, 156 Fed. Rep. 79 (1907). Where a corporation issues several million dollars of bonds, secured by a mortgage that represents that it covers many thousand acres of land, although, in fact, the company owned but a few hundred acres of land, a purchaser of such bonds may maintain a bill in equity in behalf of himself and other bondholders to hold the directors liable for false representations, and the corporation itself is not a necessary party defendant, a request to the trustee of the mortgage having first been made to bring suit. A provision in the mortgage against individual bondholders maintaining a suit before offering indemnity to the trustee is no bar to such a suit, that provision being applicable to remedies under the mortgage only. The suit may be maintained in the United States circuit court in New York, even though the corporation was organized in Missouri, it appearing that the directors

a judgment obtained by a citizen of New York against the corporation fraudulently and collusively, and also to set aside a sale of prop-

reside in New York. *Slater T. Co. v. Randolph, etc. Co.* (U. S. C. C. 1908), N. Y. L. J. June 27, 1908. *Kuchler v. Greene*, — Fed. Rep. — (1908). In *Hawes v. Oakland*, 104 U.S. 450 (1881), the court vigorously denounced transfers of stock made for the purpose of giving the federal courts jurisdiction. The ninety-fourth rule (see 104 U.S. ix) was made in consequence thereof. Where "the parties on one side of the controversy are citizens of New Jersey, and those on the other side of the controversy are a New Jersey corporation and other citizens of New Jersey, as well as a Pennsylvania corporation and citizens of Pennsylvania and of Maryland, . . . all the parties on one side of this controversy not being citizens of different states from all those upon the other side, the citizenship of the parties did not bring the case within the jurisdiction of the circuit court." *New Jersey Cent. R. R. v. Mills*, 113 U. S. 249 (1885); *East Tennessee, etc. R. R. v. Grayson*, 119 U. S. 240 (1886). If the two parties in interest are both corporations of the same state, it seems that a stockholder cannot sue in the federal court by reason of his living in another state. *Quincy v. Steel*, 120 U. S. 241 (1887). See also *Huntington v. Palmer*, 104 U. S. 482 (1881). The federal court in New Jersey has no jurisdiction of a suit brought by stockholders in a Maine corporation against that corporation and a New Jersey corporation to set aside an illegal transfer of property from the Maine corporation to the New Jersey corporation, the property itself not being in New Jersey. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 455 (1900). Moreover, if the Maine corporation is not served and does not voluntarily appear, final relief cannot be granted and a preliminary injunction will be dissolved. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 457 (1900). In a stockholder's suit to set aside a sale by a Maine corporation of all its assets to a New Jersey corporation, the suit being in New Jersey, the Maine corporation is a necessary party defendant, and a court in Maine will not appoint a receiver of the same for the sole purpose of appearing in the suit in New Jersey. *Hutchinson v. American, etc. Co.*, 104 Fed. Rep. 182 (1900). In the case of *Stevens v. Missouri, etc. Ry.*, 106 Fed. Rep. 771 (1901), a New York stockholder brought suit in the circuit court of the United States in New York to set aside an alleged *ultra vires* and fraudulent consolidation of Kansas railroad companies. A minority stockholder of an alien corporation cannot file a bill in equity to have the company wound up and its assets distributed, even though he complains of the management, and even though the main purpose of the corporation is to acquire land in the state, it being shown that the corporation is solvent. *Sidway v. Missouri, etc. Co.*, 101 Fed. Rep. 481 (1900). The federal court in New Jersey has no jurisdiction of a suit brought by a Pennsylvania stockholder in a New Jersey corporation to enjoin the latter and its directors who are residents of still another state from issuing stock on an alleged illegal contract. *Lengel v. American, etc. Co.*, 110 Fed. Rep. 19 (1901). A Connecticut stockholder in a Maine corporation cannot bring suit in the federal court in Massachusetts for a receiver and other relief, even though the corporation has appointed an agent in Massachusetts to accept service. *Platt v. Massachusetts, etc. Co.*, 103 Fed. Rep. 705 (1900). The purchaser at foreclosure sale in the federal court may enjoin a subsequent suit in the state court by a stockholder to place the property in the hands of a receiver in disregard of the foreclosure decree. *James v.*

erty thereunder, where the corporation is controlled by the interests antagonistic to the complainant.¹ A stockholder in a railroad may maintain a suit in the United States court to have declared unconstitutional and void a statute which unreasonably reduces railroad rates to a point of confiscation. He may maintain such a suit, irrespective of citizenship, inasmuch as jurisdiction is based on taking property without due process of law and denying his company the equal protection of the law.² The defendant corporation cannot remove the case to the federal court where indispensable parties defendant are participants in the act complained of and are of the same state as the complainants.³ A suit, however, commenced by the

Central, etc. Co., 98 Fed. Rep. 489 (1899).

A suit pending in the United States court brought by the purchaser of municipal bonds from a railroad to compel the state treasurer to deliver them, the corporation being made a party defendant, does not prevent the state court issuing a *mandamus* at the instance of the municipality to have such bonds delivered up by the state treasurer for cancellation. *People v. State Treasurer*, 24 Mich. 468 (1872). In suits by one or more in behalf of others, others will not be allowed to come in as parties when to do so would oust the United States court of jurisdiction. *Stewart v. Dunham*, 115 U. S. 61 (1885); *Jackson, etc. Co. v. Burlington, etc. R. R.*, 29 Fed. Rep. 474 (1887). *Of. Thouron v. East, etc. Ry.*, 38 Fed. Rep. 673 (1889). As to jurisdiction, see also *Peninsular Iron Co. v. Stone*, 121 U. S. 631 (1887). The United States court, which decreed a foreclosure, has jurisdiction to set aside a foreclosure as fraudulent irrespective of citizenship in the latter case. *Pacific R. R. of Mo. v. Missouri Pac. Ry.*, 111 U. S. 505 (1884), rev'g 12 Fed. Rep. 641. See also §§ 827, 562, notes, as to the jurisdiction of the United States courts. The United States court has no jurisdiction of a stockholder's suit for a receiver unless the actual value of the stock owned by him exceeds \$2,000, and unless he was a stockholder when the acts com-

plained of occurred, and unless he has made an earnest effort to secure relief by the corporation itself. *Robinson v. W. Virginia L. Co.*, 90 Fed. Rep. 770 (1898). The federal court has no jurisdiction of a suit by a stockholder to enjoin a corporation from allowing certain stock to be voted on various grounds where there is no allegation that the complainant's holdings of stock are worth upwards of \$2,000. *Harvey v. Raleigh & G. R. R.*, 89 Fed. Rep. 115 (1898). In ascertaining the jurisdiction of the United States court in a suit relative to stock, it is presumed to be worth par. *Bernier v. Griscom-Spencer Co.*, 161 Fed. Rep. 438 (1908). As to whether a stockholder whose interest is less than \$2,000 may file a bill in the United States court for a receiver, see *Colston v. Southern, etc. Assoc.*, 99 Fed. Rep. 305 (1899), and *Hill v. Glasgow R. R.*, 41 Fed. Rep. 610 (1888). A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts, and to have a receiver appointed. *Leary v. Columbia River, etc. Co.*, 82 Fed. Rep. 775 (1897). See also § 757, *infra*.

1 *Doctor v. Harrington*, 196 U. S. 579 (1905).

2 *Ex parte Young*, 209 U. S. 123 (1908).

3 *Wilder v. Virginia, etc. Co.*, 46 Fed. Rep. 676 (1891).

stockholder against the corporation and against another party who has defrauded the corporation may be removed to the federal court, even though the stockholder and his corporation are citizens of the same state, it being shown that such corporation is desirous of having the complainant succeed in the suit.¹ A suit instituted by a New York stockholder in a Minnesota railroad corporation against that corporation and its president, also a citizen of Minnesota, to compel them to pay the corporation a profit which he made on property which he sold to the corporation may be removed to the United States court, the corporation not being aligned as a party complainant.² A suit by several stockholders against several of the directors to hold them liable for misappropriation of corporate funds cannot be removed to the federal court by one of the defendants on the ground that the controversy is separable.³ A suit may be brought in the

¹ *Hutton v. Joseph Bancroft, etc. Co.*, 77 Fed. Rep. 481 (1896). In a stockholder's suit against a foreign corporation holding a majority of the stock of a domestic corporation and fraudulently refusing to perform its contract with the latter, the latter is a necessary party, and the case cannot be removed to the federal courts. *Douglas v. Richmond, etc. R. R.*, 106 N. C. 65 (1890).

² *Venner v. Great Northern Ry.*, 209 U. S. 24 (1908).

³ *Fox v. Mackay*, 60 Fed. Rep. 4 (1894). A stockholder's suit cannot be removed to the federal court on the ground of local prejudice, where one of the defendants is a citizen of the same state as most of the complaining stockholders, and the controversy is not separable. *Gann v. Northeastern R. R.*, 57 Fed. Rep. 417 (1891). In a suit against two directors for damages for misconduct, one director has such a separable controversy as to enable him to remove the case to the federal court, so far as he is concerned, no conspiracy being charged. *Youtsey v. Hoffman*, 108 Fed. Rep. 693 (1901). A stockholder's suit against the corporation and its majority stockholders to hold the latter liable may be removed by the latter to the federal court, even though the complainant and the corporation

are citizens of the same state. *Lamm v. Parrot, etc. Co.*, 111 Fed. Rep. 241 (1901). In a suit in equity by a stockholder against the corporation and a stockholder who owns a majority of the stock, to enjoin an illegal disposition of the corporate property, the defendant stockholder cannot remove the case to the federal court on the ground of a separable controversy, the plaintiff and the corporation being citizens of the same state. *Hanover Nat. Bank v. Credits, etc. Co.*, 118 Fed. Rep. 110 (1902). Even though a resident stockholder in a foreign corporation in bringing suit against it for a receiver, under a statute authorizing such a suit, joins the local manager as party defendant, yet this does not prevent the corporation removing the case to the federal court, if such local manager is merely a nominal defendant. *Sidway v. Missouri, etc. Co.*, 116 Fed. Rep. 381 (1902). A suit by a stockholder to enjoin a foreign corporation from maintaining and exercising control over the business of his corporation, both corporations being parties defendant, cannot be removed by the foreign corporation to the federal court, inasmuch as the controversy is not separable. *MacGinniss v. Boston, etc. Co.*, 119 Fed. Rep. 96 (1902). The defendant corporation cannot remove

federal court by a non-resident stockholder, especially where the suit is based upon an alleged violation of the constitution of the United States.¹ A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts, and to have a receiver appointed.²

A court of equity has jurisdiction, if it cares to exercise it, to remedy the frauds or *ultra vires* acts of a foreign corporation or its directors, particularly where the acts were performed within the jurisdiction or some of the parties reside within the jurisdiction. Thus, a suit to compel a foreign corporation to issue new certificates of stock for certificates lost will lie.³ A stockholder in a foreign corporation may sue in the courts of New York to enjoin fraudulent acts and hold the directors and third persons personally liable.⁴ And there have been various instances where such jurisdiction has been exercised.⁵

the case to the federal court as having a separable controversy, even though a receiver and an injunction are asked in a stockholder's suit against a non-resident corporation and its directors, to enjoin a stockholders' meeting and compel the directors to account for funds. *Campbell v. Milliken*, 119 Fed. Rep. 981 (1902).

¹ *Simpson v. Union Stock, etc. Co.*, 110 Fed. Rep. 799 (1901). A stockholder in a railroad company may enjoin the company and state officers from enforcing a state statute unreasonably reducing railroad rates, and the United States court has jurisdiction on the ground that it deprives the company of its property without due process of law and denies the equal protection of the law, but a preliminary injunction will not be granted if the railroad is already charging only the reduced rate. *Perkins v. Northern, etc. Ry.*, 155 Fed. Rep. 445 (1907). A suit in equity lies in the federal court to enjoin the collection of taxes on stock held by one corporation in another on the ground that it deprives the stockholder of the equal protection of the law, where the statutes of the state forbid such tax. *Louisville T. Co. v.*

Stone, 107 Fed. Rep. 305 (1901). Rule 94 of the federal courts is not satisfied by an allegation that a request has been made to the board of directors and has been refused and that the suit is not collusive. Something more than this is necessary, and hence if the corporation defendant is of the same state as the other defendants the federal court has no jurisdiction, the corporation defendant being looked upon as the real complainant. *Elkins v. City of Chicago*, 119 Fed. Rep. 957 (1902), the court stating that it did not pass on whether such jurisdiction would exist if the corporation really was hostile to the complainant, and rule 94 had been complied with.

² *Leary v. Columbia River, etc. Co.*, 82 Fed. Rep. 775 (1897).

³ *Guilford v. Western U. Tel. Co.*, 59 Minn. 332 (1894). Where one foreign corporation is under obligation to issue stock to another foreign corporation, a resident stockholder of the latter may bring suit in New York courts to compel the issue of such stock. *Babcock v. Schuylkill, etc. Ry.*, 9 N. Y. Supp. 845 (1890).

⁴ *Gray v. Fuller*, 17 N. Y. App. Div. 29 (1897).

⁵ In the case of *Harting v. Amer-*

It is discretionary, however, with a court as to whether it will grant equitable relief against a foreign corporation. Especially is

ican, etc. Co., 182 Ill. 551 (1899), an Illinois stockholder in a New Jersey glucose manufacturing corporation enjoined in the courts of Illinois a transfer of the property of that corporation, including real estate in Illinois, to another New Jersey corporation, the latter being a trust formed to absorb practically all the glucose factories of the country, the court saying that it need not be proved that prices have actually been raised, but it is sufficient if it is within the power of the corporation to raise them. A resident of New York cannot maintain a suit in the New York courts against a foreign corporation, where service can be made only by publication and there is no real or personal property within the state upon which a vested or contingent interest is claimed in behalf of the corporation. *Grant v. Cobre Grande Copper Co.*, 750 N. Y. App. Div. 126 (1908). Where a Maine corporation does all its business in Massachusetts, and all its officers, except the secretary, reside in Massachusetts, a Massachusetts stockholder may maintain in the courts of Massachusetts a suit to compel the directors to account for property misappropriated and to enjoin *ultra vires* acts, but a receiver will not be appointed unless special circumstances require it. *Richardson v. Clinton, etc. Co.*, 181 Mass. 580 (1902). See also cases in notes, *supra*. Even though a suit in New Jersey by a stockholder in a Maine corporation to enjoin a New Jersey corporation from taking over the assets of the Maine corporation joins the Maine corporation as a party defendant, and the latter is not served, yet the court may grant relief. *Wilson v. American, etc. Co.*, 67 N. J. Eq. 262 (1904). See also § 738, *infra*. A stockholder in a Connecticut corporation, all of whose assets have been fraudulently trans-

ferred to a New Hampshire corporation, may maintain a suit in New Hampshire to set aside such transfer, even though the Connecticut corporation is not served, and does not appear, it being made a party defendant, and the stocks and bonds involved being located in the state of New Hampshire, although pledged to a New York trust company and actually in the possession of the latter. *Kidd v. New Hampshire, etc. Co.*, 72 N. H. 273 (1903). In the case *Selover v. Isle, etc. Co.*, 91 Minn. 451 (1904), the court granted specific performance of a contract by a foreign corporation for the issue of stock to a person in payment for property. A non-resident stockholder in a non-resident corporation may institute suit asking that the property in the state be applied to the debts, showing that otherwise it would be lost by attachments and by the extravagant management of the officers. *Culver, etc. Co. v. Culver*, 99 S. W. Rep. 391 (Ark. 1906). A resident stockholder in a foreign corporation may file a bill to compel a local agent to account for sales made by him for the corporation, it being shown that such agent controlled the company and that his actions were fraudulent. *Sloan v. Clarkson*, 66 Atl. Rep. 18 (Md. 1907). A non-resident has the same right to sue a foreign corporation that a resident has under the constitution of the United States. *Deatrick's Adm'r v. State, etc. Co.*, 59 S. E. Rep. 489 (Va. 1907). A bill in equity may be filed by a citizen of New Jersey and a foreigner to have stock in a New Jersey corporation, then held by foreigners, awarded to complainants and new certificates issued to the latter. Pending the suit the court may appoint a receiver of the stock and may enjoin transfer. Service on the defendant foreigners may be made by

this the case in regard to suits brought by stockholders. The courts will often refuse to grant relief, inasmuch as there may be no means of enforcing the decree. The strong tendency of the courts is to refuse to entertain jurisdiction, where the more proper forum

publication. *Sohege v. Singer Mfg. Co.*, 68 Atl. Rep. 64 (N. J. 1907). A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of the stock which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899). A New York stockholder in an Illinois corporation may bring suit in New York to set aside a fraudulent sale of all the assets. *Whitman v. Holmes, etc. Co.*, 33 N. Y. Misc. Rep. 47 (1900). Even though a notice of a meeting of the stockholders in an English corporation is so short as not to reach American stockholders in time for the meeting, yet if such notice was in accordance with the English law and was not in violation of the charter or by-laws, it is legal. *Republican, etc. Mines v. Brown*, 58 Fed. Rep. 644 (1893), *rev'g Brown v. Republican, etc. Mines*, 55 Fed. Rep. 7.

In *Ervin v. Oregon, etc. Nav. Co.*, 28 Hun, 269 (1882), the court sustained the jurisdiction where service on the directors was personal, even though the corporate property was not in the state. A West Virginia stockholder in a Pennsylvania construction company may sue a West Virginia railroad company which owes bonds to the construction company, and compel an accounting and distribution of such bond assets, when the Pennsylvania company is insolvent and has been dissolved. No request

to the directors is necessary. *Crumlish v. Shenandoah Valley R. R.*, 28 W. Va. 623 (1886). It has been held that a resident stockholder of a foreign corporation may enjoin it from making an *ultra vires* extension of its line by building branches, etc. *Ives v. Smith*, 3 N. Y. Supp. 645 (1888). A resident stockholder may enjoin a foreign railroad corporation from constructing branch lines. *Ives v. Smith*, 8 N. Y. Supp. 46 (1889). A stockholder may file a bill against the estate of the deceased president of the corporation to compel such estate to make good corporate property misappropriated by him, and such suit may be maintained even though no assets of the corporation came into the hands of the executrix of the estate, and even though the corporation itself is a foreign corporation. *Wineburgh v. United States, etc. Co.*, 173 Mass. 60 (1899). A citizen of the Republic of Mexico may bring suit in Texas against an Illinois corporation for breach of contract, even though the corporate property is in the hands of a receiver appointed in Mexico. *American, etc. Works v. De Aguayo*, 53 S. W. Rep. 350 (Tex. 1899). Where an English corporation owning land in the United States sells a portion of such land in Louisiana at one-seventh of its value, thereby causing a loss to the corporation of over \$2,000,000, and the board of directors refuse to take any action, a stockholder may bring suit in Louisiana to set aside the sale and may have a receiver appointed of the assets in that state. *Watkins v. North American, etc. Co.*, 107 La. 107 (1902). As to the power of a court to compel a foreign corporation to exhibit its books in the state to a resident stockholder, see ch. XXX, *supra*.

is the state wherein the corporation itself is incorporated and exists.¹

A stockholder's suit to enjoin the company from leasing its property for an inadequate sum must be brought in the state where the

¹ A Pennsylvania minority stockholder in a New Jersey corporation cannot maintain a bill in equity in Pennsylvania to hold liable another Pennsylvania stockholder who is alleged to have defrauded the corporation. The suit must be in New Jersey. *Madden v. Penn. etc. Co.*, 199 Pa. St. 454 (1901). Inasmuch as in New York an agreement of a contractor to divide with the officers of the company profits made in the construction of the railroad is legal, unless avoided by the corporation, and is not subject to collateral attack, such a contract will be sustained in Pennsylvania if the contract was made in New York and pertained to a New York corporation, even though such corporation was thereafter consolidated with a Pennsylvania corporation. *Rumsey v. New York, etc. R. R.*, 203 Pa. St. 579 (1902). A contributor to a fund to be invested by syndicate managers in stocks and other property has not such an interest in the stocks as enables him to maintain a suit in the state where the corporations are organized as against the non-resident syndicate managers. *Jones v. Gould*, 141 Fed. Rep. 698 (1905); *aff'd*, 149 Fed. Rep. 153. In *McCloskey v. Snowden*, 212 Pa. St. 249 (1905), the court held that where suit was brought by a resident stockholder against a foreign corporation for fraud in the purchase of property at a fraudulent price, the directors not being charged with the fraud, a mere allegation that they had been requested to commence suit and had declined is insufficient. An Illinois stockholder in a Washington mining company cannot maintain a bill in Illinois to hold the directors liable for misconduct and illegal issue of stock even though directors' meetings are held in Illinois, but no business

is done there. *Bradbury v. Waukegan & Washington Min. Co.*, 113 Ill. App. Rep. 600 (1904). Where, in a stockholder's suit in the federal court to set aside a sale of all the assets of the company to another company, an injunction has been denied on the giving of a bond, an injunction will not be granted in a similar suit by the same parties in the state court, especially where the purchaser is outside of the jurisdiction of the court, and the advantage to the complainant will be small as compared with the injury to the defendant. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). The courts of West Virginia will not take jurisdiction of a suit brought by a citizen of West Virginia against a New York mutual life insurance company to enjoin the imposition of alleged illegal assessments. *Taylor v. Mutual, etc. Assoc.*, 97 Va. 60 (1899). The New Jersey courts have no jurisdiction of a suit by a New York bondholder against a New York trust company to hold the latter liable for certifying to bonds issued by a New York corporation before certain improvements were made, which, according to the mortgage, were to be made before the bonds were certified. *Polhemus v. Holland T. Co.*, 59 N. J. Eq. 93 (1900). But by answering on the merits such objection to the jurisdiction is waived; *s. c.*, 61 N. J. Eq. 654 (1900).

Mandamus does not lie in one state at the instance of persons claiming to be directors in a foreign corporation commanding other persons from refraining to act as directors, even though all the persons are residents. *Wason v. Buzzell*, 181 Mass. 338 (1902). Nor has the court jurisdiction where, of two bodies of men, each claim to be the rightful stockholders. *Wilkins v. Thorne*, 60 Md.

company is incorporated.¹ Under the statutes of New York a director of a foreign corporation may maintain in the New York courts a suit to compel the president to account for property misappropriated or wasted by him, but the court will not appoint a general receiver and enjoin the corporation from exercising its powers, although it may enjoin the president from acting and may appoint a receiver of the property in New York state.²

253 (1883). Nor will the court enjoin a foreign corporation from delivering stock and bonds to a construction company, though the plaintiff claims that he has the contract for construction. *Kansas, etc. R. R. v. Topeka, etc. R. R.*, 135 Mass. 34 (1883). A court will not order a domestic corporation to do an act in another state, such as opening ditches, etc. *Port Poyal R. R. v. Hammond*, 58 Ga. 523 (1877). An American corporation cannot be sued in England by service upon a resident agent in that country, although three quarters of the stockholders reside in England, it appearing that all of the directors reside in America. *Badcock v. Cumberland, etc. Co.*, [1893] 1 Ch. 362. The courts of Maryland will not issue a *mandamus* to compel a foreign corporation to annul a forfeiture of stock. This is a matter to be litigated in the courts of the state creating the corporation. *North State, etc. Co. v. Field*, 64 Md. 151 (1885). Ordinarily the court will not remedy the frauds of directors of a foreign corporation. *Moore v. Silver Valley Min. Co.*, 104 N. C. 534 (1890). Where the defendant is a foreign corporation, and has no property in the state which could be reached by sequestration, a court of chancery will not decree an injunction which cannot be enforced. *Belkows Falls Bank v. Rutland, etc. R. R.*, 28 Vt. 470 (1856).

The courts of Massachusetts will not take jurisdiction of a suit by the stockholders of a Missouri corporation to enjoin the corporation from issuing bonds secured by mortgage on property in Missouri. *Kimball v. St. Louis,*

etc. Ry., 157 Mass. 7 (1892), reviewing the cases, the court saying that while it had jurisdiction and its judgment would be binding, even in Missouri, yet "it would be a misuse of our powers to attempt to control the action of those courts in a case like this by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law."

The courts have frequently refused to entertain jurisdiction over a foreign corporation in cases where the decree of the court cannot be enforced. *Williston v. Michigan, etc. R. R.*, 95 Mass. 400 (1866). *Gregory v. New York, etc. R. R.*, 40 N. J. Eq. 38 (1885), where a resident stockholder in a foreign corporation sought to set aside its lease to a resident corporation.

¹ *Madden v. Penn, etc. Co.*, 181 Pa. St. 617 (1897); s. c., 199 Pa. St. 454. An article on "Jurisdiction over foreign corporation" is found in 12 *Harvard Law Review*, 1 (1898).

² *Acken v. Coughlin*, 103 N. Y. 1 (1905). A director in a West Virginia corporation may maintain a suit in the New York courts to hold former directors liable for corporate property which they have misappropriated and wasted, where such corporation has always had its principal business and principal place of business in New York. A suit lies under the provisions of the New York code, and also, it seems, at common law. *Miller v. Quincy*, 179 N. Y. 294 (1904); rev'g *Miller v. Barlow*, 88 N. Y. App. Div. 529. The court does not obtain jurisdiction of a stockholder's

It is a well-established rule of law that a stockholder's suit to remedy a wrong done to the corporation must be in behalf of all the stockholders, since they are all equally interested in the results of the suit. Accordingly, the complainant or complainants must

suit against a foreign corporation where service upon it is by service on its president who came into the state, but not as representing the company. *Grant v. Cananea, etc. Co.*, 117 N. Y. App. Div. 576 (1907). A New York stockholder in a New Jersey corporation, the officers of which have canceled a lease which it had with another corporation which they controlled, may bring suit in New York to set aside such cancellation, even though the property is real estate located in Mexico and the lessor is a Louisiana corporation. *Jacobs v. Mexican, etc. Co., Ltd.*, 104 N. Y. App. Div. 242 (1905). A New York court has power to appoint a receiver of corporate assets within the state, of a New Jersey corporation, in a stockholder's suit, who alleges that the directors have turned over the business to one of their number who is winding up the business in violation of law and dissipating all the assets. *Reusens v. Manufacturing, etc. Co.*, 99 N. Y. App. Div. 214 (1904). A receiver of a foreign corporation will not be appointed at the instance of a resident stockholder on allegations that it had sold treasury stock on fraudulent representation and that the directors had been guilty of fraud in mismanagement of the company; and that the assets had been conveyed to other corporations, parties defendant, and where the plaintiff did not allege that he purchased his stock by reason of the misrepresentations, he cannot maintain a suit to recover for the benefit of the corporation the moneys paid for stock. *Phillips v. Sonora Copper Co.*, 90 N. Y. App. Div. 140 (1904). Under the statutes of New York where a New Jersey corporation, doing business in New York, pays dividends from the capital stock, a director

participating in declaring the dividend is personally liable therefor, and if the corporation refuses to bring the action a stockholder may bring it in behalf of himself and other stockholders. *Hutchinson v. Stadler*, 85 N. Y. App. Div. 424 (1903). The New York courts will, at the instance of a New York stockholder in a New Jersey corporation, enjoin the latter from issuing stock as a bonus with bonds in violation of the New Jersey statute requiring stock to be issued for money or property, even though the actual value of the stock and bonds so issued does not exceed the par value of the bonds and the amount received by the corporation is the par value of the bonds. The fact that the company is in a failing condition does not change the effect of the statute. *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29 (1903). An Arizona corporation, formed by consolidation, may maintain in the New York courts a suit against a director in one of the constituent companies, to cancel an issue of stock to him, brought about by fraud in the issue of stock by the constituent company. *United, etc. Co. v. Smith*, 44 N. Y. Misc. Rep. 567 (1904). A New York court will not, at the instance of a New York stockholder in an Arizona mining company, enjoin the company from transferring its property in Arizona and appoint a receiver thereof, inasmuch as such an injunction will not be effectual except with the aid of the Arizona courts, and the question involved is one relating to the internal affairs of the company, which should be controlled by the statutes and public policy of Arizona. The court, however, in the final decree, may set aside illegal sales, even though the property is beyond the jurisdiction. Hal-

bring the suit in behalf of themselves and such others of the stockholders as care to come in.¹

lenborg v. Greene, 66 N. Y. App. Div. 590 (1901). *Cunningham v. Pell*, 5 Paige, 607 (1836), holding that no personal judgment could be rendered against an absent director who was not personally served. A non-resident stockholder cannot enjoin a foreign corporation from making an *ultra vires* transfer of its property to still another foreign corporation. *Small v. Minneapolis, etc. Co.*, 10 N. Y. Supp. 456 (1890). A foreign corporation cannot sue another foreign corporation in New York to compel a conveyance of land located in another state. *Cumberland, etc. Co. v. Hoffman, etc. Co.*, 30 Barb. 159, 171 (1859). A court will not compel a foreign corporation to declare a dividend. *Berford v. New York Iron Mine*, 4 N. Y. Supp. 836 (1888); *Redmond v. Enfield Mfg. Co.*, 13 Abb. Pr. (N. S.) 332 (1872). The holders of preferred stock in a foreign corporation may maintain a suit in equity to compel a corporation to pay their arrears of dividends before paying any dividend on the common stock. *Prouty v. Michigan, etc. R. R.*, 1 Hun, 655 (1874). *Prouty v. Lake Shore, etc. R. R.*, 85 N. Y. 273 (1881). *Boardman v. Lake Shore, etc. Ry.*, 84 N. Y. 157 (1881). See also *Ervin v. Oregon, etc. Nav. Co.*, 28 Hun, 269 (1882), 35 Hun, 544 (1885). *Fisk v. Chicago, etc. R. R.*, 53 Barb. 513 (1868). The decision in *Howell v. Chicago, etc. R. R.*, 51 Barb. 378 (1868), denying jurisdiction over a foreign corporation was overruled on that point in *Prouty v. Michigan, etc. R. R.*, 1 Hun, 655 (1874).

¹ *Wickersham v. Crittenden*, 93 Cal. 17 (1892); *Wallworth v. Holt*, 4 Myl. & C. 619 (1840); *Taylor v. Salmon*, 4 Myl. & C. 134 (1838), on the ground "that where the parties interested are numerous, and the suit is for an object common to them all, some of the

body may maintain a bill on behalf of themselves and of the others;" *Beman v. Rufford*, 1 Sim. (N. S.) 550 (1851); s. c., 6 Eng. L. & Eq. 106; *Baldwin v. Lawrence*, 2 Sim. & S. 18 (1824); *Bromley v. Smith*, 1 Sim. 8 (1826); *White v. Carmarthen, etc. Ry.*, 1 Hem. & M. 786 (1863); *Bailey v. Birkenhead, etc. Ry.*, 12 Beav. 433 (1850); *Preston v. Grand Collier Dock Co.*, 11 Sim. 327 (1840); *Winsor v. Bailey*, 55 N. H. 218 (1875); *Blatchford v. Ross*, 54 Barb. 42 (1869); *Cunningham v. Pell*, 5 Paige, 607 (1836); *Fawcett v. Laurie*, 1 Dr. & Sm. 192 (1860); *March v. Eastern R. R.*, 40 N. H. 548 (1860); s. c., 43 N. H. 515; *Whitney v. Mayo*, 15 Ill. 251 (1853); *Bethune v. Wells*, 94 Ga. 486 (1894). See *Cass v. Ottawa, etc. Co.*, 22 Grant (U. C.), 512 (1875), and *Hoole v. Great Western Ry.*, L. R. 3 Ch. App. 262 (1867), to the effect that the rule is otherwise as regards *ultra vires* acts. If the allegations show that the suit is in behalf of all, the omission of a direct allegation to that effect may not be fatal. *Flynn v. Brooklyn, etc. R. R.*, 9 N. Y. App. Div. 269 (1896); *aff'd*, 158 N. Y. 493, but this suit failed on another ground. Of course, if all the stockholders are made parties, there is no need of the suit being brought in behalf of others who may choose to come in. *Rogers v. Lafayette Agric. Works*, 52 Ind. 296 (1875). *Cf. Bengley v. Wheeler*, 45 Mich. 493 (1881). Stockholders should not be joined as parties defendant and the fact that all of them are joined does not obviate the necessity of alleging that the suit, which was against the president to account for funds misappropriated by him, was brought in behalf of all the stockholders. The court in such a case will not order a distribution of the proceeds of the suit. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70 (1906).

There has been considerable controversy as to whether a suit to hold directors liable for fraud, negligence, or *ultra vires* acts should be at law or in equity. The well-established rule is that such a suit, when brought by a stockholder, should be in equity, inasmuch as it is in the nature of an accounting or the prevention of illegal acts. A

A director's liability at common law in a national bank for mismanagement or misfeasance can be recovered only by the bank or for the benefit of all stockholders. *Yates v. Jones Nat. Bank*, 105 N. W. Rep. 287 (Neb. 1905). A stockholder, who with the creditors and bondholders of a company deposits his securities with a reorganization committee, under a plan by which they are to form a new corporation to take over the property, may hold them liable for bad faith, and his suit may be in behalf of himself and other depositors. *Mawhinney v. Bliss*, 117 N. Y. App. Div. 255 (1907); *aff'd*, 189 N. Y. 501. Several stockholders may join in bringing the suit. *Marie v. Garrison*, 83 N. Y. 14 (1880); followed in s. c., 13 Abb. N. C. 210. The bill must be filed in behalf of all. *Jefferson, etc. Bank v. Francis*, 115 Ala. 317 (1898). A stockholder in one railroad corporation cannot maintain a suit at law against another railroad corporation for damages to his shares of stock on account of the latter railroad corporation owning a majority of the stock of the former and so managing the former as to cause a mortgage to be foreclosed, resulting in a purchase of the property by the latter railroad corporation. *Niles v. N. Y. etc. R. R.*, 35 N. Y. Misc. Rep. 69 (1901); *aff'd*, 69 N. Y. App. Div. 144 (1902); 176 N. Y. 119. A stockholder cannot maintain a suit to compel another corporation to accept a deed of land from his corporation and issue stock in payment therefor, the suit being not in behalf of the corporation, but in his own behalf. *Collier v. Deering, etc. Assoc.*, 66 S. W. Rep. 183 (Ky. 1902). A suit by a stockholder against the directors to hold

them liable for violating the national bank act must be for the benefit of the corporation. *Zinn v. Baxter*, 65 Ohio St. 341 (1901). A suit by a stockholder to set aside an illegal transfer of the corporate property cannot at the same time ask for the treble damages given by the anti-trust act of congress of July 2, 1890. Such a suit is multifarious, inasmuch as the treble damages would go to the plaintiff, while the damages generally would belong to the corporation. *Metcalf v. American, etc. Co.*, 108 Fed. Rep. 909 (1901). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. *Brehm v. Sperry*, 92 Md. 378 (1901). An agreement between an improvement company and purchasers of lots that the profits will be used for certain improvements may be enforced by one lot purchaser in behalf of all. *Whiting v. Elmira, etc. Assoc.*, 45 N. Y. App. Div. 349 (1899). A stockholder may hold liable in damages a person who has broken his agreement to loan money to the corporation, the consideration of such agreement having been furnished by the stockholder. But if the agreement did not provide for any par-

suit at law is not the proper remedy.¹ In such suit in equity the

ticular duration of the loan, only nominal damages can be recovered. *Kelly v. Fahrney*, 97 Fed. Rep. 176 (1899). As to intervention by others, see § 222, *supra*, and §§ 735, 748, 848, *infra*.

¹ The leading case on this point is *Smith v. Hurd*, 53 Mass. 371 (1847), the court saying: "An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders in common." *Brinckerhoff v. Bostwick*, 88 N. Y. 52 (1882); s. c., 105 N. Y. 567; *Oraig v. Gregg*, 83 Pa. St. 19 (1876); *Eldred v. Ripley*, 97 Ill. App. 503 (1901). To same effect, *Allen v. Curtis*, 26 Conn. 456 (1857). *Deveny v. Hart Coal Co.*, 60 S. E. Rep. 789 (W. Va. 1908). In a suit by a stockholder to hold liable for fraud another corporation that owns a majority of the stock of his corporation, and has diverted its business so that it became insolvent, the suit must be in equity, and his corporation is a necessary party defendant. A direct suit at law will not lie. *Niles v. N. Y. etc. R. R.*, 69 N. Y. App. Div. 144 (1902), and *aff'd*, 176 N. Y. 119. "A fatal defect in the plaintiff's petition, both original and amended, is that it seeks no recovery in behalf of the corporation, but seeks a direct recovery of damages for the plaintiff individually, the case stated not entitling him to such a recovery." *Evans v. Brandon*, 53 Tex. 56 (1880); *Kent v. Jackson*, 2 De G., M. & G. 49 (1852). An action at law does not lie at the instance of a stockholder against a director for mismanagement of the corporation. *Howe v. Barney*, 45 Fed. Rep. 668 (1891). A stockholder's remedy for wilful waste on the part of a director is in equity, and not at law. *Hirsh v. Jones*, 56 Fed. Rep. 137 (1893). A stockholder of a dissolved corporation cannot reach corporate assets which have been fraud-

ulently diverted except by a suit in equity. Under the statutes of New York an attachment cannot be obtained in a suit in equity. *Shiel v. Patrick*, 59 Fed. Rep. 992 (1894). The stockholder's action may be in the nature of a suit in equity for conspiracy. *Fox v. Hale, etc. Co.*, 108 Cal. 369, 475, 478 (1895). Where only a money judgment is sought by a minority stockholder against directors for incurring debts and allowing the corporate property to be sold on execution, the directors being personally interested in the contracts under which the work was done, a court of equity has no jurisdiction, there not being involved any discovery or accounting or setting aside of the sale or judgment. The mere fact that the contract made by the directors was voidable is no ground for the court of equity interfering in the absence of conspiracy or fraud. *Godfrey v. McConnell*, 151 Fed. Rep. 783 (1906). The stockholder's remedy is in equity, even though the suit if it had been brought by the corporation would have been at law, but by order of the court issues may be framed for trial by jury. *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908). A stockholder cannot sue a director at law for damages for injuring his stock. *Eldred v. Ripley*, 97 Ill. App. Rep. 503 (1901). Where a stockholder brings a suit at law against a board of directors for negligence in allowing the cashier to wreck the bank, the directors having been such for different periods of time, there is a 'misjoinder of causes of action. *Sayles v. White*, 18 N. Y. App. Div. 590 (1897). A stockholder's remedy against directors for negligence is in equity. *Bloom v. National, etc. Loan Co.*, 81 Hun, 120 (1894); *aff'd*, 152 N. Y. 114. The stockholder's remedy is not at law, although money of the corporation misappropriated by the defendant constitutes all the assets

defendant cannot demand a trial by jury as a matter of right.¹ A stockholder cannot maintain a suit against the directors for damages resulting from a conspiracy to wreck the corporation, inasmuch as a request to the corporation to bring such suit is first necessary and the damages, if recovered, belong to the corporation.²

of the corporation. *Thompson v. Stanley*, 20 N. Y. Supp. 317 (1892); *aff'd*, 73 Hun, 248; 147 N. Y. 713. The suit is in equity and will not be construed as a suit for dissolution. *Watkins v. Watkins, etc. Co.*, 11 N. Y. App. Div. 517 (1896). A contract between a stockholder and a third person, by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors, it was illegal. *Kountze v. Flannagan*, 19 N. Y. Supp. 33 (1892). A stockholder's remedy to restore land to the corporation, he claiming that the land was sold under a mortgage which did not cover such land, is at law and not in equity, although he might have a receiver appointed to recover the land. *Knevals v. Florida, etc. R. R.*, 66 Fed. Rep. 224 (1894). See, in general, *Gardiner v. Pollard*, 10 Bosw. 674 (1863); *Craig v. Gregg*, 83 Pa. St. 19 (1876); and see § 701, *supra*. This principle of law is assumed in nearly all the cases cited in Part IV of this work. In a complicated case equity will take

jurisdiction of a suit to hold a president liable for misappropriating funds. *Warner v. McMullin*, 131 Pa. St. 370 (1890). A vendee sued for the price of stock cannot set up that the plaintiff vendor had negligently managed the corporation and misappropriated its assets. *Mealey v. Nickerson*, 44 Minn. 430 (1890). In *Priest v. White*, 89 Mo. 609 (1886), an action at law by a corporate creditor for fraud and deceit failed. In *Kimmel v. Stoner*, 18 Pa. St. 155 (1851), and *Kimmell v. Geeting*, 2 Grant (Pa.), Cas. 125 (1853), where the corporation, through its directors, ordered an agent to purchase for the corporation certain shares of its stock which the state was about to sell, and after the purchase the directors divided it among themselves, it was held that a stockholder could sue such director in an action on the case and obtain damages for the proportionate loss sustained by himself. See also §§ 157, 355, 651, *supra*, and § 747, *infra*. *Cf. Quincy v. Steel*, 120 U. S. 241 (1887).

A director's liability at common law in a national bank for mismanagement or misfeasance can be enforced only by the bank or for the benefit of all stockholders. *Yates v. Jones Nat. Bank*, 105 N. W. Rep. 287 (Neb. 1905). In *Hanley v. Balch*, 94 Mich. 315 (1892), a stockholder sustained an action at law for damages against another stockholder who had wrecked the corporation and bought in the

¹ *Brinckerhoff v. Bostwick*, 105 N. Y. 567 (1887); *MacNaughton v. Osgood*, 114 N. Y. 574 (1889). *Cf. People v. State Treasurer*, 24 Mich. 468 (1872). See also § 701, *supra*.

² *Niles v. N. Y., etc. R. R.*, 176 N. Y. 119 (1903). A stockholder cannot

maintain an action at law against outside parties for conspiracy to injure and ruin the corporation. *Converse v. United, etc. Co.*, 185 Mass. 422 (1904).

Where, however, the corporation itself sues its directors for neglect of duty, the action is at law.¹ An action by a receiver against directors for negligence should also be at law, and there must be a separate suit against each director.² Money or property recovered from directors or third persons, in a suit in equity instituted by a stockholder in behalf of all the stockholders, belongs to all the stockholders and not to the complaining stockholder. It goes to the corporation.³ The decree must be for the benefit of the corpora-

property in violation of an agreement to carry along the corporate debt. In a suit at law against corporate officers for damages for wrecking the corporation by creating false debts and causing all the property to be applied to their payment, the proceedings by which the property was so applied must be fully set forth. *Cottrell v. Tenney*, 48 Fed. Rep. 716 (1892). A pledgor of stock cannot, in a suit brought by one of his creditors to reach the equity in a pledge, raise an issue as to the mismanagement of the corporation. *McMullen v. Ritchie*, 57 Fed. Rep. 104 (1893). In *Ritchie v. McMullen*, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that, although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

1 See § 701, *supra*. The president of an insurance company may be held personally liable for its funds used by him for political purposes and also moneys expended on improvident agency contracts with members of his family, and the complaint may allege that he either caused the expenditure or negligently allowed it, and a suit by the company itself is at law. *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 815 (1907); *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 827 (1907). Where, however, the transactions cover thirteen years, the complaint may be ordered to be made more definite and certain. *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 828 (1907). At the same time the company may maintain a suit in equity to compel him to account for moneys paid out through false and fraudulent bills and vouchers and for unlawful purposes, the details of which the company does not know. *Mutual, etc. Co. v. McCurdy*, 118 N. Y. App. Div. 822 (1907). So also the vice-president, whose duty it was to approve disbursements and who knowingly or negligently allowed illegal payments, is personally liable. *Mutual, etc. Co. v. Grannis*, 118 N. Y. App. Div. 830 (1907).

2 See § 701, *supra*.

3 The proceeds of the suit go to the corporation. *Howe v. Barney*, 45 Fed. Rep. 668 (1891). The results of a stockholder's suit against the directors for negligence belong to the corporation, and not to him. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891). The proceeds of the suit be-

tion and not for the complainant stockholders.¹ Damages cannot be awarded to the complaining minority stockholders for the depreciation in value of their stock, because the damage was to the corporation, and the stockholders having several interests cannot join in such an action.² Where, however, an illegal salary has been paid,

long to the corporation. An agreement that the attorneys shall have a contingent fee is good where all the stockholders stood by and allowed the work to go on. *Davis v. Gemmell*, 73 Md. 530 (1891). As to the attorney's fees in such a suit, see § 879, *infra*. Mismanagement by directors gives a right of action to the corporation or stockholder for its benefit, but not to a stockholder for damages to him individually. *McMullen v. Ritchie*, 64 Fed. Rep. 253 (1894). The results of the suit belong to the corporation. *Grant v. Lookout Mountain Top Co.*, 93 Tenn. 691 (1894). The judgment is for the benefit of the corporation, and a receiver may be appointed to collect and distribute it. *Fox v. Hale, etc. Co.*, 108 Cal. 475 (1895). Moneys recovered in a stockholder's suit belong to the corporation, and not to him. *Thompson v. Stanley*, 20 N. Y. Supp. 317 (1892); *aff'd*, 73 Hun, 248; 147 N. Y. 713. Where a stockholder sues directors and also parties to whom the directors have illegally transferred property, and asks for a personal judgment in his own behalf, the complaint is multifarious. *Scharf v. Warren-Scharf, etc. Co.*, 5 N. Y. App. Div. 439 (1896). The complaining stockholder cannot ask for his share of the property or money involved. *Pratt v. Bacon*, 27 Mass. 123 (1830). That the money or property recovered belongs to the corporation, see *Evans v. Brandon*, 53 Tex. 56 (1880); *Dewing v. Perdicaries*, 96 U. S. 193, 198 (1877); *Smith v. Poor*, 40 Me. 415 (1855); *Carter v. Ford, etc. Co.*, 85 Ind. 180 (1882). A plaintiff may upon the trial be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders

and for the benefit of the corporation. *Brewster v. Hatch*, 122 N. Y. 349 (1890). Where a stockholders' suit enjoining illegal taxation is successful, the purchaser of the property of the corporation at a foreclosure sale succeeds to the benefit of that suit, and may refuse to pay the tax. *Secor v. Singleton*, 41 Fed. Rep. 725 (1890). A stockholder in an English holding corporation, which owns all the stock of an Illinois corporation, cannot maintain a bill to have the English corporation declared fraudulent and a dummy, and that the property of the Illinois corporation be declared joint property of the stockholders in the English corporation. *Terry v. Chicago Packing & Provision Co.*, 105 Ill. App. Rep. 663 (1903). Where two companies are consolidated this is practically a dissolution of the old companies and hence a stockholder in one of them may bring a suit in equity to have the value of his stock determined and insist upon payment therefor in cash. *Barnett v. Philadelphia, etc. Co.*, 67 Atl. Rep. 912 (Pa. 1907), the court following *Lau-man v. Lebanon Valley R. R. Co.*, 30 Pa. 42.

¹ *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1896).

² *Loewenstein v. Diamond, etc. Co.*, 94 N. Y. App. Div. 383 (1904). A stockholder who has sold his stock cannot hold the directors liable in an action at law for damages for managing the corporation so as to decrease the value of his stock. *Wells v. Dane*, 101 Me. 67 (1905). Even though a bank which in accordance with the statute has paid taxes in behalf of its stockholders, has not deducted the same from dividends as it should have done, a stockholder who has paid his

with the consent of a majority of the stockholders, and a minority stockholder files a bill to compel repayment, the court may order the repayment to dissenting stockholders of such part of the salary as they would get if the whole salary was repaid to the corporation and a dividend made.¹ The supreme court of Massachusetts has held

tax cannot hold the bank liable for his proportion of the taxes not collected by the bank from other stockholders. *Kennedy v. Citizens' Nat. Bank*, 128 Iowa, 561 (1905). In the case *Dudley v. Armenia Ins. Co.*, 115 N. Y. App. Div. 380 (1906), it was held that a stockholder who with other stockholders pledged his stock to secure a debt from the corporation, and whose stock was sold out for the non-payment of the debt, cannot hold the pledgee liable in damages, even though he charges that the latter wrecked the corporation and thereby rendered the stock valueless, the decision being based on the theory that the depreciation in the value of the stock was due to a wrong perpetrated upon the corporation, for which the remedy in the first instance was with the corporation. A manager who is forced to resign and sell his stock because the corporation has been defrauded by other parties, cannot hold such other parties liable for the depreciation in the value of the stock or for his proportion of the amount out of which they had defrauded the corporation, nor for damages from his enforced resignation and injury to reputation. *Ninneman v. Fox*, 43 Wash. 43 (1906). The suit must be for the benefit of the corporation and not of the stockholders direct. *Hearst v. Putnam, etc. Co.*, 28 Utah, 184 (1904). In dismissing a minority stockholders' suit in equity, the court may do so without prejudice to an action at law by him for the value of the stock at the time of the consolidation which he complains of. *Beling v. American, etc. Co.*, 65 Atl. Rep. 725 (N. J. 1907).

¹ *Brown v. De Young*, 167 Ill. 549 (1897). In *Eaton v. Robinson*, 19 R.

I. 146 (1895), where illegal salaries had been paid, the court ordered the guilty parties to pay to each stockholder his proportionate part of the money. The court may treat an illegal salary as in the nature of a fund on which a dividend is declared, and hence may order it repaid to the stockholders proportionately. *Adams v. Burke*, 102 Ill. App. Rep. 148 (1902); *aff'd*, 201 Ill. 395. In holding the president liable for an illegal salary the court should not order repayment direct to the stockholders. *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903). Stockholders should not be joined as parties defendant, and the fact that all of them are joined does not obviate the necessity of alleging that the suit, which was against the president to account for funds misappropriated by him, was brought in behalf of all the stockholders. The court in such a case will not order a distribution of the proceeds of the suit. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70 (1906). In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906). Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust*

that in order to avoid circuity of action reimbursement may be made to the individual stockholders, instead of to the corporation, if the exigencies of the case require it.¹

§ 735. *Parties plaintiff—Who may bring the suit—Unregistered transferees—Trustees—Pledgees—Stock that has voted in favor of the act—Small stockholders—Corporate creditors—Receiver.*—Ordinarily, a suit herein is instituted by one or more stockholders who are registered as such on the corporate books. It has been held, however, that the suit may be brought by a purchaser of a certificate of stock who has not as yet obtained a registry thereof in the corporate books.² A stockholder in a corpora-

for such salary. *Elias v. Schweyer*, 27 N. Y. App. Div. 69 (1898). A stockholder cannot sue at law for his proportionate part of illegal salaries paid to officers. *Rafferty v. Donnelly*, 197 Pa. St. 423 (1900). Where a corporation has been dissolved and its debts paid and ten per cent. of its stockholders complain of a fraud of the directors, which the other ninety per cent. do not complain of, the court may order the directors to pay to such ten per cent., ten per cent. of the amount for which the directors are liable. *Spaulding v. North Milwaukee, etc. Co.*, 106 Wis. 481 (1900). Where parties who suppose they own a timber tract worth \$500,000 sell the same to a corporation for \$500,000 full-paid stock, and it afterwards transpires that their title is defective as to a part of the property, and the corporation, in order to perfect the title, pays out \$215,000, although the stock actually issued for that part of the property was only \$55,000, the parties to whom the stock was so issued are liable only for the \$55,000, especially where a settlement has been made with some of them on that basis. A contract between the original parties by which some guaranteed others against liability on account of any defects in the title cannot be enforced by the corporation, and hence cannot be made the basis of the measure of damages. On the other hand, the parties receiving the \$55,000 or

stock cannot return it and avoid liability on the ground that the consideration for the issue of the stock had failed. If the stockholders are few in number, the court may decree payment directly to the stockholders who complain, and directly to such of the stockholders who are entitled to participate in the distribution of the \$55,000. *Jenkins v. Bradley*, 104 Wis. 540 (1899). *Cf.* 125 N. Y. App. Div. 881.

¹ *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). In the case *Clements v. Bowes*, 17 Sim. 167 (1852); s. c., 1 Drew, 684, the plaintiff stockholders sued to compel parties to pay to them direct corporate funds which the defendants had taken.

² *Bagshaw v. Eastern Union Ry.*, 7 Hare, 114 (1849); *aff'd*, 13 L. J. (Ch.) 410. *Great Western Ry. v. Rushout*, 5 De G. & Sm. 290 (1852); *Ervin v. Oregon, etc. Nav. Co.*, 28 Hun, 269 (1882); *Parrott v. Byers*, 40 Cal. 614 (1871). *Cf.* *Landes v. Globe, etc. Co.*, 73 Ga. 176 (1884), where a stockholder had not paid his subscription; *Mills v. Northern Ry.*, L. R. 5 Ch. 621 (1870), a *quære*. An unregistered holder of stock may, in a suit to hold the directors liable for a fraud, ask that the corporation transfer the stock on the books. *Kingston v. Montgomery*, 97 S. W. Rep. 202 (Mo. 1906). An unregistered holder of stock may maintain a suit in equity to have a receiver appointed on the ground that the company is insolvent. *Reinhardt*

tion which owns stock in another corporation may file a bill to enjoin an *ultra vires* act of the latter.¹ Stockholders who are disqualified from participating in the suit should not be joined as parties plaintiff.²

r. Interstate, etc. Co., 63 Atl. Rep. 1097 (N. J. 1906). An unrecorded stockholder may maintain a suit to prevent the illegal voting of stock owned by the corporation itself. *O'Connor v. International, etc. Co.*, 68 N. J. Eq. 67 (1904). An unregistered owner of stock maintained a bill in equity to enjoin an illegal voting of other stock at an election in *O'Connor v. International, etc. Co.*, 68 N. J. Eq. 680 (1905). An unregistered stockholder brought suit in the case of *Houston, etc. Co. v. Drew*, 13 Tex. Civ. App. 536 (1896), and the party in whose name the stock stood on the books intervened in support of the bill. *Contra*, *Ramsey v. Erie Ry.*, 7 Abb. Pr. (N. S.) 156 (1869); s. c., 28 How. Pr. 193; *Heath v. Erie Ry.*, 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976; *Hersey v. Veazie*, 24 Me. 9 (1844); *Hodge v. United States Steel Corp.*, 53 Atl. Rep. 601. (N. J. 1902), rev'd on another point in 64 N. J. Eq. 807 (1903). An unregistered holder of certificates is very doubtfully entitled to bring the action. *Moore v. Silver, etc. Co.*, 104 N. C. 534 (1889). Where the plaintiff's stock is transferred on the corporate books, until he obtains the stock again he cannot sue as a stockholder, even though he claims that the stock was transferred without consideration and on terms not performed. *Lawson v. Stanley*, 15 N. Y. Supp. 707 (1891). But such a stockholder cannot maintain a suit against directors for fraud where his stock has been transferred to another, and he has no interest therein; nor can he maintain his suit on the ground that he owns a certificate of stock standing in the name of another and transferred in blank on the back by the administratrix of the stockholder of record, no proof being given of the

administratrix's being such or of having executed the transfer. *Thompson v. Stanley*, 73 Hun, 248 (1893); aff'd, 147 N. Y. 713. A purchaser of a certificate of stock who has not yet obtained a transfer of the same on the corporate books cannot complain of fraudulent or *ultra vires* acts. *Brown v. Duluth, etc. Ry.*, 53 Fed. Rep. 889 (1893).

¹ *Carter v. Producers', etc. Co.*, 164 Pa. St. 463 (1894). A stockholder in a railroad corporation that has taken a lease from another railroad corporation cannot object thereto, on the ground that the lessor had no power originally to acquire and own the railroad. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). Where a New Jersey holding company owns all the stock of certain Rhode Island street railroad companies and as such stockholder causes them to be leased to a new corporation which guarantees five per cent. on the stock of the Rhode Island corporation, and then causes another New Jersey holding company to be organized to issue one share of its stock for every four shares of stock in the first holding company, and all the stockholders of the first holding company accept the offer excepting one stockholder, he may maintain a bill in equity in the United States court in Rhode Island against both holding companies to compel the payment to him of an equitable compensation corresponding to the earnings over and above the five per cent. Four years' delay is no bar. *Sabre v. United, etc. Co.*, 156 Fed. Rep. 79 (1907). See also § 317, *supra*.

² *Clements v. Bowes*, 1 Drew. 684 (1853); s. c., 17 Sim. 167. *Cf. Parrott v. Byers*, 40 Cal. 614 (1871), holding that if one of the complainants

Where a person who holds stock as a trustee refuses to bring the suit, the *cestui que trust* may institute it, making the trustee a party defendant.¹ An administrator holding stock may bring the suit.² A person who has sold his stock cannot sue;³ neither can a subscriber who has not paid as required by charter;⁴ but a pledgee

is competent it is immaterial that the others are not. See also *State Line R. R.'s Appeal*, 1 Ry. & Corp. L. J. 139 (Pa. 1886); *Burt v. British, etc. Assoc.*, 4 De G. & J. 158 (1859), where the court said that if the stockholders "sue by a plaintiff only who has personally precluded himself from suing, that suit cannot proceed." See *House v. Mullen*, 22 Wall. 42 (1874). Even though the board of directors have leased all the corporate property to a minority of the directors, yet the minority stockholders cannot have a receiver appointed unless it is shown that the lease was unfair, especially where one of the complaining stockholders has ratified the transaction. *Farwell v. Babcock*, 65 S. W. Rep. 509 (Tex. 1901), a case involving a corporation owning 3,000,000 acres of land and 120,000 head of cattle, valued at \$10,000,000.

¹ *Great Western Ry. v. Rushout*, 5 De G. & Sm. 290 (1852); *Daft v. Daft, etc. Co.*, N. Y. L. J. Dec. 3, 1890. Cf. *Mayer v. Denver, etc. R. R.*, 38 Fed. Rep. 197 (1889).

² *Jones v. Pearl Min. Co.*, 20 Colo. 417 (1894).

³ A person who is the registered holder of stock, but has actually sold the certificates or scrip, cannot maintain the bill, nor will the bill be sustained on the theory that he represents the purchaser of the certificates. *Doyle v. Muntz*, 5 Hare, 509 (1846). A stockholder in a national bank who has sold his stock cannot maintain a suit against the directors to hold them personally liable for violating the national bank act. *Zinn v. Baxter*, 65 Ohio St. 341 (1901). A stockholder who has sold his stock and has no interest in it cannot maintain a suit to remedy an alleged wrong

done to the corporation, even though the stock still stands in his name. *MacVeagh v. Denver City, etc. Co.*, 107 Fed. Rep. 17 (1901). A stockholder who has sold his stock with knowledge that illegal salaries have been paid cannot thereafter sue for his proportionate part of the claim. *Rafferty v. Donnelly*, 197 Pa. St. 423 (1900). A person who has sold his stock at the time of commencing suit cannot maintain the suit. *Hodre v. United States Steel Corp.*, 53 Atl. Rep. 601 (N. J. 1902); rev'd on another point in 64 N. J. Eq. 807 (1903).

⁴ *Busey v. Hooper*, 35 Md. 15 (1872). Where the corporation refuses to allow a stockholder to examine the books in order that he might ascertain whether he wished to continue to make payments on his stock, a forfeiture by the corporation for refusal to make such payments will be set aside, and such forfeiture, even before it is set aside, is not a bar to the stockholder's suit to restrain illegal acts on the part of the corporation. *Buker v. Leighton, etc. Assoc.*, 164 N. Y. 557 (1900); rev'g, 18 App. Div. 548. Where a person's stock has been sold for failure to pay an assessment he cannot maintain a suit in behalf of the corporation against the directors for misconduct, even though such misconduct caused the assessment to be levied. *Hanna v. People's National Bank*, 76 N. Y. App. Div. 224 (1902), modified on another point in 179 N. Y. 107. An assessment upon stock levied by a board of directors illegally elected, and a sale of the stock thereunder, does not put an end to the stockholders' suit to oust such board of directors and to set aside such assessment, and to set aside contracts made by such board. The complaint

may sometimes sue.¹ A pledgor of stock may maintain the action.² Even though the plaintiff in a stockholders' suit is no longer a stockholder, and hence cannot maintain a suit, yet if another stockholder has come in and been made a party the suit may be main-

is not multifarious. *Whitehead v. Sweet*, 126 Cal. 67 (1899). A forfeiture of stock by sale at public auction for failure to pay assessments, made before the amount of stock required by statute to be subscribed before the assessment can be levied, may be set aside by a suit in equity, and the statute of limitations applicable to suits to set aside forfeitures on the ground of irregularities does not apply. A pledgee of the stock may maintain such a suit. *Herbert, etc. Bank v. Bank of Orland*, 133 Cal. 64 (1901).

1 A pledgee of the stock of a stockholder who lives in the same state as the corporation itself, cannot maintain a suit in the United States court against the corporation for a receiver and a distribution of the assets, the corporation being insolvent. *Gorman-Wright Co. v. Wright*, 134 Fed. Rep. 363 (1904). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900). Pledgees of stock are not in any sense creditors of the corporation, and are bound by judgments against the corporation the same as stockholders. *Farmers' Bank, etc. v. Ohio River, etc. Co.*, 56 S. W. Rep. 719 (Ky. 1900). The pledgee may institute a suit where his security has been impaired. *Green v. Hedenberg*, 159 Ill. 489 (1896). A pledgee of stock is as fully protected against *ultra vires* acts as a stockholder is. *Campbell v. American Zylonite Co.*, 122 N. Y. 455 (1890). Cf. § 468, *supra*. Sometimes he may sue though not registered as a stockholder. *Baldwin v. Canfield*, 26 Minn. 43 (1879). Where, by the written consent of all the stockholders of a New Jersey corporation and the action of its board of directors a corporation sells all its property for stock and bonds of a new company to be distributed among the old stockholders a pledgee of one of the old stockholders cannot object, especially where the statute authorizes the pledgor of stock to represent the stock and no notice had been given of the pledge. *Elyea v. Lehigh, etc. Co.*, 169 N. Y. 29 (1901). Where the pledgor of stock votes at a corporate meeting in favor of selling the property, the pledgee is bound, the corporation having had no notice of the pledge. *City of Spokane v. Amsterdamsch, etc.* 22 Wash. 172 (1900). An unregistered pledgee cannot maintain a suit under the New York statute against the treasurer for the penalty for refusing to furnish to him a statement of the affairs of the company. *Pray v. Todd*, 71 N. Y. App. Div. 391 (1902).

2 *Fisher v. Patton*, 134 Mo. 32 (1895). The executor of an estate owning stock in a corporation may enjoin the corporation from paying a back salary to its president, who is a co-executor of the estate, even though the stock of the estate was pledged by the decedent and was transferred into the name of the pledgee. *Monmouth Inv. Co. v. Means*, 151 Fed. Rep. 159 (1906). A pledgee of stock may bring suit to set aside a fraudulent sale of all the cor-

tained by the latter.¹ An officer who is not a stockholder cannot have a receiver appointed.²

A stockholder may not be entitled to institute such a suit as this where his stock is all "water," and illegal,³ or the original business of the corporation was illegal.⁴ Thus, where the real business of

porate assets which will result in destroying the value of his stock. *Andrews Co. v. National Bank, etc.*, 58 S. E. Rep. 633 (Ga. 1907).

¹ *Hanna v. Lyon*, 179 N. Y. 107 (1904). Even though the complainant is not the real party in interest, yet if other stockholders come in as co-complainants who are qualified to maintain the suit, the suit continues. *Warren v. Pim*, 65 N. J. Eq. 36 (1903). It may be shown that the plaintiff is not the real owner of the stock standing in his name. *MacGinniss v. Boston, etc. Co.*, 29 Mont. 428 (1904). A dummy director in whose name on the books one share of stock stands, but who has endorsed it in blank and delivered it back, cannot maintain a suit for a receiver of the corporation. *Hoopes v. Basic Co.*, 69 N. J. Eq. 679 (1905). An attorney was disbarred in *Matter of Lamb*, 105 N. Y. App. Div. 462 (1905) for knowingly instituting a suit in behalf of a person who was only a nominal stockholder. A stockholder who has sold his stock cannot hold the directors liable in an action at law for damages for managing the corporation so as to decrease the value of his stock. *Wells v. Dane*, 101 Me. 67 (1905). Where the trustees of the mortgage foreclose and buy the property for the bondholders, and the trustees do not turn over to the new corporation all the property purchased by them, and they have been guilty of malfeasance in other respects, a bondholder may hold them liable by a suit in equity, even though he deposited his bonds and took stock in exchange therefor, it appearing that he did not then know of the acts complained of. The new corporation is not a necessary party defendant and a purchaser of the stock in the new

corporation cannot make such a complaint, but the complaint may be by one of the bondholders, even though he has sold his stock. *Dunning v. Bates*, 186 Mass. 123 (1904).

² *Viguerie v. Burguières, etc. Co.*, 46 S. Rep. 114 (La. 1908).

³ A person to whom watered stock has been issued as full-paid stock is not such a *bona fide* stockholder as may compel a creditor to return bonds which were illegally issued. The stock is void under the Wisconsin statutes. *Hinckley v. Pfister*, 83 Wis. 64 (1892). Stock issued as full paid for no consideration whatsoever is void under the constitutional provision that stock shall be issued only "for labor done, services performed, or money or property actually received." The original holders of such stock cannot institute a suit to remedy a wrong done to the corporation by its president. *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1899).

⁴ A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder. *Coquard v. National L. S. Co.*, 171 Ill. 480 (1898). A stockholder who has received stock for nothing from a party who has consented to the issue of stock and bonds for an insufficient consideration, may not be able to complain thereof. *Ward v. Smith*, 95 N. Y. App. Div. 432 (1904).

the corporation is an illegal one—a lottery—and where the stock is wholly fictitious, the courts will not aid a stockholder.¹ A stockholder cannot enjoin an issue of bonds by a corporation in which his corporation expects to become a stockholder.²

The right which a stockholder has to object to a fraudulent or *ultra vires* act inheres in his stock and hence passes to a purchaser of that stock, and such purchaser may bring suit to enjoin or set aside the act or to compel an accounting,³ although the rule is different in the federal courts.⁴ And there is a very important limitation to this rule even in the state courts, namely, that a stockholder who holds stock which has been voted in favor of the act complained of will fail in his suit. His stock is tainted with the fraud or illegality. This is a very important principle of law, and defeats many suits instituted by stockholders to remedy past wrongs. The law is clear that a stockholder who voted in favor of the transaction, or a holder of stock which at the time of the act complained of was held by a party who participated in the act, or acquiesced therein, or voted the stock therefor, cannot bring suit to set the transaction aside.⁵

Another important principle of law in this connection is that where the corporation is insolvent a stockholder cannot maintain a suit to hold the directors liable for fraud unless he alleges that the relief asked for will be of some benefit to him; in other words, that there will be a surplus for the stockholders after the creditors are paid.⁶

Moreover it is not every illegal act of a corporation that is *ultra vires*, in the sense that a stockholder may object. It has been held in England that a discrimination in rates by a railroad company cannot be the basis of a suit by a stockholder to prevent it.⁷

1 Le Warne v. Meyer, 38 Fed. Rep. 191 (1889).

2 Mayer v. Denver, etc. R. R., 38 Fed. Rep. 197 (1889).

3 See § 736, *infra*.

4 See § 737, *infra*.

5 See §§ 40, 730, *supra*.

6 Darragh v. Wetter Mfg. Co., 78 Fed. Rep. 7 (1897); Corning v. Barrett, 48 N. Y. Supp. 1013 (1898). See also Smith v. Hurd, 53 Mass 371, 385 (1847). Where one corporation buys out another, a stockholder of the former cannot complain, even though a large amount of watered stock was

issued in payment, and even though the directors of the purchasing company were personally interested in the selling company and had made large profits in the construction of the work, it appearing that the purchasing company had *no property at all* at the time of the purchase. In such a case no damage is done to the stockholder, and hence suit by him does not lie. Smith v. Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897). See also § 848, *infra*.

7 Anderson v. Midland Ry., [1902] 1 Ch. 369.

A stockholder who has been guilty of laches, or against whom the statute of limitations has run, cannot complain.¹

The smallness of the stockholder's interest will not prevent his instituting a stockholder's suit to remedy a corporate wrong. An owner of one share is to be protected by a court of justice equally with the owner of a thousand shares. The old doctrine of *de minimis non curat lex* has sometimes been applied to this class of cases, but such decisions are not in accord with the weight of authority. If there are no suspicious circumstances connected with the suit, and a perfectly clear case is made out, this maxim of the law will not be applied to a case of this character.²

¹ See ch. XLIV, *supra*.

² *Armstrong v. Church Soc.*, 13 Grant, Ch. (U. C.) 552 (1867), the court saying: "Every member of a corporation has a right to object to any illegal diversions of its funds; and in this respect those who contribute most have no greater rights than those who contribute least;" *Seaton v. Grant*, L. R. 2 Ch. 459 (1867), where the court said the maxim did not apply, since the stockholder sued not on his own behalf alone, but for himself and others. However, in the case of *Dannmeyer v. Coleman*, 11 Fed. Rep. 97 (1882), the court said: "It is always a suspicious circumstance where a single stockholder among a large number in a corporation rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim *de minimis non curat lex* very properly applicable." Cf. *Ithaca Gaslight Co. v. Treman*, 93 N. Y. 660 (1883). If the complaining stockholder has but a small interest, he is aided only where he makes out a clear case. *Benedict v. Western Union Tel. Co.*, 9 Abb. N. Cas. 214, 222 (1878); *Gere v. New York Central*, etc. R. R., 19 Abb. N. Cas. 193 (1885); *Reiff v. Western Union Tel. Co.*, N. Y. D. Reg., Aug. 23,

1887. The owner of a single share of stock in a street railway company may file a bill to enjoin the company from issuing stock and bonds to a construction company, where the par value of the stock and bonds is greater than the value of the construction work, and the construction company already controls the railway company and its board of directors. *Montgomery Traction Co. v. Harmon*, 140 Ala. 505 (1904). The amount of stock held by the plaintiff is to be considered when the good faith and good judgment of the act complained of is questioned. *Tanner v. Lindell Ry.*, 180 Mo. 1 (1904). A small stockholder may maintain a bill. *Teller v. Tonopah*, etc. R. R., 155 Fed. Rep. 482 (1907). A corporation organized to work and deal in mines may by a majority vote of its officers sell its mines, even though that is all the property it has and the price may be stock of another corporation to be received in exchange *pro rata*. The transaction cannot be set aside by one who buys stock which was not voted. Moreover, a holder of \$25 worth of stock cannot enjoin a sale by those owning ninety-three per cent. of the entire capital stock. Such a sale is valid, although there were directors in common. *Pitcher v. Lone*, etc. Co., 39 Wash. 608 (1905). Where the owner of one hundred shares out of seventy-four thousand shares files a bill to restrain the

The stockholders cannot join with the corporation in bringing company from engaging in business not provided for in its charter, he must show a very clear case before he will be granted any relief, and must show that neither he nor any prior owner of his stock has acquiesced in such corporate business. *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of stock. *Geer v. Amalgamated, etc. Co.*, 61 N. J. Eq. 364 (1901). A court has no power as against the dissent of minority stockholders and bondholders, however small their holdings, to reorganize the company by authorizing the receivers to lease the property for a long period of time and allow the lessee to place a large mortgage on the property, even though the proceeds of the mortgage are to be used for rebuilding the property, especially where the rebuilding is not subject to the orders of the court or the wishes of the security holders. The court has no such power, even though the system is made up of a great many different street railways with different franchises, some of which have lapsed and there is danger that the entire property will be lost if the offer of the city to grant a new franchise on certain terms is not accepted. *Merchants', etc. Co. v. Chicago Rys.*, 158 Fed. Rep. 923 (1907), rev'g *Guaranty T. Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 913 (1907). Thereupon the trustees in their foreclosure suit applied for decrees of foreclosure and petitioned the court in the meantime to have the company operated by the reorganized company, and the court so ordered. *Guaranty Trust Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 1015 (1908). In *Montreal Tel. Co. v. Low*, 27 Lower Can. Jur. 257, 283 (1883), the court refused to set aside a lease at the instance of the holder of a single share, especially as he showed no injury to that share. In the case of *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1889), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

A minority stockholder may enjoin the sale of all the assets of a prosperous corporation to another corporation for stock of the latter, even though the selling corporation offers to give to such minority stockholder a bond that the dissenting stockholders should receive the value of their stock. A court has no power to compel dissenting stockholders to so dispose of their shares *in invito*. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). In the case of *Arents v. Blackwell's, etc. Co.*, 101 Fed. Rep. 338 (1900), where the holders of 159,769 shares out of 160,000 shares of the stock of a tobacco company wished to accept the offer of another company to buy it out for \$2,800,000,

the suit.¹ Indeed, the proper party to institute the suit is the corporation, and it is only because the corporation fails to do so that a stockholder may bring the suit where fraud or *ultra vires* is involved. But both cannot join in bringing the suit. A fraudulent decree of foreclosure may subsequently be attacked by the corporation itself after it has passed into other hands, even though the officers, directors and stockholders who were such at the time of the foreclosure acquiesced therein.² The subject of the intervention of stockholders in suits carried on by the corporation is considered elsewhere.³

and a person had purchased one share for the purpose of stopping the sale and having the charter repealed, the court appointed a receiver to sell the property as preliminary to a dissolution and distribution of the assets.

In *Charleton v. Newcastle etc. Ry.*, 5 Jur. (N. S.) 1096 (1859), the court said: "A single shareholder, holding five or ten shares or less, is perfectly justified in applying to the court to restrain a company, on behalf of himself and the other shareholders, by injunction, from committing any illegal act beyond their powers. It does not signify if all the other shareholders are pitted together against this holder of ten shares; the court holds it is better for the real interests of the company that they should obey the law, and any one single shareholder who invokes the aid of the court is entitled to its aid for that purpose." See also, to the effect that the holder of a single share may bring the suit. *Beman v. Rufford*, 1 Sim. (N. S.) 550, 564 (1851); s. c., 6 Eng. L. & Eq. 106; *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381, 395 (1859); *Kean v. Johnson*, 9 N. J. Eq. 401, 410 (1853), reviewing the cases; *Gifford v. New Jersey R. R.*, 10 N. J. Eq. 171 (1854); *Elkins v. Camden, etc. R. R.*, 36 N. J. Eq. 5 (1882). As to the right of the owner of one share of stock to enjoin an election, see *Greenough v. Alabama, etc. R. R.*, 64 Fed. Rep. 22 (1894).

¹ *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1889). Where a cor-

poration has abandoned business for many years, and has no known board of directors, a stockholder may file a bill to wind up its affairs, but he should not join the corporation as a complainant with himself. In such a case no request to the directors is necessary. *Tennessee, etc. Co. v. Ayers*, 43 S. W. Rep. 744 (Tenn. 1897). See also § 629, *supra*. In the case *Pender v. Lushington*, L. R. 6 Ch. D. 70 (1877), the complaining stockholder joined the corporation as a party plaintiff and the court refused to strike out its name. In the case *Chicago, etc. Co. v. Baggiano*, 202 Ill. 312 (1903), the corporation was joined as a party plaintiff by the stockholder who brought the suit.

² *Pacific R. R. of Mo. v. Missouri, etc. Ry.*, 111 U. S. 505 (1884). A consolidated company may maintain a suit against a director of one of the constituent companies for fraudulently, at the time of consolidation, causing an issue of a large amount of stock to him out of the treasury stock for past services, which stock was thereupon exchanged for stock in the constituent company, especially where such director as trustee of the treasury stock of both companies controlled them and voted such stock for the consolidation, and also voted proxies obtained on a notice of the meeting, which did not state that his compensation was to be voted upon. *United, etc. Co. v. Smith*, 44 N. Y. Misc. Rep. 567 (1904).

³ See § 750, *infra*.

May a corporate creditor institute a suit to make the officers account for a fraudulent or *ultra vires* act? A simple creditor certainly cannot. Until judgment is obtained and execution is returned unsatisfied, the corporate creditor has no interest in any specific corporate property. Moreover, in case his debt is finally paid, he has no interest in the management or assets of the corporation, nor in the acts of its officers and stockholders.¹

1 Simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity to obtain a seizure of their debtor's property and collect unpaid subscriptions and apply the same to the payment of their debts, even though they allege that an existing mortgage on the property is fraudulent, and that the company is insolvent, and a bill of foreclosure of the mortgage is going on. Under certain conditions they might intervene. *Hollins v. Brierfield Coal, etc. Co.*, 150 U. S. 371 (1893), stating also that the federal courts will not even follow a state statute authorizing such a suit, nor does the fact that the foreclosure suit is in the federal court give jurisdiction of the creditor's suit. The court said: "Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, give to a simple contract creditor of the corporation any lien on its property, or charge any direct trust thereon." The court also held that the capital stock is a trust fund rather in the administration of the assets after possession by a court of equity than a trust attaching to the property as such for the direct benefit of either creditor or stockholder. Before a corporate creditor can attack a transfer of its property he must obtain judgment against the corporation. *Williams v. Commercial Nat. Bank*, 91 Pac. Rep. 443 (Ore. 1907). Before a corporate creditor can complain of the method in which the corporation has disposed of his property he must obtain judgment. *McKee v. City Garbage Co.*, 140 Mich. 497 (1905). A general creditor must first obtain a judgment against the corporation before filing a bill in equity to enforce such claim. *Virginia, etc. Co. v. Fisher*, 104 Va. 121 (1905). A creditor cannot charge directors with wasting assets unless he has established his claim at law or in equity and has exhausted other assets of the corporation in payment thereof. *Edwards v. National, etc. Assoc.*, 58 Atl. Rep. 527 (N. J. 1904). A policyholder in a mutual insurance company, without capital stock, may be granted a mandamus to be allowed to see the list of policyholders, but not where he is a professional litigant, and to allow him to see the list would divulge private and personal information. *People v. New York, etc. Co.*, 111 N. Y. App. Div. 183 (1906). Persons having an unexpired contract with a corporation cannot intervene to prevent a foreclosure, even though they allege that the foreclosure is collusive and fraudulent. *Wightman v. Evanston, etc. Co.*, 217 Ill. 371 (1905), the court holding that the right to intervene is very limited and the powers of the intervener still more limited. A corporate creditor who has not obtained judgment against the corporation cannot hold a director liable for assets which the latter has appropriated. *Ready v. Smith*, 170 Mo. 163 (1902). A corporate creditor seeking to set aside a fraudulent sale to a director must allege a judgment at law, and execution unsatisfied, or that the company has no property. *Kittel*

After judgment has been obtained, however, and execution returned unsatisfied, a corporate creditor may follow the corporate assets into the hands of corporate officers or of third persons who have received such assets fraudulently and to the injury of creditors. This principle applies where the corporation sells out all its property to another corporation in exchange for the stock or bonds of the latter.¹ Corporate creditors may also, under some circumstances, complain of the issue of "watered" stock,² illegally issued bonds,³ illegal dividends,⁴ and of the purchase by the corporation of its stock.⁵ But a creditor of the corporation cannot complain of "watered" stock issued after he became a creditor,⁶ nor of bonds issued at less than par before he became a creditor.⁷ Moreover, there is no such fiduciary relation between the directors and the creditors as there is between the directors and the stockholders. For instance, directors are not personally liable to creditors of the company for authorizing a transfer of the property of the company to another corporation in payment for stock in such latter corporation. A creditor cannot attack a corporate transfer as *ultra vires*, but can only attack it as fraudulently diverting corporate assets.⁸ Many acts which would be fraudulent or illegal as against the stockholders are not so as against the creditors. A large number of illustrations of this important rule are given in the notes below.⁹ And even

v. Augusta, etc. R. R., 65 Fed. Rep. 859 (1895). A simple contract creditor of a company cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt. *Mills v. Northern Ry. etc.*, L. R. 5 Ch. App. 621 (1870). A general creditor who has not obtained a judgment against the corporation cannot hold directors liable for unauthorized acts. *Streight v. Junk*, 59 Fed. Rep. 321 (1893). *Cf.* §§ 848, 863, *infra*.

Where the corporation has been dissolved, and hence a judgment against it cannot be obtained, general creditors may file a bill in equity to reach assets illegally transferred away by the corporation. The suit must be in behalf of all creditors. All the transferees may be brought into one suit. *Pullman v. Stebbins*, 51 Fed. Rep. 10 (1892). As to other excep-

tions, authorizing a simple creditor to sue, see *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7, 16 (1891). A creditor of an insolvent bank may hold the directors liable for allowing the president to borrow, without good security, an unreasonably large sum, and for allowing him to purchase stock of the bank with bank funds. Such suit must be for the benefit of all creditors, and the results of the suit will be administered by the court. *Gores v. Day*, 99 Wis. 276 (1898).

1 See ch. XL, §§ 672-674, *supra*.

2 See ch. III, *supra*.

3 See ch. XLVI and § 848.

4 See ch. XXXII, *supra*.

5 See § 311, *supra*.

6 See §§ 42, 46, *supra*, and § 848, *infra*.

7 See § 848, *infra*.

8 *Force v. Age-Herald Co.*, 136 Ala. 271 (1903). *Cf.* § 672, *supra*.

9 "The officers of a corporation act

where creditors do maintain such a suit, there is authority for the

in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." *Hollins v. Brierfield Coal, etc. Co.*, 150 U. S. 371, 385 (1893). Corporate creditors cannot have set aside an old sale of land by the corporation to the directors through "dummies," even though the sale was at a totally inadequate price. *Graham v. Railroad Co.*, 102 U. S. 148 (1880). Creditors cannot object to a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890). A corporate creditor cannot complain that a director has purchased property needed by the corporation. *Cornell v. Clark*, 104 N. Y. 451 (1887). Where, upon foreclosure of corporate property, the president and manager of the corporation purchases the property at its full value, other judgment creditors of the corporation cannot attack his purchase. *Inglehart v. Thousand, etc. Co.*, 109 N. Y. 454 (1888). A creditor of an insolvent bank cannot cause to be set aside a cancellation of a lease taken by the bank when prosperous, even though the bank built a building on the leased premises, it appearing that at the time of the cancellation the property was not paying fixed charges and the stockholders assented to the cancellation, which was made prudently and in good faith and was known to the creditor who subsequently complained on account of a rise in values. *Brown v. Schleier*, 194 U. S. 18 (1904). A creditor of a corporation may object to a mortgage given to secure the individual debts of its stockholders incurred in purchasing stock in the corporation, even though the creditor became such after the transaction. *In re Haas Co.*, 131 Fed. Rep. 232 (1904). Depositors in a national bank may join in maintaining a single suit against directors for negligence in conducting the affairs of the bank, it having become insolvent thereby. *Boyd v. Schneider*, 131 Fed. Rep. 223 (1904). A creditor of an insolvent mutual insurance company that is in the hands of a receiver may file a bill in behalf of himself and other creditors for the removal of the receiver for incompetency and for the purpose of holding the directors personally liable for malfeasance in office. *Powell v. Hinkley*, 93 N. Y. App. Div. 138 (1904). A depositor in a savings bank may maintain a bill in equity to prevent dissolution thereof, where the purpose is to turn over the business to a trust company. *Barrett v. Bloomfield Sav. Inst.*, 64 N. J. Eq. 425 (1903). A holder of a contract of a corporation, whereby he is to be entitled to a diamond on payment of certain money, is not a stockholder and cannot have a receiver appointed because of mismanagement. *Mann v. German, etc. Co.*, 70 Neb. 454 (1903). Persons who have been induced by fraud to purchase the debentures of a company which has become insolvent may file a bill in equity to wind up its affairs and to prevent the officers illegally taking its assets, even though the debentures are not yet matured. *Christian v. Michigan, etc. Co.*, 134 Mich. 171 (1903). A depositor in a bank which has gone into liquidation may maintain a suit to compel the president to turn over to the bank property which belongs to it. *Dundon v. McDonald*, 146 Cal. 585 (1905). In a judgment creditor's suit against the president to set aside a deed of corporate property to him, he cannot question the validity of the

proposition that only those creditors who complain are entitled to

judgment already obtained by the creditor against the corporation. *Johnson v. Stebbins, etc. Co.*, 177 Mo. 581 (1903). A creditor cannot hold the directors liable for *ultra vires* acts, such acts not having been with him. *Dietrich v. Rothenberger*, 75 S. W. Rep. 271 (Ky. 1903). Where the company has been dissolved corporate creditors who are unpaid may maintain a suit to hold the directors liable for misappropriating the funds. *Lewisohn v. Stoddard*, 78 Conn. 575 (1906). Where with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays in connection with the contract. *Griffith v. Blackwater, etc. Co.*, 55 W. Va. 604 (1904). A judgment creditor of a corporation may bring suit to recover corporate property converted by an individual and may join both the corporation and such individual. *Oyster v. Iola Min. Co.*, 140 N. C. 135 (1905). A creditor cannot complain of salaries paid prior to his becoming a creditor. *Commercial, etc. v. Warthen*, 119 Ga. 990 (1904). A bondholder may maintain a suit to enjoin the collection of illegal taxes. *Commissioners, etc. Co. v. Bancroft*, 203 U. S. 112 (1906). Where, in a foreclosure suit and before sale, the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. *Farmers', etc. Co. v. Missouri, etc. Ry.*, 21 Fed. Rep. 264 (1884). In a suit by creditors to hold directors personally liable for violating the statutes in the

conduct of the corporate business, the creditors must clearly set forth the character and existence of the amount they claim. *Boston, etc. R. R. v. Parr*, 104 Fed. Rep. 695 (1900). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and a delay of three or four years, during which others become creditors of the new corporation and the latter becomes insolvent, will bar his claim of an equitable lien on the assets. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). A creditor of an insolvent corporation who causes its property to be sold under execution cannot complain that a director purchased at the sale at a low price. *Potvin v. Denney Hotel Co.*, 26 Wash. 309 (1901). In a stockholder's suit against the directors for fraud a corporate creditor cannot intervene. *Smith v. Geo. T. Smith, etc. Co.*, 119 Mich. 11 (1898). Under the statutes of Wisconsin a corporate creditor may hold the directors liable for misconduct, although there exists no relationship of trustee and *cestui que trust*. *Killen v. Barnes*, 106 Wis. 546 (1900). A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that the transaction was not duly authorized by the board of directors or signed by the proper officers, where he has participated in the results of their action. *Swentzel v. Franklin, etc. Co.*, 168 Mo. 272 (1902). In a suit by a corporate creditor against the corporate officers to reach funds which they had diverted, it is not necessary that all of the wrong-doers be joined as defendants. *Morrison v. Blue Star, etc. Co.*, 26 Wash. 541 (1901). A corporate creditor cannot hold a director liable for a profit which he has made in purchasing a property at a foreclosure sale, even though the corporation was

the benefit of the decree.¹ Directors may not be liable to corporate

the equitable mortgagor of such property. *Ready v. Smith*, 170 Mo. 163 (1902). Corporate creditors cannot object that the corporation sold property to directors, where the sale has been ratified by the stockholders as well as directors. *Crymble v. Mulvaney*, 21 Colo. 203 (1895). A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president. *Hook v. Ayers*, 63 Fed. Rep. 347 (1894); s. c., 64 Fed. Rep. 660. A creditor whose debt was incurred after the directors' negligence complained of cannot sue in equity for false representations. Nor are the directors liable as trustees for the stockholders. They are liable in equity for moneys belonging to the company and received by them, but no farther. *Landis v. Sea Isle, etc. Co.*, 53 N. J. Eq. 654 (1895). Where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company, who seeks to set the sale aside on the ground that the mortgage was invalid, is in the position of one who asks to be let in to redeem from a mortgagee in possession under an unexpired mortgage. He cannot in the same action ask that the purchaser at foreclosure sale, who is about to bond the property, shall pay the judgment creditor's claim out of such bonds. *Meriman v. Chicago, etc. R. R.*, 64 Fed. Rep. 535 (1894). Where one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the lat-

ter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply. *Sidell v. Missouri Pac. Ry.*, 78 Fed. Rep. 724 (1897). Creditors cannot object to a contract between the corporation and a director, where the stockholders have assented thereto and the contract is a fair one. *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890). A creditor cannot complain of a mortgage or deed from his debtor, a corporation, even though the mortgage and deed were to another corporation having the same board of directors as the debtor corporation. A stockholder might complain, but there is no fiduciary relation between corporate creditors and directors. The mortgage was given when the company was solvent, and the deed after it became insolvent. *O'Connor, etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614 (1891). The creditors of a corporation are not allowed to attack a corporate mortgage on the ground that its stockholders did not authorize it, as required by statute. *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889). A general creditor cannot intervene the same as a stockholder. *Kansas, etc. Ry. v. Fitzgerald*, 33 Neb. 137 (1891). Where a corporation is insolvent or threatened with insolvency, a judgment creditor may maintain a suit to hold the directors liable for misapplication of corporate assets under the Wisconsin statute. *State v. Milwaukee, etc. Co.*, 116 N. W. Rep. 900 (Wis. 1908). It is difficult for a corporate creditor to seek collection by making out a conspiracy. *Brackett*

¹ See §§ 42, 46, *supra*, and § 848, *infra*.

creditors for negligence in the management of the affairs of the corporation.¹

v. Griswold, 13 N. Y. Supp. 192 (1891). A suit in equity by a creditor of a national bank against a director for mismanagement does not lie where the statutes prescribe the remedy through the receiver. *National Exch. Bank v. Peters*, 44 Fed. Rep. 13 (1890). A creditor holding an unpaid promissory note cannot, by a bill in equity to collect the debt, unite with a claim that the company was not duly incorporated a claim to hold the directors liable for false representations, and also bring in a subsequent corporation that took all the assets of the first, as well as the persons who finally obtained such effects. *Jefferson Nat. Bank v. Texas Inv. Co.*, 74 Tex. 421 (1889). See also, in general, *Columbus, etc. R. R. v. Burke*, 20 Week. L. Bull. 287 (1888), and *Belden v. Burke*, referred to in § 766, note, *infra*; *Mills v. Northern Ry.*, L. R. 5 Ch. 621 (1870); *Consolidated, etc. Co. v. Kansas City Varnish, etc. Co.*, 45 Fed. Rep. 7 (1891), and §§ 830, 869, *infra*. For various suits which corporate creditors have sustained in this connection, see *Warner v. Hopkins*, 111 Pa. St. 328 (1885); *Lothrop v. Stedman*, 42 Conn. 583 (U. S. C. C. 1875); s. c., 15 Fed. Cas. 922; *Brown v. Orr*, 112 Pa. St. 233 (1886); but see *Balliet v. Brown*, 103 Pa. St. 546 (1883); *Pond v. Framingham, etc. Co.*, 130 Mass. 194 (1881); *Gravenstine's Appeal*, 49 Pa. St. 310 (1865); *Heath v. Erie Ry.*, 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976; *Currier v. New York, etc. R. R.*, 35 Hun, 355 (1885). See N. Y. Code Civ. Pro., §§ 1781, 1782; also *Conro v. Gray*, 4 How. Pr. 166 (1849); *Fisk v. Union Pac. R. R.*, 10 Blatchf. 518 (1873); s. c., 9 Fed. Cas. 167; *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301 (1875); s. c., 13 Fed. Cas. 100; *Van Weel v. Winston*, 115 U. S. 228 (1885); *Cole v. Knickerbocker, etc. Co.*, 23 Hun, 255 (1880); *aff'd*, 91 N. Y. 641; *Mills v. Northern Ry.*, L. R. 5 Ch. 621 (1870); *Paulsen v. Van Steenberg*, 65 How. Pr. 342 (1883). In *Bewley v. Equitable Life Ass. Soc.*, 61 How. Pr. 344 (1881), where a policyholder sought to hold liable for misuse of funds the directors who were elected by the holders of the \$100,000 of stock of that corporation, it was held that the action by him would not lie. If he had been a judgment creditor and the corporation had been insolvent, a different rule would have applied, thus distinguishing *Evans v. Coventry*, 5 De G., M. & G. 911 (1854); *Aldebert v. Leaf (or Kearns)*, 1 Hem. & M. 681 (1864); *Re State F. Ins. Co.*, 11 W. R. 746 (1863); *Belknap v. North America, etc. Co.*, 11 Hun, 282 (1877). Judgment creditors may attack a preference to other creditors forbidden by statute. *Wood v. Sidney, etc. Co.*, 92 Hun, 22 (1895). Where all the corporate assets have been misappropriated by the stockholders, corporate cred-

¹ *Deadrick v. Bank of Com.*, 100 Tenn. 457 (1898). Corporate creditors cannot hold directors liable for mere non-feasance, but a receiver may hold them liable. *Stone v. Rottman*, 183 Mo. 552 (1904). The directors of a banking corporation are not liable to its creditors for violation or neglect of duty, there being no deceit. *Hart v. Hanson*, 14 N. Dak. 570 (1895). Bank directors who are guilty of neg-

ligence in the management of the bank may be held liable by a depositor. *Wolfe v. Simmons*, 75 Miss. 539 (1898). A suit by depositors to hold the directors personally liable for negligence in the management of a bank must be for the benefit of the assignee of the bank, and both the assignee and the bank must be joined as parties. *Gores v. Field*, 109 Wis. 408 (1901).

A judgment creditor's remedy is not at law,¹ but is in equity,² and may be by intervention.³ The trustee of a corporate mortgage or a bondholder secured by such mortgage may sue to protect the mortgaged property.⁴

Where a receiver has been appointed, it is for him and not for a stockholder to hold the directors responsible for mismanagement of the corporation.⁵ A receiver may hold liable a director, where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation and the company becomes insolvent.⁶ A receiver may bring an action against

itors may unite in a bill in equity to compel restitution. *Ellis v. Pullman*, 95 Ga. 445 (1895). A bill by judgment creditors to set aside illegal conveyances to directors, and to enforce a statutory liability and also a subscription liability, is multifarious. *Von Auw v. Chicago Toy, etc. Co.*, 70 Fed. Rep. 939 (1895). Directors are liable for damages in an action on the case brought by depositors in a bank after it was insolvent, the directors having neglected to know of the insolvency. *Delano v. Case*, 121 Ill. 247 (1887), aff'g 17 Ill. App. 531. See § 701, *supra*, as to a request to the receiver to sue. For a suit by a creditor against directors under the Wisconsin statute, see *Hurlbut v. Marshall*, 62 Wis. 590 (1885). A stockholder who participates in a corporate act cannot, as a corporate creditor, attack that act. *Fort Madison Bank v. Alden*, 129 U. S. 372 (1889). See *Mellen v. Moline, etc. Works*, 131 U. S. 352 (1889); *Le Warne v. Meyer*, 38 Fed. Rep. 191 (1889). The creditors of an insolvent partnership are not entitled to a receiver of a corporation, even though they allege that one of the partners is president and is mingling the business of the two concerns in such a manner as to defraud the partnership. *Cabaniss v. Reco, etc. Co.*, 116 Fed. Rep. 318 (1902).

¹ *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508 (1891).

² *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7 (1891); *Pullman v. Stebbins*, 51

Fed. Rep. 10 (1892); *Cummings v. American Gear, etc. Co.*, 87 Hun, 598 (1895).

³ See § 848, *infra*.

⁴ A trustee of a mortgage may file a bill to prevent an illegal reduction of the rates of the mortgagor company. See § 816, *infra*.

⁵ *Howe v. Barney*, 45 Fed. Rep. 668 (1891). Where the receiver is authorized to commence suit for the benefit of such corporations as come in and give security for the cost and expenses of such suit, the suit being against stockholders, the defendants cannot defend on the ground that some of the creditors purchased their claims for the sole purpose of coming in under such order of the court. *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902).

⁶ *Pierson v. Cronk*, 13 N. Y. Supp. 845 (1890); *Mason v. Cronk*, 125 N. Y. 496 (1891). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the insolvent bank through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. *Bridgens v. Dollar Sav. Bank*, 66 Fed. Rep. 9 (1895). The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been disposed of by another corporation may hold its directors liable for the loss, and his suit may be at law

directors to hold them liable for negligence.¹ But a stockholder or creditor may sometimes hold a director liable for negligence where a receiver cannot.² The receiver of an insolvent railroad corporation may file a bill in equity to compel the directors and their attorney to repay corporate funds which they divided among themselves.³ Where an insolvent corporation has illegally transferred its property, a permanent receiver may bring a suit at law for conversion instead of suing in a court of equity.⁴ A receiver may bring suit to set aside illegal transfers of property which have been made by the corporation to the directors.⁵ Where a receiver has been appointed, he may bring an action to compel stockholders to refund corporate moneys which they have taken after paying in the same on their subscriptions,⁶ or a judgment creditor may bring it.⁷ If the receiver refuses to bring such an action, a creditor may apply to the court for permission to bring it, making the receiver a party defendant.⁸ A receiver cannot sue himself, and hence a creditor may bring the suit where the receiver is one of the defendants.⁹

or in equity. *Mason v. Henry*, 152 N. Y. 529 (1897). As to whether the suit is at law or in equity, see also § 701, *supra*. Where the officers and directors, in a conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first named directors are personally responsible for their action and a receiver of the corporation may hold them liable. *Bosworth v. Allen*, 168 N. Y. 157 (1901).

¹ See § 701, *supra*.

² *Briggs v. Spaulding*, 141 U. S. 132, 150 (1891). A receiver of an insolvent corporation appointed by a court of equity can maintain only such suits as the corporation can maintain, and cannot maintain a suit which a dissenting stockholder might maintain to compel another stockholder in a building association to return to the corporation a note which had been canceled for stock. *Young v. Stevenson*, 180 Ill. 608 (1899). See also § 869, *infra*.

³ *Gindrat v. Dane*, 4 Cliff. 260 (1874); s. c., 10 Fed. Cas. 434.

⁴ *McQueen v. New*, 45 N. Y. App. Div. 579 (1899).

⁵ *Jones v. Blun*, 145 N. Y. 333 (1895); *Varnum v. Hart*, 119 N. Y. 101 (1890); *Dutcher v. Importers', etc. Nat. Bank*, 59 N. Y. 5 (1874); *Robinson v. Bank of Attica*, 21 N. Y. 406 (1860); *Brouwer v. Harbeck*, 9 N. Y. 589 (1854); *Milbank v. De Riesthal*, 82 Hun, 537 (1894); *Nealis v. American Tube, etc. Co.*, 76 Hun, 220 (1894); *aff'd*, 150 N. Y. 42; *Milbank v. Welch*, 74 Hun, 497 (1893); *Kingsley v. First Nat. Bank*, 31 Hun, 329 (1884).

⁶ *South Bend, etc. Co. v. Pierre F. & M. Ins. Co.*, 4 S. D. 173 (1893).

⁷ Even though a receiver is in charge, yet a judgment creditor may file a bill to compel a stockholder to pay back an illegal dividend and also to account for property transferred to him by the corporation for a portion of his stock, the receiver being made a party defendant. *Bowker v. Hill*, 115 Fed. Rep. 528 (1879).

⁸ See § 740, *infra*.

⁹ *Dilzell, etc. Co. v. Lehmann*, 45 S. Rep. 138 (La. 1907). See also § 869, *infra*.

In Massachusetts it is held that a receiver cannot maintain a suit to hold promoters liable for fraud, but the suit must be in the name of the corporation.¹

A receiver must obtain special permission from the court before commencing suit against directors for negligence and against stockholders to hold them liable on stock issued in payment for property at an alleged overvaluation.² The right of a receiver to bring suit in a foreign jurisdiction to hold a stockholder liable for stock and bonds illegally issued is limited.³ A stockholder may bring a suit in behalf of the corporation where the directors are guilty of a fraud, even though a receiver of the corporation has been appointed in another state.⁴ A stockholder in this class of cases should not sue in the double capacity of stockholder and creditor.⁵

The attorney-general cannot maintain a suit to recover back funds and to remove directors of a street railway company on account of their using corporate funds to bribe public officers and obtain franchises.⁶

§ 736. *Rule when the plaintiff stockholder sues in the interest of a rival company, or purchases stock for the purpose of bringing suit.*—The law is well settled that if a stockholder institutes a suit

¹ Where promoters pay out less than \$30,000 to secure options on land and then sell the options to a corporation for \$700,000 of stock to the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver,

according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900).

² *Simmons v. Taylor*, 106 Tenn. 729 (1901). Even though valid claims exist against directors for misconduct, and even though in proceedings to wind up the corporation they have filed claims as creditors, yet it is not the proper procedure to allow the receiver to file an answer and set-off in that suit, especially where no process is issued against the directors requiring them to answer. An order might have been entered withholding any distribution of assets to them until the claim against them had been litigated. *Youtsey v. Hoffman*, 108 Fed. Rep. 693 (1901).

³ *Great Western, etc. Co. v. Harris*, 198 U. S. 561 (1905).

⁴ *Fitzgerald v. Fitzgerald, etc. Constr. Co.*, 41 Neb. 374 (1894). As to a suit after dissolution, see § 741, *infra*.

⁵ See § 739, *infra*.

⁶ *State v. Milwaukee, etc. Co.*, 116 N.

in behalf of himself and other stockholders to enjoin or to bring to an accounting the corporate directors, and such suit is instituted, not to protect and benefit the stockholders' interest in the corporation, but to benefit some other corporation, the court will refuse to entertain the suit and will dismiss it.¹ The application of a stockholder herein to a court of equity will not be denied, however, merely because it is for the interest of the public or of the corporation, or of the stockholder himself, that the act complained of be allowed to stand. The law does not depend on the opinion of the court as to the benefit of the act.²

The common law clearly is that a stockholder has the same right to bring the suit that his transferrer had, even though he purchased the stock for the purpose of bringing the suit.³ The law has nothing

W. Rep. 900 (Wis. 1908). See also § 635, *supra*.

¹ A bill filed by a stockholder under the terms of a statute to bring about a dissolution and winding up of the corporation will be dismissed where it is shown that the suit is brought in the interest of rival corporations. The reason for dismissal is that the suit is a fraud upon the court. *Watson v. Le Grand, etc. Co.*, 177 Ill. 203 (1898). A preliminary injunction restraining a lease of one street railway to another will not be granted at the instance of a stockholder in the former company, where such stockholder does not deny that he has brought the suit in the interest of a competing steam railroad. *Jenkins v. Auburn City Ry.*, 27 N. Y. App. Div. 553 (1898). If the plaintiff is merely a nominal holder and is acting in the interest of a rival company, his suit will be dismissed. *Breeze v. Lone, etc. Co.*, 39 Wash. 602 (1905). The difficulty herein is in proving that the complainant is suing for the rival company. If, however, the latter is paying the costs of the suit, that is sufficient proof. *Forrest v. Manchester, etc. Ry.*, 4 De G., F. & J. 126 (1861); *Belmont v. Erie Ry.*, 52 Barb. 637 (1869); *Filder v. London, etc. Ry.*, 1 Hem. & M. 489 (1863); *Camblos v. Philadelphia, etc. R. R.*, 4 Brewst. 563 (U. S. C. C. 1873); s. c., 4 Fed. Cas.

1089; *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157 (1867); *Rogers v. Oxford, etc. Ry.*, 2 De G. & J. 662 (1858). Where the stockholder's suit is brought at the instance of a competing company, which directs the suit and pays the costs, the suit will fail. *Beshoar v. Chappell*, 6 Colo. App. 323 (1895). See, however, *Dinsmore v. Central R. R.*, 19 Fed. Rep. 153 (1883), holding that the fact that the complainant stockholder has business relations with the rival company and is aided by it in preparing his case is no bar, and that, if it were, the objection is to be raised by a plea in abatement. *Ffooks v. Southwestern Ry.*, 1 Sm. & G. 142 (1853). See also where this defense failed. *Sandford v. Railroad*, 24 Pa. St. 378 (1855); *Colman v. Eastern Counties Ry.*, 10 Beav. 1 (1846), where a rival company instigated the suit; *Central R. R. v. Collins*, 40 Ga. 582 (1869), where the plaintiff was interested in a rival company. *Jenkins v. Auburn, etc. Ry.*, 27 N. Y. App. Div. 553 (1898). See also §§ 386, 391, *supra*.

² *Hoole v. Great Western Ry.*, L. R. 3 Ch. 262 (1867); *Stevens v. Rutland, etc. R. R.*, 29 Vt. 545 (1851).

³ *Winsor v. Bailey*, 55 N. H. 218 (1875); *Bloxam v. Metropolitan Ry.*, L. R. 3 Ch. 337 (1868), where the complainant, on December 13, 1867, advertised to induce the stockholders to

to do with the motive of a legal act.¹ Parties, however, buying

combine; on January 15, 1868, purchased stock himself, and on January 25, 1868, commenced suit. So also see *Seaton v. Grant*, L. R. 2 Ch. 459 (1867), where the court sustained the suit, although it said: "He buys five shares in the company, and then files this bill in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this court, or, indeed, in any other court; and such conduct might be material at the hearing with reference to the amount of relief which the plaintiff could obtain, or whether he was entitled to any relief at all." Nevertheless the court said, also, that however questionable the mode of the plaintiff's introduction to the company may have been, he has an actual in-

terest in the subject-matter of the suit. See also *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883); *Atchison, etc. R. R. v. Fletcher*, 35 Kan. 236 (1886); *Ervin v. Oregon, etc. Nav. Co.*, 35 Hun, 544 (1885); s. c., 28 Hun, 269 (1882); *Young v. Drake*, 8 Hun, 61 (1876). A stockholder may enjoin the ratification by the stockholders of an *ultra vires* sale of all the property of a prosperous mining corporation to another corporation for stock of the latter, even though he purchased his stock after the sale had been made, such stock, however, not having voted for or acquiesced in such sale. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). The complaining stockholder need not show when and where he acquired his stock. *Montgomery, etc. Co. v. Lahey*,

1 Cases *supra*; also *Elkins v. Camden, etc. R. R.*, 36 N. J. Eq. 5 (1882); *Ramsey v. Gould*, 57 Barb. 398 (1870), where the motive was "bringing men to justice;" *Salisbury v. Metropolitan Ry.*, 38 L. J. (Ch.) 249 (1869); s. c., on further hearing, 22 L. T. Rep. 839. The right of a stockholder to enjoin an interference with an election is not defeated by the fact that a rival company purchased his stock for him. *Camden, etc. R. R. v. Elkins*, 37 N. J. Eq. 273 (1883). A bondholder's foreclosure is valid even though he purchased the bonds at the instigation of certain interests hostile to the railroad, and even though he expects those interests to protect him from loss. If he owns the bonds himself this is sufficient. *McFadden v. May's Landing, etc. R. R.*, 49 N. J. Eq. 176 (1891). The motive of a stockholder in instituting a suit to prevent the corporation converting bonds into stock is immaterial. *Hodge v. United States, etc. Corp.*, 64 N. J. Eq. 111 (1902). *MacGinniss v. Boston, etc. Co.*, 29 Mont. 428 (1904). *South Dakota v. North Carolina*, 192 U. S. 286

(1904). A purchaser of stock for the very purpose of enjoining an *ultra vires* act which will injure another enterprise of the plaintiff may obtain an injunction. *Carson v. Iowa City, etc. Co.*, 80 Iowa, 638 (1890). A person may buy stock to commence a suit. *Frothingham v. Broadway, etc. R. R.*, 9 N. Y. Civ. Proc. 304 (1886). But where a railroad contracts to run trains on Sunday, and afterwards a person buys five shares of stock and brings suit to enjoin the company, his real object being to preserve the Sabbath, equity will not aid him. *Sparhawk v. Union Pass. Ry.*, 54 Pa. St. 401, 453 (1867). As regards the motive of a stockholder, see also *Clark v. American Coal Co.*, 86 Iowa, 436 (1892). The motive of a bondholder foreclosing a mortgage is immaterial. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168, 177 (1894). The motive of the trustee in foreclosing is immaterial, even though such motive is to close out the minority stockholders. *Guardian, etc. Co. v. White Cliffs, etc. Co.*, 109 Fed. Rep. 523 (1901). See 46 S. Rep. 991.

stock for the mere purpose of bringing suit are not favored by the courts, and an injunction will be denied where their rights can be preserved by damages.¹

But where the transfer is merely nominal the transferee cannot bring such a suit, since he has no pecuniary interests of his own to protect, and equity will not aid him.²

§ 737. *Rule 94 in federal courts against suits by transferees.*—In the federal courts peculiar rules prevail. It was found that transfers of stock were frequently made for the purpose of securing jurisdiction of the case in the federal courts. Litigation that properly belonged to the state courts was added to the already over-

121 Ala. 131 (1899). Where property mortgaged to secure bonds is of doubtful value and there is a financial stringency in the market, a corporation may sell \$40,000 of its mortgage bonds and \$5,000 of its stock for \$33,000, and a subsequent purchaser of stock of the company with notice of the facts cannot attack the validity of the mortgage. The defense of usury is not good where the issue was made in New York state, although the corporation was organized in New Jersey. *Franklin T. Co. v. Rutherford, etc. Co.*, 57 N. J. Eq. 42 (1898). If, however, the transferer participated or acquiesced in the act complained of, then the transferee is also barred. See §§ 40, 730, *supra*. A person who acted as a broker in purchasing the stock of one railroad corporation for another railroad corporation cannot, by purchasing shares in the latter corporation, hold its directors personally liable for the *ultra vires* purchase. *Whitwam v. Watkin*, 78 L. T. Rep. 188 (1898). A stockholder who became such after the charter has been amended, authorizing a consolidation, cannot complain. *Colgate v. United States, etc. Co.*, 67 Atl. Rep. 657 (N. J. 1907). Where a corporation has purchased all the assets of another corporation and issued stock in payment of the same, the stockholder in the former who became a stockholder after the

transaction, cannot maintain a suit to have the issue declared void, especially where there is no offer to return the property. *Buford v. Keokuk, etc. Co.*, 69 Mo. 612 (1879), *aff'd* 3 Mo. App. 159.

¹ *Kingman v. Rome, etc. R. R.*, 30 Hun, 73 (1883). In the case of *Venner v. Atchison, etc. R. R. Co.*, 28 Fed. Rep. 589 (1886), the court said: "It would not be tolerable for a party to buy into a company with the purpose of invoking the aid of the courts to compel the company to desist from a policy which it was pursuing satisfactorily to its then stockholders." In a suit by a stockholder in a trust company to enjoin it from receiving deposits on the ground that its charter did not allow such action, the court said: "Whatever may be the plaintiff's motive in instituting such an action, it is clear that the suit is not for the purpose of promoting the interest of the other stockholders or the welfare of the corporation; and a court of equity might well hesitate to grant injunctive relief in a case wherein neither public nor private interests are to be protected." *Venner v. Farmers', etc. T. Co.*, 54 N. Y. App. Div. 271 (1900); *aff'd*, 176 N. Y. 549.

² Quoted and approved in *Breeze v. Lone, etc. Co.*, 39 Wash. 602 (1905). *M'Donnell v. Grand Canal Co.*, 3 Ir. Ch. Rep. (N. S.) 578 (1853); *Robson v. Dodds*, L. R. 8 Eq. 301 (1869).

burdened calendars of the United States courts.¹ Accordingly the supreme court of the United States made it a rule of the federal courts that a transferee of stock cannot sustain a stockholder's suit to remedy a corporate wrong which was perpetrated before he became a stockholder.² Equity rule 94 requiring an allegation that

¹ See the vigorous denunciation of such transfers by Mr. Justice Miller, in *Hawes v. Oakland*, 104 U. S. 450 (1881).

² Rule 94, as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified by oath, must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance." Promulgated January 23, 1882. (See 104 U. S. ix.) See *Dimpfel v. Ohio, etc. Ry.*, 110 U. S. 209 (1884). But see *Leo v. Union Pac. Ry.*, 17 Fed. Rep. 273 (1883); *s. c.*, 19 Fed. Rep. 283. In *Lafayette Co. v. Neely*, 21 Fed. Rep. 738 (1884), it is held that this rule does not bar the stockholder's right to bring the action after the dissolution of the corporation. Rule 94, in the United States court, against a purchaser of stock bringing suit on certain causes of action accruing before he purchases the stock, does not apply to causes removed from the state court. *Evans v. Union Pac. Ry.*, 58 Fed. Rep. 497 (1893); *Earle v. Seattle, etc. Ry.*, 53 Fed. Rep. 909 (1893). "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock." *United Elec. Securities Co. v. Louisiana Elec. Light Co.*, 68 Fed. Rep. 673, 675 (1895). See also *Whittemore v. Amoskeag Nat. Bank*,

26 Fed. Rep. 819 (1885); *rev'd on another point* in 134 U. S. 527; *Venner v. Atchison, etc. R. R.*, 28 Fed. Rep. 581 (1886). Under equity rule 94, one who purchases shares of stock in a corporation after a plan of reorganization has been adopted and partially carried out is not in a position to maintain a suit to set the same aside on the ground of fraud and neglect of duty by its trustees and other parties. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894).

The United States court has no jurisdiction of a stockholder's suit for a receiver unless the actual value of the stock owned by him exceeds \$2,000, and unless he was a stockholder when the acts complained of occurred, and unless he has made an earnest effort to secure relief by the corporation itself. *Robinson v. W. Virginia L. Co.*, 90 Fed. Rep. 770 (1898). A stockholder bringing suit in the federal court to cancel an alleged illegal issue of stock must allege a demand to the corporation or its receiver and a refusal to sue, and that he was a stockholder at the time of the transaction complained of, or that the stock has come to him since that time by operation of law. *Bimber v. Calivada, etc. Co.*, 110 Fed. Rep. 58 (1901). A purchaser of stock and bonds of an insolvent railroad company may maintain a suit in equity in the United States court for the appointment of a receiver, even though the stock and bonds were transferred to him for that purpose, the transfer being absolute. *Cole v. Philadelphia, etc. Ry.*, 140 Fed. Rep. 944 (1905). The supreme court of Montana in the case of *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898), points out that if the rule of the United States court

the plaintiff was a shareholder at the time of the transaction complained of, etc., does not prevent the court acquiring jurisdiction of the case, but the rule dismisses the complaint on the ground that it does not state facts sufficient to constitute a cause of action.¹ Where the complainant is merely the nominal holder of the stock, the defendant may set up that the complainant holds the stock merely to give jurisdiction to the United States court.² In a few of the states also the rule of the federal courts has been adopted that a subsequent stockholder cannot complain.³ The rule in the United States court that a stockholder cannot complain of matters which occurred before he became a stockholder, applies to a suit removed from the state court to the federal court, the court holding that this rule is based on equitable jurisprudence and is not due to arbitrary action on the part of the United States courts.⁴

§ 738. *Parties defendant herein—The corporation—Directors—Third persons—The receiver.*—The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong which the corporation itself should have remedied.⁵ This rule is due to the fact that the corporation is entitled

were applied in all courts the holders of stock purchased even in good faith after the doing of an *ultra vires* act would be without remedy in any court.

1 *Venner v. Great Northern Ry.*, 209 U. S. 24 (1908); *aff'g* 153 Fed. Rep. 408.

2 *MacVeagh v. Denver City W. W. Co.*, 85 Fed. Rep. 74 (1897).

3 *Alexander v. Searcy*, 81 Ga. 536 (1888). In Nebraska it is held that a purchaser of stock cannot complain of dividends illegally paid prior to his becoming a stockholder, where it would be inequitable to allow him to do so. *Home Fire Ins. Co. v. Barber*, 67 Neb. 644 (1903). A stockholder cannot complain of illegal salaries paid before he was a stockholder. *Rankin v. Southwestern, etc. Co.*, 12 N. Mex. 54 (1903).

4 *Venner v. Great Northern Ry.*, 153 Fed. Rep. 408 (1907); *aff'd*, 209 U. S. 24.

5 *Davenport v. Dows*, 18 Wall. 626 (1873). *Peck v. Peck*, 33 Colo. 421 (1905). *Coxe v. Hart*, 53 Mich. 557 (1884); *Black v. Huggins*, 2 Tenn. Ch. 780 (1877); *Samuel v. Holladay*, Woolw. 400 (1869); s. c., 21 Fed.

Cas. 306; *Allen v. New Jersey, etc. R. R.*, 49 How. Pr. 14 (1875); *Bagshaw v. Eastern Union Ry.*, 7 Hare, 114 (1849); *aff'd*, 19 L. J. (Ch.) 410; *Gregory v. Patchett*, 33 Beav. 595 (1864); *Charleston, etc. Co. v. Sebring*, 5 Rich. Eq. (S. C.) 342 (1853); *Brinckerhoff v. Bostwick*, 88 N. Y. 52 (1882); s. c., 105 N. Y. 567; *Bruschke v. Nord Chicago, etc. Verein*, 145 Ill. 433 (1893); *Mount v. Radford Trust Co.*, 93 Va. 427 (1896); *Hamilton v. Desjardins Canal Co.*, 1 Grant, Ch. (Can.) 1 (1849); *Putnam v. Ruch*, 54 Fed. Rep. 216 (1893); *Byers v. Rollins*, 13 Colo. 22 (1889); *Chicago v. Cameron*, 120 Ill. 447 (1887); *Stromeyer v. Combes*, 2 N. Y. Supp. 232 (1888); *American, etc. Co. v. Linn*, 93 Ala. 610 (1890). As to why the company must be made a party, see *Willoughby v. Chicago, etc. Co.*, 50 N. J. Eq. 656 (1892). In *Consolidated Water Co. v. Babcock*, 76 Fed. Rep. 243 (1896), the court held that where the owner of the bonds and most of the stock of a water company wished to enjoin the city from contracting with another water company in viola-

to be heard, a similar possible suit by the corporation is thereby prevented, and the remedy made effective against the corporation as well as others. The corporation is a necessary party defendant, and must be actually brought into court by service or otherwise, even though it is a foreign corporation and cannot be served and refuses to appear.¹ Stockholders who participate in the acts complained of may be joined as parties defendant, even though no relief is asked against them.² In a stockholder's suit to set aside an illegal transfer

tion of the rights of the former water company, the former water company was a necessary party to the suit. The company is a necessary party defendant and may be compelled to make a disclosure of the facts. *Spokes v. Grosvenor Hotel Co.*, [1897] 2 Q. B. 124. In a stockholder's suit to set aside a transfer of the corporate assets the corporation is a necessary party. *Eldred v. American, etc. Co.*, 105 Fed. Rep. 457 (1900), except where all the directors, officers, and stockholders are joined. *Kyle v. Wagner*, 45 W. Va. 349 (1898). In a suit by a stockholder to hold liable for fraud another corporation that owns a majority of the stock of his corporation, and has diverted its business so that it became insolvent, the suit must be in equity, and his corporation is a necessary party defendant. A direct suit at law will not lie. *Niles v. N. Y. etc. R. R.*, 69 N. Y. App. Div. 144 (1902); *aff'd*, 176 N. Y. 119. A stockholder may file a bill against the estate of the deceased president of the corporation to compel such estate to make good corporate property misappropriated by him, and such suit may be maintained even though no assets of the corporation came into the hands of the executrix of the estate, and even though the corporation itself is a foreign corporation. *Wineburgh v. United States, etc. Co.*, 173 Mass. 60 (1899). In a suit to enjoin a corporation from owning the stock of competing railroads, the latter are necessary parties defendant. *Minnesota v. Northern, etc. Co.*, 184 U. S. 199 (1902); *Taylor*

v. Southern Pac. Ry., 122 Fed. Rep. 147 (1903). In a suit by a dissenting stockholder to declare void an agreement of sale of the corporate assets to another company for stock of the latter, the vendee corporation is a necessary party defendant. *Doughty v. Lomagunda Reefs, Limited*, [1903] 1 Ch. 673. Where on a consolidation the president of a constituent company receives for the benefit of all the stockholders the stock in the new company and also certain assets of the old company, a stockholder in a suit to compel him to account must join the constituent company and also other stockholders. *Knickerbocker v. Conger*, 110 N. Y. App. Div. 125 (1905). The corporation is not a necessary party defendant if it has been dissolved. *Lewisohn v. Stoddard*, 78 Conn. 575 (1906).

¹ *Deming v. Beatty Oil Co.*, 72 Kan. 614 (1906). The corporation is a necessary party defendant, but if a non-resident, service may be made outside of the state. *Kidd v. New Hampshire, etc. Co.*, 72 N. H. 273 (1903). *Cf.* § 734, *supra*. *Cunningham v. Pell*, 5 Paige, 607 (1836), holding also that, if the corporation is foreign, service may be by publication.

² *Stone v. Pontiac, etc. R. R.*, 139 Mich. 265 (1905). Stockholders should not be joined as parties defendant, and the fact that all of them are joined does not obviate the necessity of alleging that the suit, which was against the president to account for funds misappropriated by him, was brought in behalf of all the stockholders. The court in such a case

of property the directors are not necessary parties, and if joined may be proper, but are merely nominal parties.¹ The decree against the corporation is effective and binding upon all the officers of the corporation.² Where, however, the object of the suit is to hold the directors personally liable for frauds or for negligence, the rule is different. In such cases they of course are necessary parties defendant.³ It is

will not order a distribution of the proceeds of the suit. *McCrea v. McClenahan*, 114 N. Y. App. Div. 70 (1906). Stockholders who did not participate in the act complained of are not proper parties defendant. *McCrea v. Robertson*, 192 N. Y. 150 (1908).

1 *Geer v. Mathieson, etc. Works*, 190 U. S. 428 (1903). Directors of the company are not necessary party defendants and a director who became such after the transaction complained of is not even a proper party. *Muhleran v. Gebhardt*, 93 N. Y. App. Div. 98 (1904). In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906). A president and secretary should not be joined in a suit by a stockholder against the corporation to have a dividend declared, etc. *Schell v. Alston Mfg. Co.*, 149 Fed. Rep. 439 (1906). In a suit by a stockholder to set aside an issue of stock and bonds by his railroad in exchange for a prior issue of bonds, the directors are not necessary parties, neither are the holders of the bonds which are to be retired. *Politz v. Wabash R. R.*, 153 Fed. Rep. 941 (1907).

2 See §§ 745, 746, 752, 755, *infra*; *Winch v. Birkenhead, etc. Ry.*, 5 De G. & Sm. 562 (1852), where the court

said: "I do not think it is necessary that the directors should be parties. The act that is sought to be restrained is the act of the company. The company itself cannot act except by means of its officers;" *Pioneer, etc. Co. v. Baker*, 20 Fed. Rep. 4 (1884); *Heath v. Erie Ry.*, 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976; *Chase v. Vanderbilt*, 62 N. Y. 307, 314 (1875); *Bagshaw v. Eastern Union Ry.*, 7 Hare, 114 (1849); *aff'd*, 19 L. J. (Ch.) 410; *Allen v. New Jersey, etc. R. R.*, 49 How. Pr. 14 (1875), the court saying: "They are represented by the corporation of which they are alleged to be directors, and when the corporation itself is made a party defendant it is improper to add the trustees or directors as parties when no personal claim or judgment is asked against them." But see *Ribon v. Railroad Cos.*, 16 Wall. 446 (1872); *Slattery v. St. Louis, etc. Co.*, 91 Mo. 217 (1886). Where the minority sue to set aside fraudulent acts of the majority, the guilty directors are not necessary parties defendant. *Woodroof v. Howes*, 88 Cal. 184 (1891).

3 The director who sold property to the corporation is a necessary party defendant in a stockholder's action attacking the transaction. *Tutwiler v. Tuskaloosa, etc. Co.*, 39 Ala. 391 (1889). The omission of part of the guilty directors as parties defendant is not fatal. *Anderton v. Wolf*, 41 Hun, 571 (1886). The directors taking part in an *ultra vires* transfer of property are proper parties defendant to an injunction suit. *Small v. Minneapolis, etc. Co.*, 10 N. Y. Supp. 456 (1890). See also cases ch. XXXIX, XL, and XLII, *supra*; *Duckett v. Gover*, L. R. 6 Ch. D. 82 (1877);

not necessary to join all the guilty parties.¹ Outside parties are to be joined as parties defendant whenever the relief asked would affect their rights.² After a receiver has been appointed, a stock-

Mason v. Harris, L. R. 11 Ch. D. 97 (1879); *Ferguson v. Wilson*, L. R. 2 Ch. App. 77, 90 (1866); *Imperial, etc. Assoc. v. Coleman*, L. R. 6 H. L. 189 (1873), rev'g L. R. 6 Ch. App. 558; *Bryson v. Warwick, etc. Co.*, 1 Sm. & G. 447 (1853). The executor of a deceased director who is guilty of unlawful use of corporate funds may be joined as a party defendant with the other directors. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside, the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved. *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781 (1906). Officers may be joined as parties defendant in order that they may answer interrogatories attached to the bill for the purpose of enabling the complainant to know whom to examine as witnesses. Such answers need not be made under oath. *Gulf, etc. Co. v. Crenshaw*, 138 Ala. 134 (1903). The president should not be joined as a party defendant for purposes of discovery only. *Tutwiler v. Tuscaloosa, etc. Co.*, 89 Ala. 391 (1889). Where a person in control of a company obtains control of a rival company, and allows judgments against the latter and the sale of its bonds at execution at nine cents on the dollar, and executes a mortgage and controls the business, all for the benefit of the former corporation, he and the dummy directors and third persons may be joined in a bill filed by a minority stockholder to enjoin their acts and obtain a personal

judgment. *Gray v. Fuller*, 17 N. Y. App. Div. 29 (1897). In a suit against a corporation for breach of contract, fraud, and collusion, the president may be joined as a party defendant, he being also charged with the fraud. *Berwind v. Van Horne*, 104 Fed. Rep. 581 (1900). A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus*. *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940 (1898). But where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for non-joinder of the guilty parties. *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942 (1898); *Morse v. Bay State Gas Co.*, 91 Fed. Rep. 944 (1898).

¹ *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). In a stockholder's suit to hold directors liable for purchasing property from the corporation all of the guilty parties need not be joined, and it is no defense that some of the defendants are chargeable for different periods from the period pertaining to the others. *Barry v. Moeller*, 68 N. J. Eq. 483 (1904). But a receiver's bill in equity against directors of a bank to hold the directors of a bank liable for wrongful acts need not join all of them. *Gaither v. Bauernschmidt*, 69 Atl. Rep. 425 (Md. 1908).

² *Russell v. Wakefield, etc. Co.*, L. R. 20 Eq. 474 (1875), the court saying: "When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are en-

holder's suit against officers to compel them to account for fraudulent

titled to have relief against the second for something that has been done under the *ultra vires* agreement. You may be entitled to have money paid back which has been paid under the *ultra vires* agreement, . . . and you may be entitled to have property returned or other acts done." In the important case of *Minnesota v. Northern, etc. Co.*, 184 U. S. 199 (1902), where the state of Minnesota filed an original bill of equity in the supreme court of the United States to enjoin the Northern Securities Company from acquiring, owning, or voting a majority of the capital stock of the Great Northern Railway Company and the Northern Pacific Railway Company, two competing railroad corporations of that state, the court held that it would not entertain the suit, for the reason that the two railway companies were not made parties, and no relief would be granted by a court of equity affecting absent persons materially interested, and no amendment would be allowed, inasmuch as it would bring them in as parties and would destroy the jurisdiction of the court. See also *Hare v. London, etc. Ry.*, 1 Johns. & H. 252 (1860); s. c., 2 Johns. & H. 80; 30 L. J. (Ch.) 817, holding that in an action to set aside a traffic contract all the corporations who were parties to the contract are necessary parties; *Tyson v. Virginia, etc. R. R.*, 1 Hughes, 80 (1871); s. c., 24 Fed. Cas. 493, to the effect that, in an action to set aside a consolidation, the other corporation is a necessary party; *Bell v. Donohoe*, 17 Fed. Rep. 710 (1883); *Taylor v. Miami, etc. Co.*, 5 Ohio, 162 (1831), where a guilty stockholder was made a party defendant; *Abbot v. American Hard Rubber Co.*, 4 Blatchf. 489 (1861); s. c., 1 Fed. Cas. 13, holding that an expected purchaser is not a necessary party defendant; *Bengley v. Wheeler*, 45 Mich. 493 (1881); *Shawhan v. Zinn*, 79 Ky. 300 (1881), holding that the objection to a defect of parties herein may be raised at the trial, and need not be raised by demurrer; *Cass v. Ottawa, etc. Co.*, 22 Grant (U. C.); 512 (1875), holding that the attorney-general is not a necessary party defendant. Cf. *Ryan v. Ray*, 33 Alb. L. J. 321 (Ind. 1886). A stockholder's suit to set aside an alleged illegal conveyance of corporate property to an individual must join him as a party defendant. *Maeder v. Buffalo, etc. Co.*, 132 Fed. Rep. 280 (1904). Sometimes the directors of another corporation are proper parties defendant. See *Terhune v. Midland R. R.*, 38 N. J. Eq. 423 (1884). In a suit by a minority of the stockholders of a railroad company to restrain it and a trust company from issuing bonds to a construction company, the charge being made that the majority stockholders controlled also the construction company and the issue of bonds was corrupt, the trustee is a necessary and not merely a nominal party. *Mayer v. Denver, etc. R. R.*, 41 Fed. Rep. 723 (1890). The action may be continued against the executor of a deceased defendant. *Fox v. Hale, etc. Co.*, 108 Cal. 478 (1895). Parties in league and the guilty officers may be made parties defendant. *Meyers v. Scott*, 2 N. Y. Supp. 753 (1888). The question of when the directors or officers may be joined for purposes of discovery is discussed elsewhere. See § 519, *supra*. In a suit to set aside a lease, both the lessor and lessee railroad companies are necessary parties. *New Jersey Cent. R. R. v. Mills*, 113 U. S. 249 (1885); *East Tennessee, etc. R. R. v. Grayson*, 119 U. S. 240 (1886). A director who resigned before the acts complained of were done is not to be made a defendant, even though the resignation was never accepted. Nor is a director liable who was absent by reason of sickness. *Movius v. Lee*, 30 Fed. Rep. 298

misappropriations of corporate property must join the receiver as a party defendant.¹

(1887); *aff'd*, 141 U. S. 132. In a suit to compel directors to turn over the corporation profits improperly realized by them, a separate action may be brought against each director. *Langdon v. Fogg*, 18 Fed. Rep. 5 (1883). See *Chandler v. Bacon*, 30 Fed. Rep. 538 (1887), holding that the liability is joint and several, the court saying: "When the conduct of parties operates as a fraud or deceit upon third persons, whatever their private intention, the relation of partnership may be said to exist as to such third persons." To same effect, *Ervin v. Oregon, etc. Nav. Co.*, 20 Fed. Rep. 577 (1884). In a stockholder's suit to set aside an illegal transfer of the assets of his corporation to another corporation and to compel a re-transfer, the persons through whom the property was transferred need not be made parties if the persons in possession of the assets are made parties. *Eldred v. American, etc. Co.*, 99 Fed. Rep. 168 (1900). Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association and sells it out to a corporation organized by himself, the minority stockholders of the associations may compel him to account for the property. As regards the person to whom the stock was issued, however, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. *Booth v. Dodge*, 60 N. Y. App. Div. 23 (1901). In a suit by a stockholder to restrain a sale of the property the proposed vendee has no right to intervene. *Lewisohn Bros. v. Anaconda, etc. Co.*, 29 N. Y. App. Div. 552 (1898). A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the

suit. *Ingraham v. National Salt Co.*, 36 N. Y. Misc. Rep. 646 (1902); *aff'd*, 72 N. Y. App. Div. 582; appeal dismissed, 172 N. Y. 644. Where minority stockholders started a suit in the federal court to set aside a sale of the property of the company to another corporation, but did not bring in as a party defendant a railway company which was about to issue securities, in accordance with contracts with the two companies, and afterwards started a suit in the state court for the same relief, and brought in the railway company as party defendant, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). See § 656, *supra*.

1 *Porter v. Sabin*, 149 U. S. 473 (1893); *Swope v. Villard*, 61 Fed. Rep. 417 (1894). Where a statutory receiver has been appointed he may be made a party defendant instead of the corporation. *Barry v. Moeller*, 68 N. J. Eq. 483 (1904). Where a receiver was himself one of the directors charged with fraud, a stockholder will be allowed to bring suit making the receiver a party defendant, and it is no defense that the receivership has been running for two years. *Weslosky v. Quarterman*, 123 Ga. 312 (1905). In a suit, under the New York statutes, by a creditor to recover back money misappropriated by directors judgment need not first be obtained against the company if it has been dissolved. The receiver is not a necessary party defendant, where he has been discharged. *Lilienthal v. Betz*, 185 N. Y. 153 (1906). In a suit by a stockholder of a dissolved corporation, in behalf of himself and others, to hold an officer liable in damages for having wrecked the company and acquired all its prop-

§ 739. *Complainant's bill must not improperly join two or more causes of action herein.*—If the complainant's bill is multifarious, it of course cannot succeed as against the objection of the defendants. Thus, it has been held that the stockholders cannot join an action in reference to dividends with one for an injunction to restrain the corporate directors committing a fraud.¹ A bill combining an action to restrain the corporation from investing in the stock of another company, and one to restrain it from aiding that company, has been held to be multifarious.² The stockholders cannot join a suit against the corporation with one against third persons in behalf of the corporation.³ An action to be allowed to enter a reorganized company and one to hold its officers liable for fraud cannot be joined.⁴ The plaintiff cannot join causes of action accruing to himself personally with the cause of action which he brings suit upon in behalf of the company.⁵ A bill seeking to at-

erty at foreclosure sale, the receiver is a necessary party defendant, or, if he has been discharged, the trustees of the dissolved corporation. *Michel v. Betz*, 108 N. Y. App. Div. 241 (1905). In a stockholder's suit in behalf of a dissolved corporation, the receiver is a necessary party. *Clark v. San Francisco*, 53 Cal. 306 (1878). A suit by depositors to hold the directors personally liable for negligence in the management of a bank must be for the benefit of the assignee of the bank, and both the assignee and the bank must be joined as parties. *Gores v. Field*, 109 Wis. 408 (1901). See also § 740, *infra*, on request to receiver, and § 735, *supra*, as to suits by receivers.

¹ *Winsor v. Bailey*, 55 N. H. 218 (1875). In a stockholder's suit at law for a dividend which has been declared, he cannot include a cause of action in equity against the directors for a conspiracy to illegally increase the capital stock and to enjoin them from doing so. *Searles v. Gerbie*, 115 N. Y. App. Div. 778 (1906); *aff'd*, 190 N. Y. 31. A stockholder's suit is not multifarious, although it is to compel the treasurer to pay back certain funds, and also to have a dividend declared there-

from. *Dunphy v. Traveller Newsp. Assoc.*, 146 Mass. 495 (1888); *Stroud v. Lawson*, [1898] 2 Q. B. 44. A suit to hold the directors liable for declaring a dividend out of the capital stock and thereby inducing the plaintiff to purchase the stock cannot at the same time seek to hold the directors liable to the corporation for the dividend so declared. *Stroud v. Lawson*, [1898] 2 Q. B. 44.

² *Salomons v. Laing*, 12 Beav. 339 (1850). But a bill by stockholders and creditors to restrain acts and have a dissolution is not multifarious. *Mills v. Hurd*, 32 Fed. Rep. 127 (1887).

³ *Thomas v. Hobler*, 4 De G., F. & J. 199 (1862). And see, in general, on multifariousness herein, *Merchants', etc. Line v. Waganer*, 71 Ala. 581 (1882); *Smith v. Rathbun*, 22 Hun, 150 (1880); *Lewarne v. Mexican Int. Imp. Co.*, 38 Fed. Rep. 629 (1889).

⁴ *Stanton v. Missouri Pac. Ry.*, 15 N. Y. Civ. Pro. 296 (1888).

⁵ *Whitney v. Fairbanks*, 54 Fed. Rep. 985 (1893). An assessment upon stock levied by a board of directors illegally elected and a sale of the stock thereunder does not put an end to the stockholders' suit to oust such board of directors and to set aside such assessment and to set aside con-

tack a fraudulent sale of property by a director to the corporation, and also to enjoin a sale of complainant's stock under a forfeiture for non-payment of a subscription, is multifarious.¹ Where a suit by a stockholder in behalf of the corporation is to hold a director liable for stock and bonds issued illegally under a contract, and is also to hold a director liable for bonds which had been pledged by the company to secure a debt, which pledge and bonds the director had acquired, the suit is multifarious, even though one claim is not good.² In a suit to foreclose a mortgage there cannot be joined a claim for dividends illegally paid.³ A stockholder cannot in the same bill ask relief as a stockholder and also ask to have the title to his stock cleared up.⁴ A stockholder cannot join in one suit a cause of action for breach of contract with another stockholder by which the former was to receive a certain salary from the corporation, and a cause of action against the latter for misappropriating corporate funds.⁵ A bill is multifarious where there are several defendants and no combination between them is shown.⁶ Although the complaint is multifarious and obscure, yet a demurrer does not necessarily lie.⁷ A stockholder cannot join a personal action against parties with an action brought as a stockholder in behalf of himself and other stockholders against the same parties defendant.⁸ A suit to enforce the statutory liability of stockholders cannot include a cause of action against the directors for mismanagement.⁹ A stockholder's bill to compel others to pay their subscriptions and to hold some of them

tracts made by such board. The complaint is not multifarious. *Whitehead v. Sweet*, 126 Cal. 67 (1899). A suit by a stockholder to set aside an illegal transfer of the corporate property cannot at the same time ask for the treble damages given by the anti-trust act of congress of July 2, 1890. Such a suit is multifarious, inasmuch as the treble damages would go to the plaintiff, while the damages generally would belong to the corporation. *Metcalf v. American, etc. Co.*, 108 Fed. Rep. 909 (1901).

¹ *Tutwiler v. Tuskaloosa, etc. Co.*, 89 Ala. 391 (1889). A stockholder whose stock is about to be forfeited to pay an illegal assessment, may, in a suit to enjoin such forfeiture, join a cause of action against the directors for illegal salaries and other illegal acts. *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904).

² *O'Connor v. Virginia, etc. Co.*, 184 N. Y. 46 (1906).

³ *New Hampshire Sav. Bank v. Richey*, 121 Fed. Rep. 956 (1903).

⁴ *Inman v. New York, etc. Co.*, 131 Fed. Rep. 997 (1904).

⁵ *Stoddard v. Bell & Co.*, 100 N. Y. App. Div. 389 (1905).

⁶ *American, etc. Co. v. Linn*, 93 Ala. 610 (1890).

⁷ *Moyle v. Landers*, 83 Cal. 579 (1890). The defense that a complaint by a stockholder against a director for negligence and also for paying illegal dividends is multifarious must be raised by demurrer. *Weed v. First Nat. Bank*, 106 N. Y. App. Div. 285 (1905).

⁸ *Farrow v. Holland Trust Co.*, 74 Hun, 585 (1893).

⁹ *Sturtevant-Larrabee Co. v. Mast, etc. Co.*, 66 Minn. 437 (1896).

liable for illegal acts is multifarious.¹ The bill is multifarious where it seeks to hold certain directors liable for acts done in one year and other directors for acts in another year.² A bill by a stockholder and creditor in behalf of himself and all other stockholders and creditors, to set aside a sale of the corporate property for stock to be divided between the creditors and preferred stockholders, is multifarious in that the stockholders' rights may clash with each other or with creditors' rights, and the same complainant cannot represent all.³ A bill asking for a dissolution and a

¹ *Holton v. Wallace*, 66 Fed. Rep. 409 (1895). A judgment creditor's suit against the stockholders to reach assets which they have distributed among themselves may also pray that they be held liable for their unpaid subscriptions. *Jahn v. Champagne, etc. Co.*, 147 Fed. Rep. 631 (1906).

² *Nash v. Hall Signal Co.*, 90 Hun, 354 (1895). If the various acts complained of were committed by different directors the bill is multifarious. *Higgins v. Tefft*, 4 N. Y. App. Div. 62 (1896). See also § 701, *supra*. A bill is not multifarious even though the defendants are not to be held liable to the same extent or in the same way, inasmuch as the court may mould its decree so as to do equity to all. *Gray v. Fuller*, 17 N. Y. App. Div. 29 (1897). The receiver of a bank may by suit in equity hold the directors liable for gross negligence, but if some of the defendant directors had nothing to do with some of the acts complained of the bill is multifarious as to them. *Emerson v. Gaither*, 103 Md. 564 (1906). A depositor in a suit against directors for false statements inducing him to make a deposit, cannot join other directors who were not directors at the time the statements were made, but who, it is alleged, made other misrepresentations which caused plaintiff not to withdraw such deposits. *Warner v. James*, 88 N. Y. App. Div. 567 (1903). A suit against the president for fraud in purchasing real estate and against other defendants for fraud in obtaining stock from the

corporation, and another defendant for fraudulently receiving stock and selling it to the corporation, is multifarious. *Camden Land Co. v. Lewis*, 101 Me. 78 (1905). In a suit brought by the attorney-general under the statutes of New York to hold directors liable for waste or neglect, several directors cannot be joined where the cause of action against one is not the same cause of action as against another. Each director is liable only for his own acts or omissions, unless he had knowledge from which he might reasonably have prevented a loss. An allegation in the alternative that a director participated in an act or was negligent in not ascertaining it will not save such a complaint. Moreover the remedy against some of the directors may be in equity, while as against others it may be at law. If there is a concurrent remedy at law and in equity the statute of limitations will be applied by a court of equity. *People v. Equitable, etc. Soc.*, 124 N. Y. App. Div. 714 (1908).

³ *Ward v. Sittingbourne, etc. Ry.*, L. R. 9 Ch. App. 488 (1874). See also *Hoole v. Great Western Ry.*, L. R. 3 Ch. App. 262 (1867), holding that, where there are different classes of stockholders, a stockholder may file a bill in behalf of his class. A bill filed by plaintiffs as "stockholders and bondholders" should be amended by striking out the words "bondholders." *Arnold v. Searing*, 67 Atl. Rep. 831 (N. J. 1907). See 95 N. Y. App. Div. 432.

distribution of assets so as to pay first those stockholders who were fraudulently induced to purchase is multifarious. The averment, moreover, must be definite and certain.¹ A creditor's bill to hold the president liable for fraud in converting the corporate assets, and also to collect unpaid subscriptions, is multifarious.² A bill to rescind a subscription on the ground of fraud and also to have a receiver appointed on account of the mismanagement of directors is multifarious.³

Various instances of multifariousness are given in the notes below.⁴

1 *Watson v. U. S. Sugar Ref.*, 68 Fed. Rep. 769 (1895).

2 *Montserratt Min. Co. v. Johnson, etc. Co.*, 141 Mo. 149 (1897).

3 *Davis v. Peabody*, 170 Mass. 397 (1898).

4 A bill to cancel a subscription for fraud and also to have a receiver appointed on the ground of mismanagement is multifarious. *Emmons v. National, etc. Ass'n*, 135 Fed. Rep. 689 (1905). A suit by a stockholder to compel a stock dividend and to prevent the issue of increased capital stock and to compel the corporation to issue twenty-five stock certificates for one share each in exchange for one certificate for twenty-five shares, is multifarious both as to parties and subject-matter. *Schell v. Alston Mfg. Co.*, 149 Fed. Rep. 439 (1906). A trustee holding property for various persons cannot transfer it to a corporation in exchange for stock of the latter, even though the trust agreement authorizes a sale and provides that the proceeds of the sale shall be divided among the beneficiaries. In a suit to enjoin such sale an action to hold members of the executive committee personally liable for conspiracy should not be joined. *Moody v. Flagg*, 125 Fed. Rep. 819 (1903). In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not

make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906). A corporate creditor suing a stockholder for his unpaid subscription may join a claim against the defendants for corporate assets wrongfully appropriated by them. *Lewisohn v. Stoddard*, 78 Conn. 575 (1906). A receiver will be appointed and other relief granted, in a suit by a stockholder in a mining company alleging that the directors had practically abandoned the property and refused to sell treasury stock, although it could be sold, and had removed the books from the state, and had refused all information and were destroying the value of the stock. Such a suit is not multifarious. *Glover v. Manila, etc. Co.*, 19 S. Dak. 559 (1905). A suit by stockholders to hold directors and other parties personally liable for fraudulent transfers of corporate property, and also to set aside fraudulent judgments, by which such transfers are made, is not multifarious. *Northwestern Land Assoc. v. Grady*, 137 Ala. 219 (1903). In a suit to hold stockholders liable on watered stock they may also be held liable for corporate assets illegally transferred to them. *Montgomery, etc. Works v. Capital City Ins. Co.*, 137 Ala. 134 (1903). A suit by a person as a stockholder and policyholder in an insurance company against the directors for losses due to

§ 740. *Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so—Rule 94 of the federal courts on this subject—Request to receiver.*—Inasmuch as a fraudulent, *ultra vires*, or negligent act of the directors of a corporation is an injury done to the corpora-

negligence does not make two causes of action. *Young v. Equitable, etc. Soc.*, 112 N. Y. App. Div. 760 (1906). A stockholder's suit against all the directors for moneys illegally received by some of them is not multifarious, it being alleged that they misappropriated the money either for their own benefit or for the benefit of others. *Young v. Equitable, etc. Soc.*, 112 N. Y. App. Div. 760 (1906). Even though the plaintiff sues both as a stockholder and creditor, the complaint may be sustained in his capacity as stockholder and the remainder of the complaint may be treated as immaterial. *Ward v. Smith*, 95 N. Y. App. Div. 432 (1904). A stockholder cannot join a suit to hold the president liable for converting corporate funds to his own use, with a suit to compel another corporation to pay to his corporation money then due on a contract. *Case v. New York, etc. Ass'n*, 88 N. Y. App. Div. 538 (1903). A suit in behalf of the stockholders cannot also include a claim for damages in behalf of the stockholder who brings the suit. *Brown v. Utopia Land Co.*, 118 N. Y. App. Div. 364 (1907). A suit to determine what stock is watered stock (alleged to be overissued stock) and also to set aside transactions by which the corporate property has been misapplied is multifarious. *Church v. Citizens' Street Ry.*, 78 Fed. Rep. 526 (1897). A judgment creditor's bill is multifarious where it asks to hold the defendant liable on a subscription for stock, and as an officer for causing the corporation to buy its own stock, and as an outsider for obtaining real estate of the company without consideration, and as an outsider misrepresenting the condition of

the company. *First Nat. Bank v. Peavey*, 75 Fed. Rep. 154 (1896). Where the directors for the sum of \$15,000 resign and put in other directors, and the new directors mismanage the company and cause its insolvency, the receiver of the company cannot join a suit for the \$15,000 with a suit to hold the resigning directors liable for breach of trust. The complaint is multifarious. *McClure v. Wilson*, 13 N. Y. App. Div. 274 (1897). Stockholders and corporate creditors cannot join in the same bill, the former to rescind their subscriptions and to bring the officers to an account, and the latter to bring the officers to an accounting, even though the officers have been guilty of all the frauds in the category. *Brown v. Bedford City, etc. Co.*, 91 Va. 31 (1895). As to not being multifarious, see *Stevens v. South, etc. Co.*, 14 Utah, 232 (1896). A bill in equity is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See *v. Heppenheimer*, 55 N. J. Eq.

tion itself, it is the duty and proper function of the corporation to institute any action that may be brought to remedy the injury to the corporation. As already explained, however, a stockholder may bring the action if the corporation improperly refuses or neglects to institute such suit. Before the stockholder brings suit he must make a formal request to the corporate officers that suit be instituted by the corporation. Upon its refusal or neglect to comply with that request, he may then bring suit himself. It is well settled, however, that he must allege in his bill in equity that such a request has been made and has not been complied with.¹ There

240 (1897); *aff'd*, 56 N. J. Eq. 453. A suit by a stockholder against a promoter, in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock, and also to enjoin a proposed sale of plaintiff's stock, in order to pay an assessment, is multifarious. *Pietsch v. Krause*, 116 Wis. 344 (1903). This same transaction was involved in the case of *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900), and the court there held that the mortgage was legal and could be enforced, yet the court intimated that the promoters could be held personally liable.

Where an investment company in a receiver's hands has paid all its debts, but by fraud its remaining assets have been transferred to various parties, a suit lies at the instance of a stockholder to set aside the transfer; but the complaint is multifarious where it joins parties not having a common interest and unites distinct and disconnected causes of action. *Fry v. Rush*, 63 Kan. 429 (1901). A stockholder in an irrigation company may in the same suit complain that the directors are managing the corporation in the interest of a rival company and also that they are depriving him personally of his proportionate part of the water. *Henshaw v. Salt River Co.*, 6 Ariz. 151 (1898). "The court exercises a large discretion in passing on the questions of multifariousness." *Metropolitan*

Trust Co. etc. v. Columbus, etc. R. R., 93 Fed. Rep. 689 (1899). A stockholder's bill is not necessarily multifarious because it joins several grounds of complaint and has several prayers for relief. *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940 (1898). A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus*. *Weir v. Bay State Gas Co.*, 91 Fed. Rep. 940 (1898). But where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for non-joinder of the guilty parties. *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942 (1898); *Morse v. Bay State Gas Co.*, 91 Fed. Rep. 944 (1898). Subscribers to stock may rescind the same on the ground that the promoters who sold property to the company had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only \$150,000 of cash for \$450,000 of stock. *Barcus v. Gates*, 89 Fed. Rep. 783 (1898).

¹ Quoted and approved in *Dillon v. Lee*, 110 Iowa, 156, 162 (1899), and

has been considerable discussion as to whether the stockholder, in addition to his request to the corporate officers to institute the suit, should not also be required to attempt to induce the stockholders in meeting assembled to take action by directing the directors to bring suit, or by refusing to re-elect them at the next election. The fact, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit; that the remedy of refusing to re-elect them involves delay, and involves the assumption that a minority of the stockholders can by the election control such a suit; that irreparable injury or the vesting of

Fry v. Rush, 63 Kan. 429, 440 (1901); *Holton v. New Castle, etc. Ry.*, 138 Pa. St. 111 (1890); *Byers v. Rollins*, 13 Colo. 22 (1889); *Flynn v. Brooklyn City R. R.*, 158 N. Y. 493 (1899); *Law v. Fuller*, 217 Pa. St. 439 (1907); *Ross v. American Banana Co.*, 43 S. Rep. 817 (Ala. 1907); *Tevis v. Hammersmith*, 81 N. E. Rep. 614 (Ind. 1907). Even though the secretary and treasurer takes away and secretes all the books and papers of the company, yet the president cannot have a receiver appointed in order to carry on the business and collect accounts, no charge of fraud being made and no request to the board of directors being shown. *Fallon v. United States, etc. Co.*, 86 N. Y. App. Div. 29 (1903). Failure to request the corporation to bring suit is fatal. *Weidenfeld v. Allegheny, etc. R. R.*, 47 Fed. Rep. 11 (1891). Three directors cannot sue as stockholders where, for all that appears, they are a majority of the board and could cause the corporation to sue. *Hodgson v. Duluth, etc. R. R.*, 46 Minn. 454 (1891). A stockholder's action to restrain a levy of execution by a judgment creditor on the property of the corporation fails where he does not allege a request and show his interest in the corporation. *Southwest Nat. Gas Co. v. Fayette Fuel Gas Co.*, 145 Pa. St. 13 (1892). A request made to a railroad corporation to prevent a competing railroad from voting its stock is sufficient to authorize a stockholder's suit. *Memphis, etc. R. R. v. Woods*, 88 Ala. 630 (1889). See also *Cogswell v. Bull*, 39 Cal. 320 (1870); *Hazard v. Durant*, 11 R. I. 195 (1875), the court saying that the allegations of request "will be sustained by proof of a request to the stockholders in corporate meeting, or to the directors in office when the suit began, or in any other mode so that it be in legal effect a request to the corporation;" *Talbot v. Scripps*, 31 Mich. 268 (1875); *Ware v. Bazemore*, 58 Ga. 316 (1877); *Merchants', etc. Line v. Waganer*, 71 Ala. 581 (1882); *Hersey v. Veazie*, 24 Me. 9 (1844); *Memphis v. Dean*, 8 Wall. 64 (1868); *House v. Cooper*, 30 Barb. 157 (1858); *Wilkie v. Rochester, etc. Ry.*, 12 Hun, 242 (1877); *O'Brien v. O'Connell*, 7 Hun, 228 (1876); *Abbott v. Merriam*, 62 Mass. 588 (1851); *Stevens v. Rutland, etc. R. R.*, 29 Vt. 545 (1851). Demurrer lies on the ground that no request to the directors has been made. *Ulmer v. Maine, etc. Co.*, 93 Me. 324 (1899). Where the directors do not act on a request to bring suit a stockholder may bring it. *Morgan v. King*, 27 Colo. 539 (1900). A stockholder cannot bring suit against an assignee for the benefit of creditors to hold him liable for maladministration, inasmuch as any surplus, after paying the debts, would belong to the corporation. A request to the directors to bring suit is first necessary. *State v. Mitchell*, 104 Tenn. 336 (1899). A request to bring the suit in a federal court is insufficient. See *Newby v. Oregon Cent. Ry.*, 1 Sawyer, 63 (1870); s. c., 13

great financial interests may occur in the meantime; and that laches may arise as a bar to the stockholder's suit—has settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholders' meeting.¹ The law on this subject seems to be as follows: First, as

Fed. Cas. 42. The leading case of *Foss v. Harbottle*, 2 Hare, 461 (1843), failed by reason of a failure to make this effort to induce the corporation to act. See also the important case of *Greaves v. Gouge*, 69 N. Y. 154 (1877); *Cogswell v. Bull*, 39 Cal. 320 (1870); *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. 262 (1893); *Putnam v. Ruch*, 56 Fed. Rep. 416 (1893); *Atchison, etc. R. R. v. Sumner County*, 51 Kan. 617 (1893); *New, etc. Co. v. Blevins*, 12 Tex. Civ. App. 410 (1896); *Palmer v. Hawes*, 78 Wis. 46 (1888); *Fitchett v. Murphy*, 46 N. Y. App. Div. 181 (1899). The defendant cannot raise this point in the appellate court for the first time. See *Bulkley v. Big Muddy Iron Co.*, 77 Mo. 105 (1882). The request to the directors must be made in good faith, and the actual wrong set forth, and the directors must not be charged in the request as being guilty unless they really are so. *Bacon v. Irvine*, 70 Cal. 221 (1886). A simple allegation that the corporation neglected is insufficient. Refusal must be alleged. *Leslie v. Lorillard*, 31 Hun, 305 (1883). It need not be alleged specifically that the present board of directors have refused to act. *Brown v. Buffalo, etc. R. R.*, 27 Hun, 342 (1882). A stockholder suing in behalf of his corporation, which has been dissolved many years, must nevertheless show that he sought to have the directors bring suit. *Taylor v. Holmes*, 127 U. S. 489 (1888). Where the corporation is dissolved, but by statute suits may be brought during the three succeeding years, a stockholder must request the directors to sue before he sues to compel a creditor to restore property illegally taken. *General Electric Co. v. West Asheville Imp. Co.*, 73

Fed. Rep. 386 (1896). Where a stockholder brings suit for an injunction and receiver on the ground that the president is using the assets to construct an insolvent road organized by himself, and is misappropriating the corporate funds, and controls a majority of the directors and also of the stock, the allegations are insufficient where it appears that no member of the board excepting the president is interested in the railroad company, and no effort has been made to induce the directors to bring the suit. *Roman v. Woolfolk*, 98 Ala. 219 (1893). See 96 Pac. Rep. 259.

¹ *Mason v. Harris*, L. R. 11 Ch. D. 97 (1879), holding also that the court has no power to order such a meeting. See a discussion of this question in *Brewer v. Boston Theater*, 104 Mass. 378 (1870). See also *Gregory v. Patchett*, 33 Beav. 595 (1864). In *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13, 22 (1875), the difficulty herein probably arose from cases where a stockholder sought to enjoin acts which the directors could not do, but which the majority of stockholders could do. If the stockholders have the power to remove the directors, a request to the stockholders to act must be made before suit is brought by a stockholder. *Rathbone v. Parkersburg Gas Co.*, 31 W. Va. 798 (1888). In *Miller v. Murray*, 17 Colo. 408 (1892), the court refused to sustain an action by the minority stockholders to set aside an alleged fraudulent sale of the corporate property at foreclosure sale, the property having been subsequently purchased by one of the officers, inasmuch as the complaining stockholders had votes enough to elect a board of directors, and thus have the suit brought in the corporate

to acts *ultra vires* of both the directors and majority of stockholders, the directors or majority of stockholders cannot ratify the same, and hence no request to the stockholders to vote on the subject is necessary,¹ and it has been held, with much reason, that not even a request to the directors is necessary;² second, as to acts *ultra vires* of the directors, but *intra vires* of the stockholders, a single stockholder cannot sue if the majority of the stockholders confirm such acts of the directors, and hence a vote of the stockholders is necessary;³ third, as to frauds perpetrated on the corporation by outside parties, such causes of action are like other causes of action which the corporation may have, and the discretion of the directors as to the advisability of suing, not suing, compromising, or settling such claims is final;⁴ fourth, as to acts of the directors themselves which are fraudulent in the eye of the law, but which the majority of the

name. In *Latimer v. Richmond, etc. R. R.*, 39 S. C. 44 (1893), the court seemed to follow the federal rule that an effort must be made to induce the stockholders to act as well as the directors. In Alabama it is held that application must be made to the stockholders as a body also to cause the suit to be brought, unless it is shown that a majority of them are interested in preventing the suit or are the wrongdoers, or that the application cannot be made in time to be of avail. *Montgomery, etc. Co. v. Lahey*, 121 Ala. 131. In the case of *Louisville, etc. R. R. v. Neal*, 128 Ala. 149 (1900), the court intimated that the stockholders should apply to the stockholders as a body for redress as well as to the board of directors. No meeting of the stockholders need be called to pass upon a stockholder's request to bring suit where a majority of the stock is owned by the parties whose acts are complained of. *Virginia, etc. Co. v. Fisher*, 104 Va. 121 (1905). In *McCloskey v. Snowden*, 212 Pa. St. 249 (1905), the court held that where suit was brought by a resident stockholder against a foreign corporation for fraud in the purchase of property at a fraudulent price, the directors not being charged with the fraud, a mere allegation that they

had been requested to commence suit and had declined is insufficient.

1 A stockholder may file a bill to enjoin or set aside an *ultra vires* act, even though every other stockholder is opposed to him. *Hooles v. Great Western Ry.*, L. R. 3 Ch. App. 262 (1867); *Beman v. Rufford*, 1 Sim. 550 (1851); s. c., 6 Eng. L. & Eq. 106, where a majority of the stockholders have even voted to ratify the illegal act; *Bagshaw v. Eastern Union Ry.*, 19 L. J. (Ch.) 410 (1850), aff'g 7 Hare, 114; *Hare v. London & N. W. Ry.*, 30 L. J. (Ch.) 817, 829 (1861); s. c., 2 Johns. & H. 80; *Winch v. Birkenhead, etc. Ry.*, 5 De G. & Sm. 562 (1852). See also § 730, *supra*.

2 No request is necessary to the board of directors before a stockholder brings suit to cancel an illegal subscription to stock by a municipality, inasmuch as said subscription is *ultra vires*. *Stebbins v. Perry County*, 167 Ill. 567 (1897). A request must be made to the board of directors, even though the act complained of is an *ultra vires* act. *Hutton v. Bancroft, etc. Co.*, 83 Fed. Rep. 17 (1897). No request to the directors is necessary if the act is *ultra vires*. *Botts v. Simpsonville, etc. Turnp. Co.*, 88 Ky. 54 (1888).

3 See § 684, *supra*. 4 See § 750, *infra*.

stockholders might have authorized, there is reason for requiring a stockholders' vote thereon before a single stockholder sues to remedy the wrong;¹ and fifth, as to acts of the directors which are fraudulent, and which not even the majority of the stockholders could have authorized, no stockholders' vote would be of any avail, and hence such a vote is unnecessary.² A receiver may by order of the court compromise a claim against directors.³

In the federal courts the necessity of an allegation that the corporation has been requested to sue and has refused is fixed by a rule of the court.⁴ This rule in the federal courts requiring stockholders

¹ See ch. XXXIX, *supra*, for illustrations, especially § 662.

² See ch. XXXIX, *supra*, for illustrations, and § 733.

³ See § 701, *supra*.

⁴ Rule 94 (104 U. S. ix): "It [the bill] must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees; and, if necessary, of the shareholders, and the causes of his failure to obtain such action." *McHenry v. New York, etc. R. R.*, 22 Fed. Rep. 130 (1884); *s. c.*, 25 Fed. Rep. 65, 114. See *Leo v. Union Pac. Ry.*, 19 Fed. Rep. 283 (1884); *s. c.*, 17 Fed. Rep. 273; *Converse v. Dimock*, 22 Fed. Rep. 573 (1884); *Bill v. Western Union Tel. Co.*, 16 Fed. Rep. 14 (1883); *Quincy v. Steel*, 120 U. S. 241 (1887). A request in Alaska to the general manager in Alaska of a Minnesota corporation, the entire business of which is in Alaska, is insufficient where the board of directors is in Minnesota and no irreparable injury is shown. *Corbus v. Alaska, etc. Co.*, 187 U. S. 455 (1903), the court saying: "It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs." The suit in this case was instituted to enjoin the corporation from paying a license tax imposed by the United States government. The bill must set forth with particularity the efforts made to induce the officers

and stockholders to institute a suit. *Worth, etc. Co. v. Bingham*, 116 Fed. Rep. 785 (1902); *Savings & T. Co. v. Bear Valley, etc. Co.*, 112 Fed. Rep. 693 (1902); *Clarke v. Eastern, etc. Assoc.*, 89 Fed. Rep. 779 (1898); *Foote v. Cunard Min. Co.*, 17 Fed. Rep. 46 (1883), holding that an allegation that the corporation would probably refuse relief is insufficient. The provision of rule 94 in the federal court that a stockholder's suit must be verified by oath does not apply to a suit instituted by him in the state court and removed to the federal court. *Maeder v. Buffalo, etc. Co.*, 132 Fed. Rep. 280 (1904). A stockholder's suit to compel the declaration of a dividend does not lie where the stockholder has not applied to the directors therefor and does not allege that the directors would refuse to give such application proper consideration. *Maeder v. Buffalo, etc. Co.*, 132 Fed. Rep. 280 (1904). A dissenting stockholder must apply to the stockholders to take action as well as to the directors. *Macon, etc. R. R. v. Shailer*, 141 Fed. Rep. 585 (1905). In the case *Kesler v. Ensley*, 123 Fed. Rep. 546 (1903), where a stockholder charged that a majority of the directors were interested in judgments under which the property was sold out, the court held that the directors having ceased to be such, and the majority of the stockholders in meeting assembled having ratified the transaction, the court would not interfere, no fraud on the part of

to endeavor to have the corporation bring the suit and to allege what steps he has taken in that direction does not raise a question

the stockholders being alleged, and the court held that the corporation being estopped from maintaining the suit the stockholders were estopped. A letter to the directors, explaining the desired suit and requesting that suit be brought, is sufficient to satisfy rule 94, where there is also an allegation that the company declined to comply with the request. *Ball v. Rutland R. R.*, 93 Fed. Rep. 513 (1899). A stockholder bringing suit in the federal court to cancel an alleged illegal issue of stock must allege a demand to the corporation or its receiver and a refusal to sue, and that he was a stockholder at the time of the transaction complained of, or that the stock has come to him since that time by operation of law. *Bimber v. Calivada, etc. Co.*, 110 Fed. Rep. 58 (1901). The compliance of a stockholder with rule 94 requiring him to first make a request of the board of directors must not only be alleged, but must be proved in evidence. Where the stockholder delays for eighteen months, and in the meantime a new board of directors has been elected consisting of the most part of new parties, and a stockholders' meeting is held, it is insufficient for him to allege that the directors who did the *ultra vires* act control a majority of the stock. *Dickinson v. Consolidated, etc. Co.*, 114 Fed. Rep. 232 (1902). In this case the court said that while a stockholder might have the right to bring suit for an injunction against an *ultra vires* act of the corporation without first requesting the directors to bring suit, yet that a suit to set aside an *ultra vires* act after it had been completed could not be brought without first requesting the board of directors to bring it, as required by rule 94. Subscribers to stock may rescind the same on the ground that promoters

who sold property to the company had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators, and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only \$150,000 of cash for \$450,000 of stock. Rule 94 of the federal courts does not apply to such a case. *Barcus v. Gates*, 89 Fed. Rep. 783 (1898). Rule 94 does not apply to a case where it appears from the allegations in the bill that there is collusion and that a demand would have been useless. *Eldred v. American, etc. Co.*, 99 Fed. Rep. 168 (1900). No request need be made to the board of directors under rule 94, when they are guilty of the act complained of. *Harrison v. Thomas*, 112 Fed. Rep. 22 (1901). Rule 94 does not require a stockholder to set forth his efforts to induce the corporation to bring suit where he alleges that the corporation is controlled by the defendants. *Berwind v. Canadian, etc. Ry.*, 98 Fed. Rep. 158 (1899); *Universal, etc. Co. v. Stoneburner*, 113 Fed. Rep. 251 (1902). Where one railroad owns a majority of the stock and controls the board of directors of another railroad, and causes the latter to lease its road to the former, a stockholder of the former may file a bill in equity to set aside such lease on the ground that its terms were so inequitable as to constitute fraud. In such case no demand need be made to the board of directors to bring the suit, if the facts alleged in the bill show that the board of directors is controlled by the guilty party. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). In *Barnes v. Kornegay*, 62 Fed. Rep. 671 (1894), the court very properly held

of jurisdiction, but of the authority of the plaintiff to maintain the that no request need be made where the state owned most of the stock and controlled the directors and was about to destroy an exemption from taxation.

In a suit by depositors of a bank to hold the directors liable for negligence the depositors need not under the ninety-fourth rule, first request the corporation to institute the suit. *Foster v. Bank, etc.*, 88 Fed. Rep. 604 (1898). Rule 94 does not prevent a stockholder in a water-works company from filing a bill to enjoin a city from reducing the water rates so low as to deprive the stock of its earning ability, in violation of the fourteenth amendment of the United States constitution, it appearing that the court had jurisdiction of the case irrespective of citizenship, even though it is shown that the company is in sympathy with the stockholder and that the company has already instituted a suit in the state court. *Kimball v. City of Cedar Rapids*, 99 Fed. Rep. 130 (1900), the court saying that the object of the rule was to prevent suits being brought in the federal court, and also to prevent minority stockholders from interfering with the discretion of the directors.

Rule 94 of the federal courts is not satisfied by an allegation that a request has been made to the board of directors and has been refused and that the suit is not collusive. Something more than this is necessary; and hence if the corporation defendant is of the same state as the other defendants the federal court has no jurisdiction, the corporation defendant being looked upon as the real complainant. *Elkins v. City of Chicago*, 119 Fed. Rep. 957 (1902), the court stating that it did not pass on whether such jurisdiction would exist if the corporation really was hostile to the complainant, and rule 94 had been complied with. The request cannot be omitted merely because the

guilty party owns a majority of the stock. *Allen v. Wilson*, 28 Fed. Rep. 677 (1886), holding also that the fact that the guilty party elected the existing board of directors does not excuse request. A suit by a stockholder to remedy frauds on the part of the president does not come within the ninety-fourth rule, and, even if it does, an allegation that the guilty parties control the board of directors excuses any request to them to sue. *Ranger v. Champion, etc. Co.*, 52 Fed. Rep. 611 (1892). Concerning the United States rule as to the request to the company, see also *Whitney v. Fairbanks*, 54 Fed. Rep. 985 (1893). Under rule 94, in the federal courts (104 U. S. ix), it is not enough to allege that the guilty parties are in control of the corporation. This is not enough to dispense with a request to the directors to bring suit. *Squair v. Lookout Mountain Co.*, 42 Fed. Rep. 729 (1890). In the federal courts the stockholder must set out in his pleading when or how the request to sue was made, upon what showing of facts, and that the directors so requested are still in office. *Swope v. Villard*, 61 Fed. Rep. 417 (1894). Where the guilty parties control the board of directors, the ninety-fourth rule does not require the complainant stockholder to set forth with particularity his efforts to have the directors act. *De Neufville v. New York & Northern Ry.*, 81 Fed. Rep. 10 (1897). No attempt to get the officers to bring suit need be made under rule 94, where the officers themselves are the guilty parties complained of. *Excelsior, etc. Co. v. Brown*, 74 Fed. Rep. 321 (1896). Under the ninety-fourth equity rule, if the board of directors is controlled by the guilty parties, "it is still required that an effort should be made to induce action by the body of the corporation,—by the stockholders,—and that if action cannot be obtained either from the

suit. It may be raised by demurrer. A failure, however, to allege such facts does not prevent jurisdiction attaching.¹

The request may be made to the president,² although this is denied in Tennessee.³ If a receiver is in charge the request is to be made to him.⁴ A request to the executive committee is sufficient.⁵ A request by a stockholder to the trustee in insolvency of a corpo-

board of directors or from the body of the stockholders, the bill shall show the character and extent of the efforts, and shall particularly show the reasons why the party who brings his suit failed to obtain remedial action within the body of the corporation.' *Church v. Citizens' Street Ry.*, 78 Fed. Rep. 526 (1897). Equity rule number 94 does not apply to suits removed into the federal court from state courts. *Earle v. Seattle, etc. Ry.*, 56 Fed. Rep. 909 (1893); *Evans v. Union Pac. Ry.*, 58 Fed. Rep. 497 (1893). A request to the directors is first necessary, and is not excused by vague and general averments as to complicity on the part of the directors in the wrongs complained of. *Ziegler v. Lake Street Elev. R. R.*, 76 Fed. Rep. 662 (1896).

¹ *Illinois, etc. R. R. v. Adams*, 180 U. S. 28 (1901). A demurrer may raise the point that no request has been made to the directors. *O'Connor v. Virginia, etc. Co.*, 184 N. Y. 46 (1906). A non-resident stockholder in an Illinois gas corporation may maintain a bill in equity in the federal court to enjoin a city in Illinois from illegally reducing gas rates, the gas company being made also a party defendant, and the question of whether a request by the stockholder to the gas company to bring suit was collusive will not be determined on demurrer. *Mills v. City of Chicago*, 127 Fed. Rep. 731 (1904).

² A request to and refusal by the president, who is also the manager, suffices, even though he is the party guilty of the acts complained of. *Chi-*

cago v. Cameron, 120 Ill. 447 (1887). Service of the demand may be in the same manner as authorized by statute for service of other papers. *The Telegraph v. Lee*, 125 Iowa, 17 (1904). A request made to the president is good, though he replies that he had resigned two years previously, it appearing that his resignation had not been accepted and no meetings held since the resignation. *Averill v. Barber*, 6 N. Y. Supp. 255 (1889). A request by one of the stockholders to the officers and president is sufficient. *Becker v. Gulf City, etc. Co.*, 80 Tex. 475 (1891).

³ In a stockholder's suit to hold the directors liable for negligence the request must be to the board of directors. A request to the president is insufficient. *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891).

⁴ *Nelson v. Burrows*, 9 Abb. N. Cas. 280 (1881); *Fisher v. Andrews*, 37 Hun, 176 (1885); *Kelsey v. Sargent*, 40 Hun, 150 (1886); *Coble v. Beall*, 41 S. E. Rep. 793 (N. C. 1902). That it is the duty of a receiver to bring suit, see § 735, *supra*. The request of the stockholders should be to the receiver, and upon his refusal to bring the suit the stockholder may bring it. *Streight v. Junk*, 59 Fed. Rep. 321 (1893). Redress must first be sought through the board of directors, or through the receiver who is in charge of the property. *Holton v. Wallace*, 77 Fed. Rep. 61 (1896). It is not enough that the receiver has refused to sue. The stockholder must apply to the court to order the receiver to sue. *Swope v. Villard*, 61

⁵ *Hazard v. Durant*, 11 R. I. 196 (1875).

ration is sufficient to enable the former to bring suit to hold the directors liable for negligence if the trustee refuses to sue.¹ The request must clearly demand that suit be brought.² A request is insufficient where it does not state the facts on which the suit may be maintained.³ Failure of a suit on account of no request having been made is no bar to a subsequent suit after request has been made.⁴

§ 741. *When such an allegation may be omitted.*—There are occasions when the allegation that the stockholder has requested the directors to bring suit and they have refused may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and even if they did the court would not

Fed. Rep. 417 (1894). The statute authorizing suit against receivers without previous request does not apply to a stockholder's suit to remedy wrongs committed before the receiver was appointed. *Swope v. Villard*, 61 Fed. Rep. 417 (1894). Where a receiver was himself one of the directors charged with fraud, a stockholder will be allowed to bring suit making the receiver a party defendant, and it is no defense that the receivership has been running for two years. *Weslosky v. Quarterman*, 123 Ga. 312 (1905). It has been held that where a director is appointed receiver he may sue himself as a director. *Murphy v. Penniman*, 66 Atl. Rep. 282 (Md. 1907). The depositors of a bank may sue the directors for deceit in causing the former to make deposits when the bank was insolvent, and they need not first make a request to the receiver to bring such suit. *Blumer v. Ulmer*, 44 S. Rep. 161 (Miss. 1907).

¹ *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630 (1891).

² A request is first necessary, and such request is not proved, where a fraudulent lease has been made by the stockholder, demanding his share of the surplus profits over and above the rental agreed upon, nor is it proved by his notice that the lease was unlawful. *Flynn v. Brooklyn, etc. R. R.*, 158 N. Y. 493 (1899).

³ *Doherty v. Mercantile T. Co.*, 184 Mass. 590 (1904). In a stockholder's suit to enjoin his railroad corporation from reducing rates, in accordance with the state statute, he must, in addition to alleging that he made a demand on the board of directors, show the manner or reason for their refusal, since their refusal may have been proper. *Poor v. Iowa, etc. Ry.*, 155 Fed. Rep. 226 (1907). Where a stockholder in a railroad company requests the directors or managing officers not to reduce rates as required by the statute, and they reduce the rate on account of the dangers of severe penalties, this is a sufficient demand preliminary to a suit by him to have the rates declared illegal. *Perkins v. Northern, etc. Ry.*, 155 Fed. Rep. 445 (1907). The general allegation that the stockholder tried unsuccessfully to have the corporation secure relief and protection against the wrongs complained of is insufficient. *Vogeler v. Punch*, 103 S. W. Rep. 1001 (Mo. 1907). A general allegation that a demand had been made on the company to bring suit, but that the company had omitted and failed to do so, does not state sufficient detailed facts. *Kavanaugh v. Commonwealth, etc. Co.*, 103 N. Y. App. Div. 95 (1905).

⁴ *The Telegraph v. Lee*, 125 Iowa, 17 (1904).

allow them to conduct the suit against themselves.¹ Nevertheless

¹ Quoted and approved in *Loomis v. Missouri etc. Ry.*, 165 Mo. 469, 488 (1901), and *State v. Grant University*, 90 S. W. Rep. 294 (Tenn. 1905); *Jacobson v. Brooklyn, etc. Co.*, 184 N. Y. 152 (1906); *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781 (1906); *Barry v. Moeller*, 68 N. J. Eq. 483 (1904); *Appleton v. American Malting Co.*, 65 N. J. Eq. 375 (1903); *McConnell v. Combination, etc. Co.*, 30 Mont. 239 (1904); *Hingston v. Montgomery*, 97 S. W. Rep. 202 (Mo. 1906); *Columbia, etc. Co., v. Washed, etc. Co.*, 136 Fed. Rep. 710 (1905). *Montgomery Traction Co. v. Harmon*, 140 Ala. 505 (1904). No request is necessary if the guilty directors control a majority of the stock. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). A stockholder need not make a request where there is no board of directors. *Frederick Milling Co., v. Frederick, etc. Co.*, 106 N. W. Rep. 298 (S. Dak. 1906). Even though the Michigan statutes authorize one mining company to purchase the stock of other mining companies, yet where this results in establishing a practical monopoly in a certain kind of copper, a minority stockholder may enjoin the voting of such stock so held by the purchasing company, and no formal demand need first be made by him upon the directors to institute the suit. *Bigelow v. Calumet, etc. Co.*, 155 Fed. Rep. 869 (1907). Where a purchaser at tax sale is about to remove the corporate property and the officers do not act, the stockholders may maintain a bill in equity to enjoin the removal of the property and no request to the directors is necessary. *Starr v. Shepard*, 145 Mich. 302 (1906). In a suit by a stockholder for winding up, in accordance with a statute, the insolvent corporation, no previous request need be made to the board of directors. *Briggs v. Traders' Co.*, 145 Fed. Rep. 254 (1906). Where the

corporation files a cross-complaint and obtains judgment in its behalf, this excuses the failure to demand of the directors that they bring suit. *Dundon v. McDonald*, 146 Cal. 585 (1905). A stockholder may file a bill to set aside a sale of the entire assets of the company, which is solvent and a going concern, to another company, and no request to the directors need be made where they authorized the transaction and a majority of the stockholders had ratified it. *Tillis v. Brown*, 47 S. Rep. 589 (Ala. 1908). If it is shown that an application to the officers would be futile, such application need not be made. *Burrows v. Interborough, etc. Co.*, 156 Fed. Rep. 389 (1907). Where the officers know the facts and are not faithfully discharging their duties no request is necessary. *Williams v. Erie Mountain, etc. Co.*, 91 Pac. Rep. 1091 (Wash. 1907); *Wayne Pike Co. v. Hammons*, 129 Ind. 368 (1891); *Donnelly v. Sampson*, 115 N. W. Rep. (Wis. 1908); *Hannerty v. Standard Theater Co.*, 109 Mo. 297 (1891); *Wickersham v. Crittenden*, 93 Cal. 17 (1892); *Ashton v. Dashaway Assoc.*, 84 Cal. 61 (1890); *Barr v. Pittsburgh, etc. Co.*, 40 Fed. Rep. 412 (1889); *Smith v. Dorn*, 96 Cal. 73 (1892); *Eschweiler v. Stowell*, 78 Wis. 316 (1890); *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (1898); *Anderton v. Wolf*, 41 Hun, 571 (1886); *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483 (1892); *Brinckerhoff v. Bostwick*, 88 N. Y. 52 (1882); s. c., 105 N. Y. 567. *Rogers v. La Fayette, etc. Works*, 52 Ind. 296 (1875); *Tazewell County v. Farmers', etc. Co.*, 12 Fed. Rep. 752 (1882); *Davis v. Gemmell*, 70 Md. 356 (1889); see *Davis v. Gemmell*, 73 Md. 530; *Tippicanoe County v. La Fayette, etc. R. R.*, 50 Ind. 85 (1875); *Wilcox v. Bickel*, 11 Neb. 154 (1881), where the officers had absconded. No demand is necessary if the guilty parties constitute a majority of the board

the complainant must allege facts which excuse such a demand or

Tevis v. Hammersmith, 66 N. E. Rep. 476 (1875). And an allegation that the directors are "nearly if not entirely" in league with the guilty parties is insufficient. *Cogswell v. Bull*, 39 Cal. 320 (1870).

Where one of three directors, who is also president and manager, dies, and the three owned all the stock and the company owed the decedent \$45,000 and other parties \$15,000, and had no money, and the works of the company were idle, and the two remaining directors could not agree, and the treasurer was managing the business illegally, the court will appoint a receiver *pendente lite*, the suit being to preserve the assets for the benefit of the creditors. In such a case no request need first be made to the directors to bring the suit. *Sheridan, etc. Works v. Marion T. Co.*, 157 Ind. 292 (1901). No request to the board of directors or to a stockholders' meeting that suit be brought need be made where a majority of the directors will be defendants, and no meeting of the stockholders can be called except by them. *Schoening v. Schwenk*, 112 Iowa, 733 (1901). In a stockholders' suit to hold directors in a national bank liable for negligence, a request to the receiver to bring the suit is unnecessary where the receiver was one of the directors. *Flynn v. Third Nat. Bank*, 122 Mich. 642 (1900). A request is necessary, even though it is alleged that a majority of the directors are involved in the fraud complained of, where it appears that such directors were not qualified to act as directors by reason of not being stockholders, and never had acted as such. *Loomis v. Missouri, etc. Ry.*, 165 Mo. 469 (1901). Where the board of directors of a prosperous mining corporation have sold all its assets to another corporation in exchange for the stock of the latter, and a stockholders' meeting has been called for the purpose of ratifying the same under a statute, a minority

Teviss v. Hammersmith, 66 N. E. Rep. 476 (1875). And an allegation that the directors are "nearly if not entirely" in league with the guilty parties is insufficient. *Cogswell v. Bull*, 39 Cal. 320 (1870).

Hodges' Adm'x v. South Fork, etc. Co., 50 S. W. Rep. 969 (Ky. 1899); *Stahn v. Catawba Mills*, 53 S. C. 519 (1898); *Joy v. Ft. Worth, etc. Co.*, 24 Tex. Civ. App. 94 (1900); *Currier v. New York, etc. R. R.*, 35 Hun, 355 (1885); *Ramsey v. Gould*, 57 Barb. 398 (1870); *Kelsey v. Sargent*, 40 Hun, 150 (1886); *Mojle v. Landers*, 21 Pac. Rep. 1133 (Cal. 1889); s. c., 83 Cal. 579 (1890); *Pa rott v. Byers*, 40 Cal. 614 (1871); *Fisher v. Andrews*, 37 Hun, 176 (1885); *Young v. Drake*, 8 Hun, 61 (1876); *Higgins v. Lansingh*, 154 Ill. 301 (1895); *Young v. Alhambra Min. Co.*, 71 Fed. Rep. 810 (1895); *Sage v. Culver*, 147 N. Y. 241 (1895); *Green v. Hedenberg*, 159 Ill. 489 (1896); *Gerry v. Bismarck Bank*, 19 Mont. 191 (1897); *George v. Central R. R., etc. Co.*, 101 Ala. 607 (1894); *Bell v. Montgomery Light Co.*, 103 Ala. 275 (1894); *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894); *Pondir v. New York, Lake Erie, etc. R. R.*, 72 Hun, 384 (1893); *Mount v. Radford Trust Co.*, 93 Va. 427 (1896); *Cowles v. Glass*, 30 S. W. Rep. 293 (Tex. 1895); *Loftus v. Farmers', etc. Assoc.*, 8 S. Dak. 201 (1896); *Heath v. Erie Ry.*, 8 Blatchf. 347 (1871); s. c., 11 Fed. Cas. 976, the court saying: "It would be a mockery to require or permit a suit against them to be brought and prosecuted under their management to obtain relief sought by this bill;" *Mussina v. Goldthwaite*, 34 Tex. 125 (1870); *Doud v. Wisconsin, etc. Ry.*, 65 Wis. 108 (1886); *Pond v. Vermont Valley R. R.*, 12 Blatchf. 280 (1874); s. c., 19 Fed. Cas. 976. But an allegation that the management is under the control of persons appointed by the guilty parties is insufficient. See *McMurray v. Northern Ry.*, 22 Grant (U. C.),

request to the directors, and these facts must be stated with particularity. A stockholder may enjoin such ratification, if it is *ultra vires*, without requesting the board of directors to bring suit, inasmuch as they have already committed themselves as to their position. *Forrester v. Boston, etc. Co.*, 21 Mont. 544, 565 (1898). Where the majority of the directors control also a majority of the stock no request is necessary. *Alexander v. Automatic, etc. Co.*, [1900] 2 Ch. 56, rev'g [1899] 2 Ch. 302. In a suit by a stockholder to restrain the directors from transferring all the property to another corporation without consideration, no request is necessary. *Boaz v. Sterlingworth, etc. Co.*, 68 N. Y. App. Div. 1 (1902). Where the stockholders of a bank have legally ordered the winding up of its business, and for three years thereafter the officers still continue to do business at a great loss, apparently without any effort to wind up its affairs, a stockholder may file a bill for an accounting and the appointment of a receiver, and no request to the corporation to bring the suit need be made. *Mathews v. Bank of Allendale*, 60 S. C. 183 (1901). A request to the board of directors is necessary, even though the corporation has been enjoined from commencing suit, and even though there is involved the validity of a mortgage given on the corporate property for the benefit of the president. *Smith v. Bulkley*, 18 Col. App. 227 (1902). If the directors are the guilty parties, a stockholder suing to prevent their running the corporation for the benefit of a partnership need not allege a request to them to sue. *Rothwell v. Robinson*, 39 Minn. 1 (1888); s. c., 44 Minn. 538. If the fraud has been by the majority of the stockholders on the minority, no request to the directors to sue need be made. *Nathan v. Tompkins*, 82 Ala. 437 (1887). No request is necessary to the directors to undo an illegal lease when they cannot undo it except with the consent of another company. *Tippecanoe County v. Lafayette, etc. R. R.*, 50 Ind. 85 (1875). A request to the directors is not excused by the fact that the guilty party—the corporate treasurer—owns a majority of the stock. *Dunphy v. Traveller Newsp. Assoc.*, 146 Mass. 495 (1888). In North Carolina it would seem that a demand on the guilty officers is necessary in any case. *Moore v. Silver, etc. Co.*, 104 N. C. 534 (1889). In a stockholder's suit to enjoin a rival company from voting stock in the stockholder's company, a request to the directors to sue is unnecessary where the directors are controlled by such rival company. *Mack v. De Bardeleben, etc. Co.*, 90 Ala. 396 (1890). A stockholder may be permitted to bring suit against the receiver of the corporation to set aside a fraudulent assessment by him on stock, and a request need not be made to the receiver to bring the suit, he being guilty of the fraud. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522 (1896). A request is unnecessary in a suit to recover back an illegal salary where the guilty parties are in control. *Eaton v. Robinson*, 18 R. I. 396 (1893); s. c., 19 R. I. 146 (1895). A stockholder may bring suit in behalf of the corporation to compel the president to pay his subscription where the president is in control of the company and refuses to pay such subscription. No request to the directors is necessary in such a case. *Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891). A request is not excused by the fact that a majority of the stockholders sustain the acts complained of. *Decatur, etc. v. Palm*, 113 Ala. 531 (1896). No request is necessary where the owners of a majority of the stock cause the directors to sell the property to a person who buys for them. *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320 (1892). See also § 740, *supra*.

larity and definiteness.¹ In a suit by a stockholder in a lessor railroad to compel the lessee to account, a request to the directors of the lessor to bring the suit is not excused by the fact that the lessee owned a majority of the stock of the lessor and elected its di-

¹ Quoted and approved in *Kern v. Arbeiter, etc. Verein*, 139 Mich. 233 (1905). See also cases in preceding note. The plaintiff must allege that the officers have committed a breach of trust, and though requested the corporation refuses to act or is controlled by the wrong-doers, and that he has been diligent in prosecuting his remedy. *Von Arnim v. American Tubeworks*, 188 Mass. 515 (1905). An allegation that a majority stockholder controlled the directors and also controlled directors in other corporations and that thereby acts of spoliation were committed does not excuse the failure to request the directors to bring suit. *Virginia, etc. Co., v. Fisher*, 104 Va. 121 (1905). A letter to the directors requesting them to call a meeting and to take steps to redeem property that had been fraudulently sold under foreclosure is insufficient. *Johns v. McLester*, 137 Ala. 283 (1903). Where a majority of the board of directors are usurpers the request should be made to the proper board, and hence a failure to make such request is fatal. *Ide v. Dascomb*, 18 Colo. App. 415 (1903). The general allegation that the guilty parties control the corporation and refuse to permit the suit to be brought is insufficient. *Deveny v. Hart Coal Co.*, 60 S. E. Rep. 789 (W. Va. 1908). An allegation that frequent protests had been made is not a sufficient allegation of a request to sue. *Boyd v. Simms*, 87 Tenn. 771 (1889), holding also that it is insufficient to show that a majority of the directors are large stockholders in a competing company, although the charge is that such directors are fraudulently favoring the latter company. It is not

sufficient to allege that a majority of the directors "are acting in the interest of, and are under the control of," the guilty directors. It must be alleged that they are wilfully disregardful of the interests of the corporation, or would be if informed of the injurious effect of their actions, or would yield to the influence or control of the guilty directors if aware of the purposes and uses for which that influence is exercised. *Brewer v. Boston Theatre*, 104 Mass. 378 (1870). A request is not excused by an allegation that the complainant had offered to assume the expense and conduct of the litigation. *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97 (1896). A request is necessary, and it is insufficient that the plaintiff had demanded his part of what he would have received if the illegal act had not been committed. *Flynn v. Brooklyn City R. R.*, 9 N. Y. App. Div. 269 (1896); *aff'd*, 158 N. Y. 493 (1899). No request is necessary where, in case the directors brought suit, the suit would be subject to the control of persons opposed to its success, and where the directors themselves are the wrong-doers or the partisans thereof. The allegation of these facts must be statements of fact and not conclusions of law. The manner in which the directors are interested must be pointed out. *Steiner v. Parsons*, 103 Ala. 215 (1893). In alleging the reason why a request has not been made to the board of directors a plaintiff must set forth the facts explicitly and definitely. *Louisville, etc. R. R. v. Neal*, 128 Ala. 149 (1900). As to the rule in the federal courts, see note, pp. 2473, 2474, *supra*.

rectors.¹ The stockholder may bring his suit although the corporation has been dissolved.²

§ 742. *Miscellaneous allegations of the complainant.*—The allegations which set forth the complaining stockholder's cause of action will of course depend largely on the particular facts of each case. It is necessary, however, to determine first whether the allegations are to make out a case of fraud, or of an *ultra vires* act, or of a negligent act. If an *ultra vires* act is complained of, the gist of the action is not fraud, and fraud need not be and should not be alleged.³ But where the action is to remedy a fraud, the allegations must clearly charge to that effect. The word "corrupt" has been held insufficient herein.⁴ Fraud need not be alleged if there has been a breach of the fiduciary relation.⁵ A general al-

1 *Wolf v. Pennsylvania R. R.*, 195 Pa. St. 91 (1900). A request by a stockholder to the corporation to bring suit against the directors for declaring dividends in violation of a statute is not excused by the fact that five out of the twelve directors were directors when such dividends were declared, even though one of the others was a brother of one of the five and another was an employee of one of the five. *Siegman v. Maloney*, 65 N. J. Eq. 372 (1903). Even though the guilty director has elected, through his control of the stock of the corporation, the board of directors, yet that fact does not excuse failure to make a request to them to bring suit. *Bowne v. Smith*, 44 N. Y. Misc. Rep. 575 (1904).

2 *Lafayette Co. v. Neely*, 21 Fed. Rep. 738 (1884); *Taylor v. Holmes*, 127 U. S. 489 (1888); *General Electric Co. v. West Asheville Imp. Co.*, 73 Fed. Rep. 386 (1896). Even after a dissolution a stockholder may file a bill to recover assets that have been wrongfully diverted. *Boyd v. Hankinson*, 92 Fed. Rep. 49 (1899).

3 *Clinch v. Financial Corp.* L. R. 5 Eq. 450, 482 (1868). If the pleadings charge fraud as the basis of the suit, fraud must be proved; otherwise the suit fails, even though the evidence shows a right to relief on the ground of account, discovery, or some other

ground of equitable jurisdiction. *Spies v. Chicago, etc. R. R.*, 40 Fed. Rep. 34 (1889). Where a stockholder of a railroad which has been foreclosed and reorganized attacks the foreclosure on the ground of fraud he cannot on appeal change his complaint and claim that inasmuch as the plan of reorganization allowed the majority stockholders to come in on a more favorable basis than the minority, he was entitled to come in on the same terms as the majority. *MacArdell v. Olcott*, 189 N. Y. 368 (1907). The dissenting opinion to the effect that on the merits the majority stockholders should have allowed the minority stockholders to come in on the same basis as the former came into the reorganization has much force.

4 *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. 474 (1875). The mere allegation of fraud without specifying the facts is insufficient. *Schell v. Alston Mfg. Co.*, 149 Fed. Rep. 439 (1906).

5 *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97 (1896). Where stockholders desire to attack a deed of the corporation on the ground of fraud, they must do so affirmatively, and not by simply denying its execution. *Morrill v. Little Falls, etc. Co.*, 53 Minn. 371 (1893). In a suit against an officer to recover back moneys, his position as officer may be proved by

legation that the president has appropriated large amounts of money of the corporation to his own use, the details of which the complainant is unable to state, is insufficient. Such an allegation is merely a fishing allegation.¹ A suit by a minority stockholder against the majority alleging a conspiracy to defraud the company will not lie where it is not alleged that the directors were parties to the conspiracy.² If the action is to set aside an *ultra vires* act, the act itself must be stated with particularity,³ and the articles of incorporation should be alleged in part at least.⁴ The complaint need not allege who the other stockholders are, how numerous, or whether a majority.⁵ The stockholder need not allege that he was a stockholder at the time of the act or that his stock has since come to him by operation of law.⁶ It is not necessary to allege that the stockholders have been free from acquiescence or laches.⁷

In North Carolina it is held that the complaining stockholder must aver that he is a "*bona fide* owner of the stock; that he bought the same in good faith, and not for mere vexatious purposes."⁸ A general allegation that the board of directors were negligent does not render a particular director liable.⁹ The essential allegations in a stockholder's suit to hold directors liable for negligence are first the same allegations as the corporation would have made if it had brought the suit, and, second, that he is a stockholder and the corporation has refused or unreasonably failed to bring the action. Allegations as to the injury to his stock are not

his signatures as such officer. *Putnam v. Gunning*, 162 Mass. 552 (1895).

¹ *Blair v. Telegram News Co.*, 172 Mass. 201 (1898). In a stockholder's suit to cancel an alleged agreement by which the corporation is to pay to a director royalties on a void and worthless patent, the allegation that such director with his sons constitute a majority of the board and that the sons are without means and are supported by their father, is material and not impertinent. *Burden v. Burden*, 124 Fed. Rep. 250 (1903).

² *Brown v. Utopia Land Co.*, 118 N. Y. App. Div. 364 (1907).

³ *Leo v. Union Pac. Ry.*, 19 Fed. Rep. 283 (1884); s. c., 17 Fed. Rep. 273. The plaintiff must allege that the corporation is one for profit. *Applegarth v. McQuiddy*, 77 Cal. 408 (1888).

⁴ *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901).

⁵ *Descombes v. Wood*, 91 Mo. 196 (1886).

⁶ *Parsons v. Joseph*, 92 Ala. 403 (1890). See also § 736, *supra*. As to the federal courts, see § 737, *supra*.

⁷ *Horn, etc. Co. v. Ryan*, 42 Minn. 196 (1889). See also § 733, *supra*. A stockholder must allege that neither he nor any prior owner of his stock has acquiesced in the acts complained of, where the amount of the stock owned by him is very small, comparatively. *Trimble v. American, etc. Co.*, 61 N. J. Eq. 340 (1901). For the various allegations to be made in a complaint to set aside an illegal alienation of corporate property, see *Beecher v. Schieffelin*, 4 N. Y. Civ. Proc. 230 (1883).

⁸ *Moore v. Silver, etc. Co.*, 104 N. C. 534 (1889).

⁹ *Fisher v. Graves*, 80 Fed. Rep. 590 (1897). The stockholder's complaint

proper.¹ A demurrer is not the proper way to raise the question of laches.² A stockholder is not liable for libel and slander by reason of allegations in his bill in equity against directors for fraud.³ Neither is he liable for malicious prosecution, there having been no arrest of the person or seizure of property.⁴ While a stockholder at a meeting of a private corporation may charge fraud against another stockholder or officer in connection with the corporate affairs, yet a newspaper has no right to report such charge and may be held liable for libel in doing so.⁵

§ 743. *Prayer for relief.*—The relief for which prayer is made in the bill will depend upon the character of the act complained of, and also of the facts in the particular case. Generally it is to compel the director or third parties to turn over to the corporation money or property fraudulently held by the defendants, or to enjoin acts, or to set aside transactions, or for a receiver, or for dissolution, or for more than one of these. It is well settled that the prayer for relief may be in the alternative.⁶ The relief granted cannot exceed that which is asked.⁷ Where a director sells property to the corporation the presumption against him is that it is fraudulent, but there is not the same presumption against the other directors who voted for it. In a stockholder's suit to set the sale aside the court cannot render a judgment against the directors for the difference between the value of the property and the price paid, unless fraud is proved.⁸

§ 744. *Property received under the act objected to must be returned upon that act being set aside.*—This is a principle of law that applies to all the remedies given by a court of equity in remedying the frauds or *ultra vires* acts of the directors or third persons

against directors of the bank for negligence need not allege particular losses nor all of the losses in particular, nor who were on the managing board at the time of each particular loss. *Sigwald v. City Bank*, 74 S. C. 473 (1906).

¹ *Kavanaugh v. Commonwealth T. Co.*, 181 N. Y. 121 (1905).

² See also § 733, *supra*.

³ *Runge v. Franklin*, 72 Tex. 585 (1889).

⁴ *Cincinnati, etc. Co. v. Bruck*, 61 Ohio St. 489 (1900).

⁵ *Kimball v. Post Pub. Co.*, 85 N. E. Rep. 103 (Mass. 1908), the court saying: "No doubt a stockholder at such

a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest."

⁶ *Colton v. Ross*, 2 Paige, 396 (1831); *Thomas v. Hobler*, 4 De G., F. & J. 199 (1861).

⁷ *Latimer v. Eddy*, 46 Barb. 61 (1864).

⁸ *Polhemus v. Polhemus*, 114 N. Y. App. Div. 781 (1906).

against the corporation. He who seeks equity must do equity. An *ultra vires* act will not be set aside unless the money or property received by the corporation from third persons thereby is returned to such persons.¹ In Massachusetts the supreme court has recently

1 *Buford v. Keokuk, etc. Co.*, 69 Mo. 611 (1879); *Harpending v. Munson*, 91 N. Y. 650 (1883); *New Castle, etc. R. R. v. Simpson*, 23 Fed. Rep. 214 (1885), allowing to the party outlays, compensation, and interest. *Cf. Gray v. New York, etc. Co.*, 3 Hun, 383; *Thomas v. Railroad Co.*, 101 U. S. 71 (1879); *Louisiana v. Wood*, 102 U. S. 294 (1880); *Chapman v. Douglas County*, 107 U. S. 348 (1882); *Salt Lake City v. Hollister*, 118 U. S. 256, 263 (1885); *Green's Brice, Ultra Vires*, 717. The benefits received by the corporation must be returned in order to sustain an action setting aside a fraudulent contract. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). Even though the purchasers of an equity in land sell it to a corporation which they form, at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. *Fleckenstein v. Waters*, 160 Mo. 649 (1901). Where a mining corporation makes a contract with a person holding a majority of its stock and who has furnished the qualification shares for the directors, by which contract the stock is issued to him for work to be done on the mine, minority stockholders may cause the contract to be set aside, and the decree may provide that the stock shall be delivered back upon the repayment of the money. *Jones v. Green*, 129 Mich. 203 (1901). Even though directors are interested in the construction company which takes the bonds and the property is foreclosed and is bought in by the directors, yet the railroad company cannot set aside the transaction unless it offer to pay to the directors what they have expended or offers to take the property subject to such mortgage bonds. *San Antonio, etc. Ry. v. San Antonio, etc. R. R.*, 25 Tex. Civ. App. 167 (1900). Where promoters pay out less than \$30,000 to secure options on land and then sell the options to a corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900). The complaining stockholder need not offer to return any benefits to a director to whom the property of the corporation has been transferred, where the director has given nothing therefor. *Mobile, etc. Co. v. Gass*, 129 Ala. 214 (1901). Stockholders complaining of a reorganization must offer to pay their share of what may be found due if the transaction is set aside. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). Even though the secretary has sold the corporate

held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of

property without authority, yet if the money has been used by the corporation, the amount must be tendered back before the transfer can be set aside. *Alaska, etc. Co. v. Solner*, 123 Fed. Rep. 855 (1903). An order authorizing the receiver to sell the assets to another corporation, in which the directors are interested, at a certain price, a condition of the sale being that the directors should be released by the receiver from personal liability on their part for past acts, cannot be set aside as to such release by a suit by a stockholder for that purpose, where the effect would be to deprive the directors of the benefit to them without returning the benefit they confer. *Craig v. James*, 89 N. Y. App. Div. 541 (1904); *aff'd*, 181 N. Y. 538. Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on a suit by the stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. *Hitchcock v. Barrett*, 50 Fed. Rep. 653 (1892). The consideration must be returned. *Pierson v. McCurdy*, 33 Hun, 520 (1884), where a receiver sued a director for funds used to purchase stock; *aff'd* on another point in 100 N. Y. 608. See also *Gould v. Cayuga, etc. Bank*, 86 N. Y. 75 (1881); but see *Allerton v. Allerton*, 50 N. Y. 670 (1872). Where the president of a corporation by fraud causes a purchase of property by the company from himself at an excessive price, he cannot demand that he be put *in statu quo* before relief is granted the com-

pany. *Gerry v. Bismarck Bank*, 19 Mont. 191 (1897).

Payment by bondsmen of moneys used by directors in illegal purchases of bonds prevents action by the receiver of the corporation against the directors. *Hun v. Van Dyck*, 26 Hun, 567 (1882); *aff'd*, 92 N. Y. 660. As to the right of the fraudulent possessor to compensation for improvements, see *Jackson v. Ludeling*, 99 U. S. 513 (1878). If, however, the complainant never received the consideration and cannot compel others to return it, it is not necessary for him to offer to return it. See *Lamb v. San Pedro, etc. Co.*, 3 N. M. 632 (1886). Where the majority have fraudulently caused the directors to sell land to them and to buy stock of them, the minority need not offer to restore anything in order to institute suit. *Woodroof v. Howes*, 88 Cal. 184 (1891). A stockholder need not make a tender to a purchaser in bad faith of corporate property fraudulently sold by the directors. The action was to enjoin and set aside the sales. *Gray v. New York, etc. Co.*, 3 Hun, 383 (1875). Where two religious corporations united by one conveying its property to the other and the latter paying the debts of the former, a judgment setting aside such sale will also require the former to restore to the latter the money advanced by it. *Madison Ave. Bapt. Ch. v. Oliver St. Bapt. Ch.*, 73 N. Y. 82 (1878). A stockholder seeking to have corporate bonds canceled must offer to return the consideration. *Spencer v. Clarke*, 1 N. Y. Supp. 533 (1888). It is clear, however, that the stockholder himself cannot be expected to repay this consideration. A just rule would allow him to pray in his bill that the corporation repay the consideration. *Cf. Atlantic, etc. Tel. Co. v. Union Pac. Ry.*, 1 Fed. Rep.

dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors and officers approved the transaction when it was carried out, it appearing, however, that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.¹ The federal courts decided differ-

745 (1880), holding that though a contract be *ultra vires* a corporation will be restrained from recovering possession of property conveyed by it, except by due process of law and after return of the consideration. A stockholder suing to set aside need not tender if the party sued knew of the stockholder's dissent at the time when he entered into the act. *Metropolitan Elev. Ry. v. Manhattan Elev. Ry.*, 11 Daly, 373 (1884).

1 Where a person buys all the stock of a corporation for about \$613,000, and some real estate for about \$175,000, and sells the former to a corporation formed by him for that purpose, for \$2,500,000 par value of stock, having also an actual value of \$2,500,000, and sells the real estate for \$750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to

the corporation and did not see to it that the corporation had adequate independent advice. The court said: "That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315 (1905), the court refusing to follow *Old Dominion, etc. Co. v. Lewisohn*, 136 Fed. Rep. 915, involving the other issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued. Even though two of the directors sell to the corporation certain patents for \$3,000,000 full paid

ently, however.¹ A tender prior to the suit need not be made where the amount to be tendered is an unascertained amount. It is sufficient to offer in the complaint to pay or perform whatever obligations may exist.² A stockholder who brings suit to have a municipal subscription canceled on the ground that it is illegal need not first return to the municipality bonds which have been received in payment of the subscription.³ In a suit by a minority stockholder of a land company to cancel a contract between the company and a railroad corporation whereby the latter advanced large sums of money to the former and practically named its directors and officers, the stockholder charging that there was a fraudulent plan to deprive him of the stock, he need not first tender to the railroad company the sums so advanced.⁴ Where at the instance of a stockholder, the court sets aside a transfer of corporate property to a director, the stockholder, however, being obliged to repay the consideration, for which the decree gives him a lien upon the property therefor, the stockholder may foreclose such lien and may have a receiver of the corporation appointed.⁵ Where the company

stock, being the entire capital stock, and give to the corporation \$750,000 of the same as treasury stock, and even though the patents are worth but \$10,000, neither the corporation nor a purchaser of treasury stock at fifty cents on the dollar can compel them to return the stock nor hold them liable thereon, but the remedy, if any, is to rescind the transaction and return the patents and demand a return of the stock or the value of such part of the stock as they have sold. Such is the rule, even though the statutes of the state prohibit the issue of stock at less than par. The court said (p. 477): "Whether they knew that the value of the patents did or did not exceed \$10,000 was entirely immaterial. They had a right to hold the letters patent until they were offered the price at which they were willing to sell. They sold them to this company for its whole capital stock, agreeing with the company that that was the value of the patents. I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on,

and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the company the consideration they had received, less the real value." A purchaser of the treasury stock has of course a remedy at law if there were false representations. *Insurance Press v. Montauk, etc. Co.*, 103 N. Y. App. Div. 472 (1905). See also §§ 46, 47, *supra*.

¹ *Old. D. etc. Co. v. Lewisohn*, 210 U. S. 206 (1908).

² *Zebley v. Farmers' L. & T. Co.*, 139 N. Y. 461 (1893).

³ *Stebbins v. Perry County*, 167 Ill. 567 (1897). A stockholder need not offer to return property acquired by the corporation under a fraudulent agreement or show any effort to procure its return by the corporation where he alleges that he requested the corporation to bring the suit and it refused. *Edwards v. Mercantile, etc. Co.*, 124 Fed. Rep. 381 (1903).

⁴ *Holt v. California, etc. Co.*, 161 Fed. Rep. 3 (1908).

⁵ *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (1898).

purchases at an excessive price real estate in which the directors are personally interested, they may be compelled to repay the excess with interest or take the property at cost; otherwise the property should be sold and they be held liable for the difference between the price and the price originally paid with interest.¹ If a director through his wife sells property to the corporation for an exorbitant price in stock and mortgage bonds, and the hotel built thereon fails, the court may reduce the mortgage by the amount of profit made by the director.²

§ 745. *Injunction restraining the corporate officers and others from doing specified acts.*—The ordinary remedy of the stockholder is an injunction by a court of equity restraining the corporate officers from doing the specified fraudulent or *ultra vires* act which the stockholder complains of.³ Where a corporation has brought suit against its president for an accounting for money misappropriated by him, and where the president owns a majority of the stock, the court may enjoin the holding of an election, it being shown that the president has power to elect a board of directors who may defeat the purpose of the suit.⁴ In a suit by a stockholder to hold a

¹ Klein v. Independent, etc. Assoc., 83 N. E. Rep. 434 (Ill. 1907).

² Voorhees v. Malott, 69 Atl. Rep. 643 (N. J. 1908).

³ Where a proposed consolidation is attacked by a stockholder, a preliminary injunction granted so as not to render useless the whole suit, in case it is successful, will not be disturbed by the court of appeals. Young v. Rondout, etc. Co., 129 N. Y. 57 (1891); River Dun. Nav. Co. v. North Midland Ry., 1 Ry. Cas. 135, 153 (1838); Blatchford v. Ross, 54 Barb. 42 (1869). In Indiana it is held that no injunction will be granted against the payment of an unfounded claim by the directors, but that the action will proceed and other relief be granted. Rogers v. Lafayette Agric. Works, 52 Ind. 296 (1876). Vague fears are no ground for an injunction. Emerson v. South, etc. Co., 53 Pac. Rep. 756 (Kan. 1898). A stockholder may maintain a suit in the state court to enjoin directors from extending a lease at a reduced rental and from releasing security for such rental, where he charges fraud, even though both the lessor and lessee are in the

hands of receivers appointed by the federal court. Moreover the federal court has no authority in such suits to compel the lessor to execute such lease. Guaranty Trust Co. v. North Chicago St. R. Co., 130 Fed. Rep. 801 (1904). Where in a suit by a complaining stockholder the main relief is denied he will not be allowed to amend so as to enjoin particular acts by some of the defendants. Pierce v. Old Dominion, etc. Co., 65 Atl. Rep. 1005 (N. J. 1907). Under the statutes of New York a director of a foreign corporation may maintain in the New York courts a suit to compel the president to account for property misappropriated or wasted by him, but the court will not appoint a general receiver and enjoin the corporation from exercising its powers, although it may enjoin the president from acting and may appoint a receiver of the property in New York state. Acken v. Coughlin, 103 N. Y. App. Div. 1 (1905). As to foreign corporations, see §§ 734, 738, *supra*.

⁴ Coxe v. Huntsville, etc. Co., 129 Ala. 496 (1901). Even though a "trust" has purchased stock in a cor-

president liable for an illegal salary paid to him the validity of his election may be contested and an injunction asked against his continuing to act as president.¹ Generally the injunction runs to the corporation itself; and this is sufficient to make it effective and binding upon all corporate officers to whose notice it comes.² Where the officers of a corporation refuse to comply with an order of the court to allow inspection of the corporate property they are liable for contempt, even though they are not parties to the suit.³ In a stockholders' suit to set aside a consolidation on the ground that it was *ultra vires* and also fraudulent in that one company controlled the other, a preliminary injunction will not be granted if the consolidation has already been completed.⁴ A shareholder cannot enjoin an agreement authorized by the directors that their pay be in-

poration, yet another stockholder cannot maintain a suit in equity to have such stock forfeited to the corporation itself. His remedy is to compel the corporation to abandon any illegal contract or connection. Hence, the mere fact that the Amalgamated Copper Company, a New Jersey corporation, has acquired a majority of the stock of a Montana copper company, as well as of other companies, is not sufficient to enable a minority stockholder in a Montana company to obtain an injunction against the voting of such stock or the paying of dividends thereon, or the directors acting as such. *MacGinniss v. Boston, etc. Co.*, 29 Mont. 428 (1904).

¹ *Chicago, etc. Co. v. Boggiano*, 202 Ill. 312 (1903).

² See § 738, *supra*, and § 755, *infra*; also *Hatch v. Chicago, etc. R. R.*, 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799; *Trimmer v. Pennsylvania, etc. R. R.*, 36 N. J. Eq. 411 (1883), holding, however, that the officers are not liable herein for contempt by reason of the acts of subcontractors. See *People v. Sturtevant*, 9 N. Y. 263 (1853); *People v. Pendleton*, 64 N. Y. 622 (1876). A director may resign after the company and officers have been enjoined from interfering with the corporate assets and may then pursue his remedies as a corporate creditor. *Mexican Ore Co. v. Mexican,*

etc. Co., 47 Fed. Rep. 351 (1891). The corporation must not only be made a party defendant, but must be served or voluntarily appear before an injunction is granted. *Morshead v. Southern Pac. Co.*, 123 Fed. Rep. 350 (1903).

³ *Heinze v. Butte, etc. Co.*, 129 Fed. Rep. 274 (1904).

⁴ *Stevens v. Missouri, etc. Ry.*, 106 Fed. Rep. 771 (1901). A preliminary injunction against an alleged fraudulent lease of a railroad should not be granted where the lease has already been executed and delivery made. *Content v. Metropolitan, etc. R. R.*, 73 N. Y. App. Div. 230 (1902). Where it is conceded that a railroad corporation has no power to consolidate with another the court will not at the instance of a minority stockholder enjoin a possible consolidation under a statute which the legislature may hereafter pass; neither will the court enjoin the company from selling certain stock, even though such sale will expedite a consolidation. *Ryan v. Williams*, 100 Fed. Rep. 172 (1900). And even after such statute has been passed the court will not grant a preliminary injunction against consolidation under it on the ground that such statute is unconstitutional, where no injury to the dissenting stockholder is shown. *Ryan v. Williams*, 100 Fed. Rep. 177 (1900).

creased, inasmuch as such agreement will be legal if ratified by a majority in interest of the stockholders.¹

§ 746. *Appointment of a receiver—Injunction against corporate officers acting at all—Removal of directors by the court or corporation.*—The law is well settled that the courts have no power to remove corporate officers.² Neither can the stockholders, in meeting assembled, remove the officers.³ It is also the prevailing and general rule that a court of equity will not practically remove corporate officers by enjoining them from performing any of their customary duties, and by appointing a receiver to manage the corporate affairs.

The appointment of a receiver as a remedy for the frauds or *ultra vires* acts of the directors is a punishment of the innocent and complaining party for the acts of the guilty party. As was well said by an Illinois court, "in principle this is very much like sending the creditor to jail, because his debtor cannot pay him, and is so opposed to that spirit of justice which pervades all the true doctrines of equity jurisprudence that it will not bear discussion."⁴

¹ *Normandy v. Ind., etc. Co., Ltd.*, 97 L. T. Rep. 872 (1907).

² *Neall v. Hill*, 16 Cal. 145 (1860), the court saying: "It is well settled that there is no jurisdiction in equity with regard to the removal of corporate officers of any description." Also *Johnston v. Jones*, 23 N. J. Eq. 216 (1872), and §§ 618, 624, 711, *supra*.

³ *Imperial Hotel Co. v. Hampson*, L. R. 23 Ch. D. 1 (1882). See § 711, *supra*.

⁴ *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132 (1879), where a decree had been made that a receiver be appointed unless the officers paid over money received by them in fraud of corporate rights. The court set aside the decree. Even though the dominating directors have purchased at an excessive price real estate in which they are personally interested, no receiver should be appointed, the company being solvent and a going concern. *Klein v. Independent, etc. Assoc.*, 83 N. E. Rep. 434 (Ill. 1907). A receiver will not be appointed merely because a stockholder is dissatisfied with the management. *Hastings v. Tousey*, 121 N. Y. App. Div.

815 (1907). Internal dissensions are no ground for a receiver, where dangers prior to the next election have been removed. *Stokes v. Knickerbocker Inv. Co.*, 70 N. J. Eq. 519 (1905). A receiver will not be appointed merely because a company has made an *ultra vires* lease of its property. *New Albany Waterworks v. Louisville, etc. Co.*, 122 Fed. Rep. 776 (1903). A receiver will not be appointed on the ground that the directors have illegally paid salaries to themselves. *Alabama, etc. Co. v. Shackelford*, 137 Ala. 224 (1903). A bill to have a receiver appointed and the officers removed on account of certain contracts having been fraudulently canceled and excessive salaries paid is subject to demurrer. *Donald v. Manufacturers', etc. Co.*, 142 Ala. 578 (1905). A pledgee of stock may not have a receiver appointed on the ground that there has been an over-issue of stock. *Virginia, etc. Co. v. Provident, etc. Soc.*, 126 Ga. 50 (1906). A receiver, being merely incidental to a suit, cannot be appointed if the object of the suit is to dissolve the corporation, at the instance of a

A court will not appoint a receiver, because some of the shareholders stockholder, on account of frauds. *People v. District Court*, 33 Colo. 293 (1905). A receiver of the corporate property will not be appointed in a suit concerning the ownership of five-sixths of the stock. *Belding v. Washington, etc. Co.*, 36 Wash. 549 (1905). A Texan stockholder in an Indiana corporation, owning land in Texas, cannot have a receiver appointed in Texas on the ground that preferred stock had been fraudulently issued and corporate funds diverted, etc., the purpose of the bill being to wind up the affairs of the company and sell its property and pay its debts. *American, etc. Co. v. Schuler*, 34 Tex. Civ. App. 560 (1904). A receiver will not be appointed at the instance of a stockholder for the purpose of bringing suits which the corporation should bring. *Hallenborg v. Cobre, etc. Co.*, 8 Ariz. 329 (1904). Even though stock of a plantation company has been issued for property at an overvaluation and sold to the public, and a receiver has been appointed at the instance of stockholders, yet if a great majority of the stockholders wish to reorganize the company and pay in more money and continue the business, it still being solvent, the court will discharge the receiver. *Tolman v. Ubero, etc. Co.*, 142 Fed. Rep. 270 (1905). Where an order appointing a receiver at the instance of a stockholder is reversed on appeal, and a sale of the corporate property by such receiver is set aside, the purchaser holds the property for the benefit of the corporation, but is entitled to a return of the purchase price, even though in the meantime judgment creditors have had additional sales of the property. *Lutey v. Clark*, 31 Mont. 45 (1904). Where a person causes a receiver to be appointed of a growing and solvent corporation, and such appointment is afterwards declared void, he is liable for all damages by reason thereof without proof of malice or probable cause. *Thorn-ton, etc. Co. v. Bretherton*, 32 Mont. 80 (1905). In general, see also *United Elect. Securities Co. v. Louisiana Elect. Light Co.*, 68 Fed. Rep. 673 (1895); *People v. Albany, etc. R. R.*, 55 Barb. 344, 383 (1869); *aff'd*, 57 N. Y. 161; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309 (1884); *Howe v. Deuel*, 43 Barb. 504 (1865); *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157 (1867); *Cicotte v. Anciaux*, 53 Mich. 227 (1884); *La Grange v. State Treasurer*, 24 Mich. 468 (1872). A court will not appoint a receiver merely because some of the stockholders disapprove of the management. *Edison v. Phonograph Co.*, 52 N. J. Eq. 620 (1894). Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyances and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756 (1893); *rev'd* on another point in 57 N. J. Eq. 318. A court has no power to appoint a receiver in a stockholder's suit for fraud. *Fischer v. San Francisco Super. Ct.*, 110 Cal. 129 (1895); *Stockton v. Harmon*, 32 Fla. 312 (1893); *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 942 (1898). A temporary receiver will not be appointed in a stockholder's suit where all his charges are denied. *Taylor v. Cuban, etc. Co.*, 106 Fed. Rep. 437 (1901). A minority stockholder can-

disapprove of the management.¹ A receiver will not be appointed at the instance of a stockholder, even though mismanagement is charged, there being no fraud, and no danger of insolvency.² There

not have a receiver appointed on the ground that the corporation, the property of which consists of land, is about to sell a large tract of land at a low price, such price being satisfactory to the majority and no fraud being alleged. Not even the statute in Louisiana authorizing a receiver for gross mismanagement is sufficient. *North American, etc. Co. v. Watkins*, 109 Fed. Rep. 101 (1901). Although preferred stockholders who were deprived of the right to vote, and whose stock amounted to practically a debt, may be entitled to an injunction and an accounting, if the property is being mismanaged, nevertheless they are not entitled to a receiver unless the company is insolvent as well as being mismanaged. *Texas, etc. Mfg. Assoc. v. Storrow*, 92 Fed. Rep. 5 (1899). A court will not appoint a receiver at the instance of minority stockholders, even though the property of the corporation has been sold under execution and purchased in behalf of the majority stockholders and notes have been given for illegal salaries. *Taylor v. Decatur, etc. Co.*, 112 Fed. Rep. 449 (1901). Even though a corporation has lost most of its assets and has abandoned its business, yet a minority stockholder cannot have a receiver appointed, except for mismanagement, especially where the object of the receivership is to bring suits against the directors, which the stockholder himself may bring. *Clark v. National, etc. Co.*, 105 Fed. Rep. 787 (1900). A stockholder cannot cause a receiver to be appointed merely on the ground that the liabilities exceed the assets and the company has ceased to do business. *Mur-*

ray v. Superior Court, 129 Cal. 628 (1900). In the case of *Worth, etc. Co. v. Bingham*, 116 Fed. Rep. 785 (1902), the court reversed the court below in appointing a receiver at the instance of a minority stockholder on charges of fraud and mismanagement and a sale of property by a company in which the directors were interested, to the corporation, such appointment having been made without notice to the corporation. The court held also that where the bill does not specify any act which is illegal, fraudulent, or *ultra vires*, nor show any effort on the part of the minority stockholder to change the management, the court will not appoint a receiver and will not decree dissolution of the corporation; also that a receiver will not be appointed on the ground that the directors were interested in a company selling property to the corporation, where such purchase was made on the unanimous vote of stockholders present and voting at a meeting called to consider such purchase; also that insolvency alone of a corporation is not sufficient to warrant the appointment of a receiver at the instance of a minority stockholder, unless fraud or gross mismanagement on the part of the officers is shown. A receiver will not be appointed at the instance of a stockholder, even though mismanagement is charged, there being no fraud and no danger of insolvency, especially where there is some doubt as to the plaintiff being a stockholder. *Kelly v. Fargo, etc. Co.*, 16 S. Dak. 73 (1902). Mere mismanagement is not sufficient cause for a receiver at the instance of a stockholder who

¹ Quoted and approved in *Black v. Sullivan Timber Co.*, 147 Ala. 327 (1906). See 96 Pac. Rep. 723.

² Quoted and approved in *Black v. Sullivan Timber Co.*, 147 Ala. 327 (1906).

is a limit, however, to this rule. The powers of courts of equity to appoint receivers are very broad. Thus a court of equity has power to appoint a receiver where there is such fraud or dissension as to make it impossible for the corporation to carry on its business honestly and to the advantage of its stockholders. Such receivership, how-

owns a small amount of stock. *Callaway v. Powhatan, etc. Co.*, 95 Md. 177 (1902). The fact that a foreign corporation intends to withdraw its property from the state and take it to the place where it is incorporated is no ground for a receiver at the instance of a stockholder. *Reynolds, etc. Co. v. Martin*, 116 Ga. 495 (1902). Where a Maine corporation does all its business in Massachusetts, and all its officers, except the secretary, reside in Massachusetts, a Massachusetts stockholder may maintain in the courts of Massachusetts a suit to compel the directors to account for property misappropriated and to enjoin *ultra vires* acts, but a receiver will not be appointed unless special circumstances require it. *Richardson v. Clinton, etc. Co.*, 181 Mass. 580 (1902). A receiver was denied in *Downing v. Dunlap Coal, etc. Co.*, 93 Tenn. 221 (1893), where all the allegations of the bill were denied in the answer. A court of equity has no jurisdiction to appoint a receiver of and dissolve a solvent beneficial assessment association on the ground of mismanagement, fraud, and the abuse of corporate powers. *Mason v. Equitable League*, 77 Md. 483 (1893). A stockholder cannot have a receiver appointed on the ground of mismanagement, where it appears that the company is solvent, and that the officer charged with fraud is responsible, and that the usual remedies are sufficient. *Rumney v. Detroit, etc. Co.*, 116 Mich. 640 (1898). A receiver appointed at the instance of minority stockholders without notice is illegally appointed. *State v. Clancy*, 20 Mont. 284 (1897). The court refused to appoint a receiver in *McGeorge v. Big Stone Gap, etc. Co.*, 57 Fed. Rep. 262 (1893), and

discharged a temporary receiver who had been appointed in a stockholders' and bondholders' suit. In *Lowe v. Pioneer Threshing Co.*, 70 Fed. Rep. 646 (1895), the court enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but the court refused to appoint a receiver. It is no ground for a receivership that the business has been largely contracted, no fraud, negligence, or *ultra vires* acts being shown. *Hunt v. American Grocery Co.*, 80 Fed. Rep. 70 (1897). Although there are but two stockholders, and the whole property of the corporation consists of stock in another corporation, and these two stockholders disagree, yet one of them cannot have a receiver appointed. *Wallace v. Pierce, etc. Co.*, 101 Iowa, 313 (1897). The court stated that it would require a very strong case to justify the appointment of a receiver. A receiver will not be appointed although bonds have been issued in excess of the charter limit, and although the directors are not managing for the best interests of the stockholders. *Peatman v. Centerville, etc. Co.*, 100 Iowa, 245 (1896). A minority stockholder is not entitled to a receiver in a suit brought by him for an accounting and winding up the company, even though he is refused an inspection of the books of the company, and especially so where he was denied the right for several years for the reason that he did not pay his subscription, and he finally sold his stock. *Ridpath v. Sans Poil, etc. Co.*, 26 Wash. 427 (1901). A minority stockholder of an alien corporation cannot file a bill in equity to have the company wound up and its assets distributed, even though he complains

ever, will be granted only in extreme cases and will be limited in time and extent, so far as the circumstances will permit.

There are numerous cases to the effect that the court will appoint a receiver where it is evident that a continuation of the business

of the management, and even though the main purpose of the corporation is to acquire land in the state, it being shown that the corporation is solvent. *Sidway v. Missouri, etc. Co.*, 101 Fed. Rep. 481 (1900). A receiver was refused in *Griffing v. Griffing Iron Co.*, 96 Fed. Rep. 577 (1899), there being no proof of usurpation, *ultra vires*, fraud, or gross negligence on the part of the directors. A stockholder cannot cause a receiver to be appointed merely on the ground that the liabilities exceed the assets and the company has ceased to do business. *Murray v. Superior Court*, 129 Cal. 628 (1900). Mismanagement is not a good cause for the appointment of a receiver with a view to winding up the business and distributing the assets. A court of equity has no such power. *Ulmer v. Maine, etc. Co.*, 93 Me. 324 (1899). No receiver on charge of mismanagement. *Mulqueeney v. Shaw*, 50 La. Ann. 1060 (1898). A receiver will not be appointed at the instance of a stockholder to recover back illegal salaries, inasmuch as such a suit may be carried on by the stockholder himself. Nor can a stockholder have a receiver appointed merely because the directors reserved the profits for a surplus instead of distributing them by way of dividends. *Marcuse v. Gullett, etc. Co.*, 52 La. Ann. 1383 (1900). In a stockholder's suit for a dissolution on the ground that the officers are defrauding the corporation the court has no power to appoint a receiver. *Dudley v. Dakota, etc. Co.*, 11 S. Dak. 559 (1899). Even though the board of directors have leased all the corporate property to a minority of the directors, yet the minority stockholders cannot have a receiver appointed unless it is shown that the lease was unfair, especially where one of the complaining stockholders has ratified the transaction. *Farwell v. Babcock*, 65 S. W. Rep. 509 (Tex. 1901), a case involving a corporation owning three million acres of land and one hundred and twenty thousand head of cattle valued at \$10,000,000. Even though the directors have sold preferred stock held by them to the corporation, and taken its notes therefor, when the corporation was insolvent, yet a receiver should not be appointed at the instance of a stockholder. The remedy is an injunction and accounting. *Empire Hotel Co. v. Main*, 98 Ga. 176 (1896). A general creditor of an insolvent corporation cannot have a receiver appointed and obtain a marshaling of the assets. Neither can a stockholder. *Steele Lumber Co. v. Laurens Lumber Co.*, 98 Ga. 329 (1896). A receiver will not be appointed. *New, etc. Co. v. Blevins*, 12 Tex. Civ. App. 410 (1896); *Wenzel v. Palmetto, etc. Co.*, 48 S. C. 80 (1896). A receiver will not be appointed for a benevolent society in a suit by a member charging that illegal expulsions have been made, and illegal elections held, even though the illegal officers are running the business; nor will a receiver be appointed although the purpose of the company is impracticable, the member bringing the suit having been a party thereto. Equity will not interfere although the company is wholly illegal and unauthorized. The remedy is at law. *Crombie v. Order of Solon*, 157 Pa. St. 588 (1893). No receiver will be appointed for the fraud of directors. *People's Inv. Co. v. Crawford*, 45 S. W. Rep. 738 (Tex. 1898). Dissatisfaction by the minority with the management of the majority is not sufficient for the appointment of a receiver of

will be impracticable or inequitable.¹ The supreme court of Missouri has said: "That solvent corporations are wrecked for purely selfish

the corporation. *Fluker v. Emporia City Ry.*, 48 Kan. 577 (1892); *American, etc. Co. v. Toledo, etc. Ry.*, 29 Fed. Rep. 416 (1886). A receiver will not be appointed for mere mismanagement. The proceeding must comply with the statutory provisions for dissolution of the corporation. *Port Huron, etc. Ry. v. St. Clair Circuit Judge*, 31 Mich. 456 (1875). The court will not appoint a receiver of a solvent corporation, even though the president has embezzled some of the funds and is disposing of his property, and is apparently sustained by a majority of the stockholders. *Ranger v. Champion, etc. Co.*, 52 Fed. Rep. 609 (1892). See also *Bayles v. Orne*, Freem. Ch. (Miss.) 161 (1841); *People v. Conklin*, 5 Hun, 452 (1875); *Hand v. Dexter*, 41 Ga. 454 (1871); *Baker v. Backus*, 32 Ill. 79 (1863); *People v. Albany, etc. R. R.*, 7 Abb. Pr. (N. S.) 290 (1869); *Belmont v. Erie Ry.*, 52 Barb. 637 (1869); *Overton v. Memphis, etc. R. R.*, 10 Fed. Rep. 866 (1882); *Smith v. Wells*, 20 How. Pr. 158 (1860). Even where two rival boards of directors are litigating their respective rights, the court cannot turn the corporate affairs over to a receiver. See *Karnes v. Rochester, etc. R. R.*, 4 Abb. Pr. (N. S.) 107 (1867); *Gravenstine's Appeal*, 49 Pa. St. 310 (1865), holding that the appointment of a receiver is equivalent to enjoining the officers from managing the corporate business. See *Cincinnati, etc. R. R. v. Duckworth*, 2 Ry. & Corp. L. J. 560 (1887), refusing a receiver at the instance of a stockholder and discussing the question. Mere disagreement of the parties as to the management of the property is no ground for a receivership. *American, etc. Co. v. Toledo, etc. Ry.*, 29 Fed. Rep. 416 (1886). The case of *State v. Jacksonville, etc. R. R.*, 15 Fla. 201 (1875), seems to

have been one for a decree that certain consolidated railroads were subject to the mortgage (pp. 279, 280). Mismanagement and default in interest were charged. The court (p. 386) held that a receiver should not have been appointed. The stockholders of a corporation cannot obtain a receiver of its property on the ground that the lessee of its property is not paying the rent which is due. *Rochester v. Bronson*, 41 How. Pr. 78 (1871). The lessee in this case alleged that it did not know which of two contesting boards of directors of the lessor was the right board to pay rent to. The court will not enjoin the officers from acting. *Foss v. Harbottle*, 2 Hare, 461 (1843); *Mozley v. Alston*, 16 L. J. (Ch.) 217 (1847); 1 Phil. Ch. 790; *Hattersley v. Shelburne*, 31 L. J. (Ch.) 873 (1862). So also *Manneck, etc. Co. v. Manneck*, 23 Alb. L. J. 216 (1881). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. *Stanley v. Luse*, 36 Oreg. 25 (1899).

1 Where an electric-light company purchases a majority of the stock of a competing electric-light company in the same city, and elects the board of directors, and fraudulently uses its power to make the latter subservient to and as a feeder to the former, and intends to destroy the latter, the court, at the instance of a minority stockholder of the latter, will appoint a receiver of the company; but the proof of such intent must be clear. The fact that the directors so elected are stockholders in the controlling company is not sufficient. *Davis v. U. S. Electric, etc. Co.*, 77 Md. 35 (1893). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the com-

and illegal purposes, that minority interests are 'frozen out,' that party, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal and void. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97 (1892).

Where one of three directors, who is also president and manager, dies, and the three owned all the stock, and the company owed the decedent \$45,000 and other parties \$15,000, and had no money, and the works of the company were idle, and the two remaining directors could not agree, and the treasurer was managing the business illegally, the court will appoint a receiver *pendente lite*, the suit being to preserve the assets for the benefit of the creditors. In such a case no request need first be made to the directors to bring the suit. *Sheridan, etc. Works v. Marion T. Co.*, 157 Ind. 292 (1901). A receiver may be appointed, at the instance of a stockholder, in a suit against directors who control a majority of the stock and are diverting all the profits to themselves. *Columbia, etc. Co. v. Washed, etc. Co.*, 136 Fed. Rep. 710 (1905). A suit for the appointment of a receiver and an accounting and the liquidation of the affairs of a corporation, lies at the instance of a stockholder where it appears that the board of directors and a majority of the stockholders are guilty of mismanagement and gross negligence. *Klugh v. Coronaca, etc. Co.*, 66 S. C. 100 (1903). A receiver will be appointed and other relief granted in a suit by a stockholder in a mining company alleging that the directors had practically abandoned the prop-

erty and refused to sell treasury stock, although it could be sold, and had removed the books from the state, and had refused all information and were destroying the value of the stock. Such a suit is not multifarious. *Glover v. Manila, etc. Co.*, 19 So. Dak. 559 (1905). Where a lessee railroad is insolvent and in the hands of a receiver, and the rent is not paid and it controls the board of directors of the lessor railroad, a stockholder of the latter may have a receiver appointed of such of the lessor's property as is not already in the hands of a receiver, and such second receiver may be authorized to sue for the rent due, and the court may also authorize him to issue receiver's certificates to pay the expense of prosecuting such suit. *Town of Vandalia v. St. Louis, etc. R. R.*, 209 Ill. 73 (1904). A court may appoint a receiver of a corporation where the stock is evenly divided and no election can be held and there is danger of the assets being wasted. *Gibbs v. Morgan*, 9 Idaho, 100 (1903). A stockholder may have a receiver appointed where the directors are fraudulently paying out profits in salaries and are grossly mismanaging the business, which will result in insolvency. *Hall v. Nieu Kirk*, 12 Idaho, 33 (1906). Where the officers practically abandon the corporation and taxes are not paid and suits are pending against the company, and there is an evident intent on the part of the officers to acquire the property at a small figure, the stockholders may maintain a bill in equity for a receiver and an accounting and for an injunction against mortgaging, foreclosing or selling under execution the property. *Torrey v. Toledo, etc. Co.*, 113 N. W. Rep. 580 (Mich. 1907). A court may appoint a receiver of the corporate assets during litigation at the instance of a stockholder who complains that the corporation has transferred all its

business immorality has run amuck under the assumption that courts property illegally to another corporation for stock of the latter. *State v. Boston, etc. Co.*, 22 Mont. 220 (1899). Especially where it is charged that there is danger of property being removed beyond the jurisdiction of the court. *State v. Boston, etc. Co.*, 22 Mont. 241 (1899). But where the majority represents $\frac{14}{15}$ of the stock and the corporation is solvent and has \$1,000,000 in the treasury, and its property is worth \$40,000,000, and there are no debts, and the corporation offers to cancel the transfer and indemnify the minority stockholders, and shows that the receiver will not manage the property as well as the corporation would manage it, the receiver will be discharged. *Forrester v. Boston, etc. Co.*, 22 Mont. 430 (1899). A receiver appointed at the instance of minority stockholders by reason of an illegal transfer of all the corporate property should be discharged upon the property being returned. *Forrester v. Boston, etc. Co.*, 24 Mont. 148 (1900). Where the corporate property is being wasted by reason of a contest between two rival boards of directors, one board having been declared illegal by the court and the other refusing to act, the court will, at the instance of a minority stockholder, appoint a receiver to protect the property until a recognized board is elected, and the stockholder need not request the directors to bring suit before he himself brings suit. *Jasper, etc. Co. v. Wallis*, 123 Ala. 652 (1899). In the case of *Sternberg v. Wolff*, 56 N. J. Eq. 555 (1898), the court stated that it had power, where there were dissensions among the stockholders of a corporation, to appoint a receiver to preserve the property until a certain object could be attained; but that this power, while recognized by the New Jersey courts, had never yet been acted upon. To same effect, see s. c., 56 N. J. Eq. 389 (1898). A receiver at the instance of stockholders and creditors was appointed in *Hodges' Adm'x v. South Fork, etc. Co.*, 50 S. W. Rep. 969 (Ky. 1899). In Louisiana, by statute, a receiver may be appointed at the instance of stockholders when the directors are grossly mismanaging the business or committing *ultra vires* acts. *Sincer v. Alverson*, 51 La. Ann. 955 (1899). A stockholder may have a receiver appointed if the property is being mismanaged and is in danger of being lost by the absorption thereof by the directors for salaries and expenses. *Cameron v. Groveland Co.*, 20 Wash. 169 (1898). In the case of *McGilliard v. Donaldsonville, etc. Works*, 104 La. 544 (1900), where the business of a corporation was going to ruin by reason of bad management, and the corporation was insolvent, the court appointed a receiver at the instance of two stockholders. Where an English corporation owning land in the United States sells a portion of such land in Louisiana at one-seventh of its value, thereby causing a loss to the corporation of over \$2,000,000, and the board of directors refuse to take any action, a stockholder may bring suit in Louisiana to set aside the sale and may have a receiver appointed of the assets in that state. *Watkins v. North American, etc. Co.*, 107 La. 107 (1902). A receiver was appointed at the instance of minority stockholders, under the Louisiana statutes, in the case of *Davies v. Monroe, etc. Co.*, 107 La. 145 (1901), where the majority were about to sell out an electric-light and water-works plant to a foreign corporation controlled by the president, at a price less than the debts, and the president, in addition to his salary, had been charging for traveling expenses. Where the stockholders of a bank have legally ordered the winding up of its business, and for three years thereafter the officers still continue to do business at a great loss,

are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis.”¹

apparently without any effort to wind up its affairs, a stockholder may file a bill for an accounting and the appointment of a receiver, and no request to the corporation to bring the suit need be made. *Mathews v. Bank of Allendale*, 60 S. C. 183 (1901). Where one building association absorbs another and takes all its assets, and tries to force the minority stockholders to transfer or surrender their stock, and causes the absorbed association to become insolvent, a receiver will be appointed at the instance of minority stockholders, even though the absorbed association is a failing one. *Continental, etc. Assoc. v. Miller*, 44 Fla. 757 (1902). Where an insurance company has re-insured all its risks and is doing no business, but the officers are drawing large salaries, a stockholder may have a receiver appointed. *Treat v. Pennsylvania, etc. Co.*, 203 Pa. St. 21 (1902).

Where a stockholder in a street railway starts suit to set aside an illegal consolidation with another company, fraudulently brought about by the officers, the latter company being insolvent and the former liable to become so, a cause of action is stated and a receiver may be appointed. *Becker v. Gulf City, etc. Co.*, 80 Tex. 475 (1891). In a stockholder's suit to cause an alleged fraudulent transaction to be set aside, the court appointed a receiver, not to take the property, but to carry on the suit. The upper court held that such an appointment was illegal. *Burns v. Atchison*, 48 Kan. 507 (1892). A few cases have held that the court, under extreme circumstances, may appoint

a receiver to take charge of the corporate business, even though the corporation is solvent, and no dissolution is intended, and no corporate creditors' interests are involved. See *Stevens v. Davison*, 18 Gratt. (Va.) 819 (1868), where a railroad was turned over to a receiver to protect stockholders' rights. "Courts of equity have the ultimate power of administering the assets of insolvent corporations." A stockholder of a building and loan corporation which is insolvent and is being mismanaged may have a receiver appointed. The federal court will take jurisdiction where the assets are scattered through many states, even though it is charged that the bill is collusive. *Towle v. American Bldg. etc. Soc.*, 60 Fed. Rep. 131 (1894). A minority of the mortgage bondholders may have a receiver appointed, where the mortgage trustees have resigned, the corporation is without officers, executions are being levied, and forfeiture of charter is imminent. *Ralph v. Shiawassee* Circuit Judge, 100 Mich. 164 (1894). Where a receiver has been appointed at the instance of a minority stockholder on the ground of fraud in the management, the court will not remove the receiver and appoint another at the instance of the controlling stockholders who are charged with fraud, where the receiver's management has been able and impartial. *Street v. Maryland Central Ry.*, 58 Fed. Rep. 47 (1893). A receiver was appointed in a stockholders' suit in *Aiken v. Colorado River Irr. Co.*, 72 Fed. Rep. 591 (1896), where it was charged that the control had been

¹ *Cantwell v. Columbia, etc. Co.*, 97 S. W. Rep. 167 (Mo. 1906). In this case it was held that where a majority of the stockholders and a majority of the directors have combined

to wreck a company for the benefit of a competing company in which they are interested, the court may appoint a receiver.

Sometimes the power to restrain or remove corporate officers, obtained by spurious stock and the funds had been diverted. Where an improvement company and a development company have practically the same officers, and the business is conducted largely as one concern, and the real estate involved is being sold for taxes and judgments obtained, and the accounts are not properly kept and the funds misapplied, a stockholder of the latter company may have a receiver appointed, it being shown that the officers are so implicated in the confusion that they will not properly conduct the business. *Bridgeport Development Co. v. Tritsch*, 110 Ala. 274 (1895). Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. *Du Puy v. Transportation, etc. Co.*, 82 Md. 408 (1896). A policyholder in a mutual benefit association may have a receiver appointed where it is alleged that the officers have converted three-quarters of the assets to their own use, and that the officers refused to call meetings of the directors, and refused to publish the proceedings as required. *Order of Iron Hall v. Baker*, 134 Ind. 293 (1893). Where, at the instance of a stockholder, the court sets aside a transfer of corporate property to a director, the stockholder, however, being obliged to repay the consideration, for which the decree gives him a lien upon the property therefor, the stockholder may foreclose such lien and may have a receiver of the corporation appointed. *Ponca Mill Co. v. Mikesell*, 55 Neb. 98 (1898). A stockholder may have a receiver appointed of a foreign corporation which is insolvent and is in the hands of a receiver in the state creating it. *Phoenix, etc. Co. v. North River, etc. Co.*, 33 Hun, 156 (1884). A receiver will be appointed if the corporation is practically defunct and there has been a breach of trust. *Hall v. Astoria, etc. Co.*, 5 Ry. & Corp. L. J. 412 (Louisville Ct., 1889). See also, in general, *Frostburg Bldg. Assoc. v. Stark*, 47 Md. 338 (1877). In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639 (1885), the corporation was insolvent. In *Lawrence v. Greenwich F. Ins. Co.*, 1 Paige, 587 (1829), the court appointed a receiver to preserve the corporate property, there having been no officers elected by the stockholders. In *Forbes v. Memphis, etc. R. R.*, 2 Woods, 323 (1872); s. c., 9 Fed. Cas. 408, a receiver was appointed upon the default of the defendants to answer, the bill being filed by a stockholder, a bondholder, and the trustee for the bondholders on behalf of themselves and all other stockholders and bondholders to prevent the directors of the insolvent company from fraudulently disposing of the property. Where there are but two stockholders and one dies, and his administrator takes possession of the corporate property as though it belonged to the estate, the other stockholder may have a receiver appointed. *Re Belton*, 47 La. Ann. 1614 (1895). The court refused to appoint a receiver under the Louisiana statute, at the instance of stockholders, in *Posner v. Southern, etc. Co.*, 109 La. 658 (1902). A statute authorizing the appointment of a receiver in case of mismanagement by the officers will be strictly construed. *Bartlett v. Fourton*, 115 La. 26 (1905). The court may appoint a receiver to prevent waste and destruction. *Houston, etc. Co. v. Drew*, 13 Tex. Civ. App. 536 (1896); *Stevens v. South, etc. Co.*,

and to appoint a receiver of the corporation, is given to the court by a statutory enactment. Such a statute exists in New York.¹

14 Utah, 232 (1896). Where the stockholder alleges that the president is fraudulently contracting a debt to himself, and is about to sell out the whole property illegally, a receiver will be appointed. *Stewart v. Belt*, 19 S. Rep. 957 (Miss. 1896). Where the majority take all the profits, keep false books, buy a worthless franchise, and mortgage the corporate property in order to wreck the corporation, a receiver will be appointed pending suit to cancel the mortgage. *State v. District Court*, 15 Mont. 324 (1895). A receivership in one state in a suit between claimants for office does not prevent a receivership in another state in behalf of the bondholders to take charge of the property in such latter state. *Schmidt v. Mitchell*, 98 Ky. 218 (1895). The appellate court, in *Florida Constr. Co. v. Young*, 59 Fed. Rep. 721 (1892), refused to reverse an order in an action brought by stockholders in a construction company for an accounting between the company and a railroad company, and a distribution of the assets of the former, although the order appointed a receiver of the former and granted an injunction. *Cf.* § 684, *supra*. As to the appointment of a receiver for the purpose of distributing the assets, see § 629, *supra*.

¹ In New York, by statute, the court may appoint a receiver in a stockholder's action. *Osgood v. Maguire*, 61 N. Y. 524 (1875); *Piza v. Butler*, 90 Hun, 254 (1895). The appointment of a receiver at the instance of a stockholder may be voidable. It is not void. *Attorney-General v. Continental L. Ins. Co.*, 28 Hun, 360 (1882); *aff'd*, 93 N. Y. 630. A receiver may be the proper remedy. *Hallenborg v. Greene*, 66 N. Y. App. Div. 590, 596 (1901). A receiver may be appointed under the New York statutes in a stockholder's action for fraud on the

part of the directors. *Halpin v. Mutual Brewing Co.*, 91 Hun, 220 (1895). In *Duncan v. Treadwell Co.*, 82 Hun, 376 (1894), the court upheld a discharge of a receiver appointed by reason of directors' wrong-doing, new directors having been elected since the appointment. In New York an injunction order suspending "the general and ordinary business" of a foreign or domestic corporation in New York can be obtained only after notice to the corporation. *Code Civ. Proc.*, § 1809. *Cf.* § 1787 of the same Code. Hence an *ex parte* injunction against the removal of the treasurer is void. *Wilkie v. Rochester, etc. Ry.*, 12 Hun, 242 (1877). An injunction against an officer doing any corporate business during the pendency of a suit against him for maladministration, etc., will not always be set aside, even under the rule that, where the defendant specifically denies under oath all charges, the injunction must be dissolved. *Hayt v. Malone*, 9 N. Y. Supp. 877 (1890). In New York a stockholder's action under the statute to place the corporate property in a receiver's hands and for an accounting by its officer will be compelled to give precedence to another action instituted by the attorney-general under the statute to remove the officers, etc. *Keller v. Brooklyn Elev. R. R.*, 9 Abb. N. Cas. 166 (1880). In New York the misconduct of a trustee authorizes a court to appoint a receiver. *Jenkins v. Jenkins*, 1 Paige, 243 (1828). See also *Conro v. Gray*, 4 How. Pr. 166 (1849); *Kelly v. Mariposa, etc. Co.*, 4 Hun, 632 (1875). See also *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84 (1831). Under the statutes of New York a director of a foreign corporation may maintain in the New York courts a suit to compel the president to account for property misappropriated or wasted by him,

Where a receiver has been appointed at the instance of a minority stockholder on account of the company having sold all its property to another corporation, but the transaction has been undone and canceled, the court should discharge the receiver.¹

but the court will not appoint a general receiver and enjoin the corporation from exercising its powers, although it may enjoin the president from acting and may appoint a receiver of the property in New York state. *Acken v. Coughlin*, 103 N. Y. App. Div. 1 (1905). A New York court has power to appoint a receiver of corporate assets within the state, of a New Jersey corporation, in a stockholder's suit, who alleges that the directors have turned over the business to one of their number who is winding up the business in violation of law and dissipating all the assets. *Reusens v. Manufacturing, etc. Co.*, 99 N. Y. App. Div. 214 (1904). A receiver will not be appointed on allegations made on information and belief. *Weber v. Wallerstein*, 111 N. Y. App. Div. 700 (1906). Even though a corporation is in debt to its directors, yet if its income is sufficient to pay the interest, the directors cannot legally sell their holdings of stock to a competing concern, together with such debt, whereby the competing concern obtains a majority of the stock, even though the minority are offered the same price, such action being followed practically by the new corporation taking a lease of the assets of the old corporation and doing all the business. The minority stockholders may hold the directors personally liable, and may have a receiver appointed, and may have the mortgage securing the directors' debts canceled, and the business itself continued by the receiver. The former directors who resigned, as well as new directors who took their place, are proper party defendants. *Jacobus v. Diamond, etc. Co.*, 94 N. Y. App. Div. 366 (1904). A receiver of a foreign corporation will not be appointed at the instance of a resident stockholder on allega-

tions that it had sold treasury stock on fraudulent representations and that the directors had been guilty of fraud and mismanagement of the company; and that the assets had been conveyed to other corporations, parties defendant, and where the plaintiff did not allege that he purchased his stock by reason of the misrepresentations, he cannot maintain a suit to recover for the benefit of the corporation the moneys paid for stock. *Phillips v. Sonora Copper Co.*, 90 N. Y. App. Div. 140 (1904). Even though the secretary and treasurer takes away and secretes all the books and papers of the company, yet the president cannot have a receiver appointed in order to carry on the business and collect accounts, no charge of fraud being made and no request to the board of directors being shown. *Fallon v. United States, etc. Co.*, 86 N. Y. App. Div. 29 (1903). In certain cases an "officer" is construed to mean merely an agent and not a director. So held in regard to appointing a receiver of a foreign corporation. *Moran v. Alvas, etc. Co.*, N. Y. L. J., Dec. 5, 1891. Under the statutes of Indiana the court may appoint a receiver in a stockholder's suit where there has been a diversion of funds to pay salaries and a failure to repair. *Wayne Pike Co. v. Hammons*, 129 Ind. 368 (1891). Under the Kansas statutes the court may appoint a receiver in a stockholder's suit where the business is being run in the interest of a rival company, and the company is insolvent, and its assets being absorbed by the officers. *Re Lewis*, 52 Kan. 660 (1894). As to resignations of officers to obtain a receiver, see *Zeltner v. Zeltner, etc. Co.*, 174 N. Y. 247 (1903).

¹ *Forrester v. Boston, etc. Co.*, 22 Mont. 430 (1899).

§ 747. *Miscellaneous remedies*.—It has been held and clearly established that a stockholder cannot bring about the dissolution of the corporation merely because the officers have been guilty of a breach of trust.¹ Nor can he defeat an action for his subscription by alleging such a defense.² The remedy of a stockholder who wishes to examine the corporate books in order to bring suit against the directors for fraud is by *mandamus*, not by an order for inspection.³ The court may refuse to set aside a foreclosure if the parties offer to make full reparation.⁴ An *ultra vires* act cannot be set aside by a stockholder unless it works a substantial injury, where it cannot be set aside by the corporation itself.⁵ The court in a decree in equity may grant separate decrees, adjusting the liability as against each of the defendants, the same as though they had been sued in

1 See § 629, *supra*. A stockholder's prayer for relief that the corporation be dissolved and the assets distributed because a director has sold property to it at an overvaluation will be denied. *Tutwiler v. Tuskaloosa, etc. Co.*, 89 Ala. 391 (1889). Where a corporation has abandoned its authorized business and engaged in another, it will be wound up. This is different from a case where the directors have merely and incidentally committed *ultra vires* acts. *Re Crown Bank, L. R.* 44 Ch. D. 634 (1890). A court of equity has no power to wind up a solvent corporation and distribute its assets simply on the ground of dissensions among the stockholders. *Sternberg v. Wolff*, 56 N. J. Eq. 555 (1898). A court of equity has no power to dissolve a corporation in a stockholder's suit complaining of frauds. *People v. District Court*, 33 Colo. 293 (1905).

2 See § 187, *supra*; also *Chetlain v. Republic L. Ins. Co.*, 86 Ill. 220 (1877); *South Georgia, etc. R. R. v. Ayres*, 56 Ga. 230 (1876). Nor can the stockholder enjoin a call. *Ex parte Booker*, 18 Ark. 338 (1857). If an illegal consolidation is set aside, the stockholders of the new company may recover back the amount paid in by them. *Re Bank of Hindustan*, L. R. 16 Eq. 417 (1873).

3 *Walsh v. Press Co.*, 48 N. Y. App. Div. 333 (1900). On this point, see § 519, *supra*.

4 In the case of *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

5 *Wisconsin Lumber Co. v. Greene, etc. Co.*, 127 Iowa 350 (1904). See also § 848*k*, *infra*. In the case *Home, etc. Co. v. Barber*, 67 Neb. 644 (1903), where the purchaser of stock sued to hold former stockholders liable for corporate assets appropriated by them, the court found that such use of assets had been taken into consideration in fixing the price at which the stock had been sold, and

separate actions.¹ Interest is not allowed on the recovery where the defendant invested capital and the proofs do not show what dividends could have been paid.² A stockholder cannot maintain a suit against the directors for damages resulting from a conspiracy to wreck the corporation, inasmuch as a request to the corporation to bring such suit is first necessary and the damages, if recovered, belong to the corporation.³ In New York it has been held that a stockholder may have a corporate officer arrested for his frauds on the corporation.⁴ Officers of a corporation who obtain money in its name, representing that it would be used in speculation and profits divided by way of dividends, but use the money to pay pretended dividends and keep the balance for their own use, may be convicted of embezzlement and larceny at common law.⁵ A director is not guilty of grand larceny, even though he donates corporate funds for a political purpose.⁶ The vice-president and general counsel of an insurance company cannot be convicted of larceny for using the corporate funds to settle a claim against the corporation and its president, there being no proof that the company was not liable thereon.⁷ In England there is a statute, under which the court has power, on the application of creditors, to direct the official receiver to prosecute criminally a director for alleged offenses as director, such prosecution to be carried on at the expense of the assets of the company.⁸ In order to avoid circuity of action reimbursement may be made to the individual stockholders, instead of to the corporation, if the exigencies of the case require it.⁹ In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors, it is not necessary for the court to order an accounting, but the court may hear the entire case and

hence refused to hold the parties liable.

¹ *Von Arnim v. American Tube-works*, 188 Mass. 515 (1905).

² *McCourt v. Biggers-Singer*, 145 Fed. Rep. 103 (1906).

³ *Niles v. N. Y., etc. R. R.*, 176 N. Y. 119 (1903).

⁴ *Crook v. Jewett*, 12 How. Pr. 19 (1854).

⁵ *People v. Kellogg*, 105 N. Y. App. Div. 505 (1905).

⁶ *People v. Moss*, 187 N. Y. 410 (1907).

⁷ *People v. Burnham*, 119 N. Y. App. Div. 302 (1907); s. c., 120 N. Y. App. Div. 388.

⁸ *Re London, etc. Corp. Ltd.*, [1903] 1 Ch. 728.

⁹ *Von Arnim v. American Tube-works*, 188 Mass. 515 (1905). See § 734, *supra*. In a suit by a minority stockholder to set aside a consolidation because the majority of the stockholders own the other company and made an unfair contract of consolidation, the guilty directors and stockholders are proper parties defendant, and their joinder does not make the bill multifarious. The suit may be in equity. Instead of setting aside the transaction the court may give complainant the value of his stock. *Jones v. Missouri, etc. Co.*, 144 Fed. Rep. 765 (1906).

decide it.¹ Where an officer has been obliged to pay a corporate loss due to his negligence he is entitled to any securities held by the corporation in connection therewith.² A suit by a stockholder against the corporation for an injunction and a receiver on the ground that the corporation is insolvent does not render the stockholder liable to a suit for malicious prosecution, even if his suit failed, there having been no arrest of the person or seizure of property.³ There are various other remedies and rules which govern this subject.⁴ A stockholder is not liable for libel and slander by reason of allegations in his bill in equity against directors for fraud.⁵ While a stockholder at a meeting of a private corporation may charge fraud against another stockholder or officer in connection with the corporate affairs, yet a newspaper has no right to report such charge and may be held liable for libel in doing so.⁶

1 Davis v. Hofer, 38 Oreg. 150 (1900).

2 Brinckerhoff v. Holland T. Co., 159 Fed. Rep. 191 (1908).

3 Cincinnati, etc. Co. v. Bruck, 61 Ohio St. 489 (1900).

4 Where money is recovered and is to be distributed among the stockholders, see Pacific Ry. of Mo. v. Cutting, 27 Fed. Rep. 638 (1886). The corporation may appeal from the judgment. Sheridan v. Sheridan Electric L. Co., 38 Hun, 396 (1886). Even though the plaintiff proves fraud, yet if the findings are not full enough to sustain the judgment, the higher court will reverse a judgment in the plaintiff's favor. Beach v. Cooper, 72 Cal. 99 (1887). Before an accounting is ordered the fact of misapplication must be proved. Stokes v. Stokes, 91 Hun, 605 (1895). Pledgees of a majority of the corporate stock who, by voting their stock, cause men of their choice to be elected directors, are not liable for the misconduct of such directors. Higgins v. Lansingh, 154 Ill. 301 (1895). Where promoters represent to capitalists that it will cost \$1,900,000 to purchase a company to be reorganized, when in fact it costs them but \$1,400,000, and the capitalists advance the former sum, and the promoters organize a company and carry out the reorganization and give

to the capitalists a part of the stock with bonds, the latter as stockholders may compel the promoters to pay the extra \$500,000 to the company, even though the promoters controlled all the stock at the time the property was taken over, the essence of the transaction being that the capitalists were the stockholders in the new company from the beginning, and it is no defense that for each dollar advanced by the capitalists they were to receive a dollar in bonds and a dollar in stock. Arnold v. Searing, 67 Atl. Rep. 831 (N. J. 1907). Where the majority, who are in control of the corporation, cause it to give illegal rebates to themselves and others, and another corporation then recovers judgment for a similar rebate, the minority may compel the majority to make good to the corporation the amount. Dodd v. Pittsburg, etc. R. R., 106 S. W. Rep. 787 (Ky. 1908).

5 Runge v. Franklin, 72 Tex. 585 (1889).

6 Kimball v. Post Pub. Co., 85 N. E. Rep. 103 (Mass. 1908), the court saying: "No doubt a stockholder at such a meeting, speaking to stockholders, may with impunity say things derogatory to an officer or the manager of the company provided that what he says be pertinent to the matter in hand and he speaks in good

§ 748. *The complaining stockholder controls the conduct of the suit—Right of other stockholders to come into the suit—Compromise and discontinuance—Costs and disbursements—Similar suits elsewhere.*—It is a principle of equity practice, when a person brings a suit in behalf of himself and such others as may wish to come in who are similarly situated, that the complaining stockholder controls the case and may continue, compromise, abandon, or discontinue it at his pleasure until a creditor similarly situated has procured an order to be made a party to the action, or until interlocutory judgment is entered.¹ Where a stockholder sues in

faith and without malice. His justification rests upon the fact that he is speaking to the stockholders upon a subject in which he and they have an interest."

¹ Quoted and approved in *Hirshfeld v. Fitzgerald*, 157 N. Y. 166 (1898). "The plaintiff, as he acts upon his own mere motion and at his own expense, retains (as in other cases) the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure. After decree, however, he cannot, by his conduct, deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it." 1 *Daniells*, Ch. Pl. (6th Am. ed.) 244; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 194 (1885); *Allen v. New Jersey*, etc. R. R., 49 How. Pr. 14 (1875); *Tremain v. Guardian*, etc. Ins. Co., 11 Hun, 286 (1877), allowing discontinuance, and reviewing cases. See also the valuable briefs in this case. But see *Seaton v. Grant*, L. R. 2 Ch. 459 (1867); and see *Salisbury v. Binghamton Pub. Co.*, 85 Hun, 99 (1895), refusing to allow a creditor to discontinue. Where the plaintiff stockholder delays unreasonably in trying the case, the court may allow another stockholder, who has intervened and been made a party, to proceed with the trial, upon his giving a bond to the original plaintiff to secure payment to him of a ratable part of the entire expense of the suit, whenever that should be determined. *Manning v. Mercantile T. Co.*, 37 N. Y.

Misc. Rep. 215 (1902). In a suit by a bondholder in behalf of himself and other bondholders against a reorganization committee to hold them liable for breach of their duty and to restrain them from carrying out a plan of reorganization, another bondholder who has not come into the suit has no standing in court, especially where he did not deposit his bonds under the agreement. *Browne v. Bache*, 66 N. Y. App. Div. 367 (1901). Where a stockholder has commenced suit to set aside an illegal assignment by the corporation for the benefit of creditors, a settlement between the corporation and the assignee does not put an end to the case, especially where a receiver has been appointed. *Standard, etc. Co. v. Jones*, 64 Ohio St. 147 (1901). As to the right of a creditor to assign his claim in a suit in behalf of himself and others to enforce the statutory liability, see *Hirshfeld v. Bopp*, 157 N. Y. 166 (1898), rev'g 27 N. Y. App. Div. 180 (1898). In *Wisconsin* it is held that a taxpayer who has brought suit in behalf of himself and others to enjoin the construction of a street railway cannot discontinue the suit at his pleasure, but the court may allow other taxpayers to be substituted as plaintiffs in his place. *State v. Ludwig*, 106 Wis. 226 (1900). In *Belmont v. Erie Ry.*, 52 Barb. 637 (1869), the court held that the other stockholders could intervene in the management of the case. If the guilty directors settle

behalf of himself and others, another stockholder may file a petition in the case without a formal order authorizing him to do so.¹ But where a stockholder's suit to set aside an alleged illegal foreclosure sale has been pending for ten years, another stockholder will not be allowed to come into the suit unless he explains the delay or shows that it is necessary in order to protect his interest.² After a receiver of an insolvent corporation has been appointed at the instance of a creditor, and under an order of the court other creditors have proved their claims in such suit, the court has power to refuse to discontinue the suit at the instance of the complainant of record.³ After other creditors have come in as parties plaintiff, the original plaintiff cannot dismiss the suit except with their consent.⁴ In case the suit is successful and property or money is recovered back by the corporation, the complaining stockholder is entitled to have his costs and attorney's fees paid by the corporation.⁵ A stockholder who re-

with the complaining stockholder by paying him out of the corporate treasury, the corporation may subsequently recover back the money so paid. *Erie Ry. v. Vanderbilt*, 5 Hun, 123 (1875). See also *Derby v. Yale*, 13 Hun, 273 (1878). The stockholder who sues may discontinue or go on. *Mattison v. Demarest*, 1 Rob. (N. Y.) 717 (1863). Cf. *Thouron v. East Tennessee, etc. Ry.*, 38 Fed. Rep. 673 (1889); *Innes v. Lansing*, 7 Paige, 583 (1839). The suit stops if the complaining stockholder is paid. *Scarth v. Chadwick*, 14 Jur. 300 (1850). A debenture holder who brings suit in behalf of himself and other debenture holders for a receiver may discontinue at his pleasure, even after a decree and the appointment of a receiver, no other debenture holder having come into the case, such decree being different from an administration decree which directs inquiries as to debts and also directs that the assets be applied "in a due course of administration." *Re Alpha Co. Ltd.*, 87 L. T. Rep. 646 (1903). See § 222, *supra*.

¹ *Coltrane v. Templeton*, 106 Fed. Rep. 370 (1901).

² *MacArdell v. Olcott*, 62 N. Y. App. Div. 127 (1901).

³ *Johnson v. Miller*, 96 Fed. Rep. 271 (1899).

⁴ *Belmont, etc. Co. v. Columbia, etc. Co.*, 46 Fed. Rep. 336 (1891). A stockholder in bringing suit for a receiver cannot discontinue after creditors have intervened and proven their claims and a final decree rendered and the property sold. *Culver, etc. Co. v. Culver*, 99 S. W. Rep. 391 (Ark. 1906). Where other stockholders have come into the suit as parties complainant, a settlement made with the stockholders who filed a bill is not binding on the other stockholders who have come in, and they may proceed with the suit on indemnifying the original plaintiffs against further costs and paying their *pro rata* share of the expenses already incurred. *McAlpin v. Universal, etc. Co.*, 57 Atl. Rep. 418 (N. J. 1904). A settlement with the complaining stockholder and his agreement to discontinue may not amount to a discontinuance if another stockholder intervenes before actual discontinuance. *Snyder v. De Forest, etc. Co.*, 154 Fed. Rep. 142 (1907).

⁵ See § 879, *infra*. A corporation may pay the expense of defending a suit brought by a stockholder against the company and its officers,

covers a fund for the company will be allowed his reasonable attorney's fees and expenses, but stockholders and officers who resisted the recovery are not given such an allowance, although defending in the name of the company.¹ Where the directors on the demand of a stockholder institute a suit for an accounting, the stockholder cannot then institute another suit in the courts of the same state for the same purpose, even though he alleges that the first suit will not be properly conducted.²

Judgment rendered in one stockholder's suit is a bar to a similar suit by another stockholder, even though the latter commenced his suit before judgment was rendered in the former.³ A stockholder may institute a suit although there is already one pending in another court at the instance of another stockholder, bearing on the same question, but after judgment in one case the other cases may be stopped.⁴

charging the latter with fraud, where such suit is held to be ungrounded. *Figge v. Bergenthal*, 130 Wis. 594 (1906).

1 *McCourt v. Singers-Bigger*, 145 Fed. Rep. 103 (1906).

2 *Gray v. South, etc. R. R.*, 43 S. Rep. 859 (Ala. 1907).

3 *Willoughby v. Chicago, etc. Co.*, 50 N. J. Eq. 656 (1892). A judgment in one suit instituted by stockholders is a bar to another suit by other stockholders on the same cause of action based on the same facts. *Hearst v. Putnam Mining Co.*, 28 Utah, 184 (1904). Where two suits for the same purpose, one by a stockholder and one by the corporation itself, are pending in different states, the first decision will be followed in the other state, although the suit in the latter state was commenced first, unless there is collusion. *Memphis, etc. R. R. v. Grayson*, 88 Ala. 572 (1889). The judgment in a stockholders' suit constitutes *res judicata* and prevents another suit on the same cause of action by the corporation, the corporation having been a party defendant in the first suit and having replied and adopted the allegations of the plaintiff. *Montezuma, etc. Co. v. Dake*, 16 Col. App. 139 (1901). See also § 839.

4 *Brinckerhoff v. Bostwick*, 99 N. Y.

185, 194 (1885). A stockholder's suit in a state court does not prevent a similar suit in the federal court. *Snyder v. De Forest, etc. Co.*, 154 Fed. Rep. 142 (1907). A stockholder may maintain a suit in the federal court to enjoin an *ultra vires* act, even though two similar suits are pending in the state courts, all of the suits being *in personam*, and there being no conflict over property *in custodia legis*. *Consumers', etc. Co. v. Quinby*, 137 Fed. Rep. 882 (1905). Where the corporation is suing in the state court a non-resident stockholder cannot begin suit on the same cause of action in the federal court. *Kemmerer v. Haggerty*, 139 Fed. Rep. 693 (1905). Where a suit by a minority director is pending, a subsequent suit for the same relief and in the same court by a stockholder should be stayed until the former is tried. *Loewenstein v. Diamond, etc. Co.*, 94 N. Y. App. Div. 383 (1904). Where a stockholder's suit is instituted in the federal court after the same party has commenced a similar suit in the state court, the federal court will await the decision in the state court before proceeding. *Hennesy v. Tacoma, etc. Co.*, 129 Fed. Rep. 40 (1904). If the company

After judgment is entered the parties for whose benefit it was brought may come in and prove their claims and share in the recovery, but if they fail to do so they are barred from participation.¹ Where a creditor brings suit in behalf of himself and such others "as would join with him" to hold directors of an insolvent bank liable for misappropriation of assets and compromised the suit, a creditor who did

cannot. *Memphis v. Dean*, 8 Wall. 64 (1868); *Black v. Huggins*, 2 Tenn. Ch. 780 (1877). See also, as to who may be a complainant herein, *Green's Brice*, *Ultra Vires* (2d ed.), 649. In *Dannmeyer v. Coleman*, 11 Fed. Rep. 97 (1882), the court queries whether each stockholder may institute a separate suit herein. Where a stockholder or those acting with him institute practically the same suit in different circuit courts of the United States for the same purpose, namely, the enjoining of a consolidation, the court where the bill was first filed will conduct the litigation, and in the other circuits the courts will stay the proceedings. *Dady v. Georgia, etc. Ry.*, 112 Fed. Rep. 838 (1900). Although a stockholder may bring similar suits in courts of different jurisdictions, yet the defendant may apply in all the suits instituted after the first suit, and ask the court to stay proceedings or refuse to permit final judgment until the first suit has been determined. *Mumford v. Ecuador, etc. Co.* 50 Atl. Rep. 476 (N. J. 1901). Where in a stockholder's suit in the federal court to set aside a sale of all the assets of the company to another company an injunction has been denied on the giving of a bond, an injunction will not be granted in a similar suit by the same parties in the state court, especially where the purchaser is outside of the jurisdiction of the court, and the advantage to the complainant will be small as compared with the injury to the defendant. *Mumford v. Ecuador, etc. Co.*, 50 Atl. Rep. 476 (N. J. 1901). The party with whom the alleged il-

legal contract was made cannot sustain a bill in equity to prevent a multiplicity of stockholders' suits. *Manhattan Ry. v. New York Elev. R. R.*, 29 Hun, 309 (1883). Although a creditor has brought suit in behalf of himself and others, yet another creditor may institute another similar suit. After judgment in one, the other ceases. *Innes v. Lansing*, 7 Paige, 583 (1839). As to demurrer on the ground that another suit is pending for the same relief, see *Zebble v. Farmers' L. & T. Co.*, 139 N. Y. 461 (1893). A corporate creditor's suit in equity in behalf of himself and all others to enforce the stockholders' statutory liability does not, even though it goes to a decree, prevent other creditors filing a subsequent bill for the same purpose. *Palmer v. Woods*, 149 Ill. 146 (1894). A suit pending in the United States court brought by the purchaser of municipal bonds from a railroad to compel the state treasurer to deliver them, the corporation being made a party defendant, does not prevent the state court issuing a *mandamus* at the instance of the municipality to have such bonds delivered up by the state treasurer for cancellation. *People v. State Treasurer*, 24 Mich. 468 (1872). A suit brought by a bondholder in behalf of himself and other bondholders who may choose to join with him does not make the judgment binding on those who do not join. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908).

¹ *Hirshfeld v. Fitzgerald*, 157 N. Y. 166 (1898).

not take part nor make himself known prior to the compromise is not entitled to any part of the money so received.¹

Where the company itself has already brought suit on a cause of action and has been defeated, a stockholder cannot bring suit on the same cause of action on behalf of the corporation, even though the former case was decided in another state.² Even after trial, however, the court in its decree may dismiss a bill without prejudice.³ In a creditor's suit attacking a mortgage, the suit being for himself and other creditors, there being no fund to pay the expense of litigation, the court may require parties coming in to contribute towards such expense or else be excluded from the suit.⁴ Where the court authorizes the receiver to sue promoters for secret profits, the proceeds of the suit to belong to the creditors who agree to pay the expenses, costs, etc., a creditor who delays taking part until it is evident that a large sum will be recovered, will not be allowed to come into such suit.⁵ A stockholder, who intervenes and becomes also a party plaintiff, is entitled to the same rights as the original plaintiff, but if they disagree as to bringing in an additional party defendant, the court may require the one wishing to bring in such additional party to give security for costs as regards such additional party.⁶ Where the board of directors has been changed and the new board proposes to dismiss a pending suit, the court may allow minority stockholders, who originally caused the directors to commence the suit, to file a supplemental bill setting forth all the facts and to continue the suit at their own expense.⁷

§ 749. *No contribution among the directors.*—No contribution can be enforced among directors guilty of a breach of trust for which a part are held liable.⁸ Directors who have been obliged to repay

¹ Nicolls v. Rice, 147 Cal. 633 (1905).

² Quoted and approved in Smith v. Bulkley, 18 Col. App. 227 (1902); Alexander v. Donohoe, 68 Hun, 131 (1893); aff'd, 143 N. Y. 203 (1894). A stockholder cannot maintain a suit in a matter which has been adjudicated against the corporation itself.

³ Ebner v. Massie, 109 La. 776 (1901).
⁴ Ebner v. Zimmerly, 118 Fed. Rep. 818 (1902).

⁵ Chick v. Northwestern, etc. Co., 118 Fed. Rep. 933 (1895). Where the receiver is authorized to commence suit for the benefit of such creditors as come in and give security for the

cost and expenses of such suit, the suit being against the stockholders, the defendants cannot defend on the ground that some of the creditors purchased their claims for the sole purpose of coming in under such order of the court. Central T. Co. v. East Tennessee, etc. Co., 116 Fed. Rep. 743 (1902).

⁶ McEwan v. Harriman, etc. Co., 138 Fed. Rep. 797 (1905).

⁷ Weed v. First Nat. Bank, 117 N. Y. App. Div. 340 (1907).

⁸ Eagle Iron Co. v. Colyar, 156 Fed. Rep. 954 (1907).

⁹ Wilkinson v. Dodd, 40 N. J. Eq. 123 (1885); Ervin v. Oregon, etc. Nav.

money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution among joint tort-feasors.¹ A director cannot claim a set-off,² or bankruptcy, where he has been guilty of fraud.³

B. SUITS BY OR AGAINST THE CORPORATION IN GENERAL—SERVICE AND JURISDICTION.

§ 750. *The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with—Intervention by stockholders.*—It frequently happens that the corporation has a cause of action against a third party which the directors think best not to press, or that the corporation is sued and the directors think best not to defend, or, where an action is pending, the directors decide to compromise the matter. The judgment of the directors may, in the opinion of a stockholder, be erroneous, and yet it cannot be controlled or changed by the stockholders except by refusing to re-elect the directors to office. The stockholder cannot go into court and attempt to change the policy of the directors as regard the management of the suit.⁴ A stockholder can-

Co., 20 Fed. Rep. 577 (1884); Peck v. Ellis, 2 Johns. Ch. 131 (1816). See Power v. O'Conner, 19 W. R. 923 (1871). In Lingard v. Bromley, 1 Ves. & B. 114 (1812), contribution was enforced between assignees in bankruptcy, one of whom had improperly paid a loss with the concurrence of the others. In Ramskill v. Edwards, L. R. 31 Ch. D. 100 (1885), contribution was enforced against a director who subsequently ratified an unauthorized loan which another director made and was held responsible for. An executor of a deceased director was also held liable. A director who objects and protests is not liable. In the case Gaither v. Bauernschmidt, 69 Atl. Rep. 425 (Md. 1908), the court held that contribution between the directors in a receiver's suit to hold them liable for illegal dividends and illegal loans and other wrongful acts might be enforced in the same suit in equity.

¹ Gilbert v. Finch, 173 N. Y. 455 (1903). Where a treasurer, who is also a director, has divided among the stockholders, in violation of the statute, the corporate funds of an insolvent corporation, and is afterwards held liable to creditors, he cannot have contribution from the other directors, even though they took part in the division. Sharp v. Call, 69 Neb. 72 (1903). As to contribution among directors under the English statute, see Shephard v. Bray, 95 L. T. Rep. 414 (1906), reversed by consent in 97 L. T. Rep. 729 (1907).

² Re Anglo-French Co-op. Soc., L. R. 21 Ch. D. 492 (1882).

³ Emma Min. Co. v. Grant, L. R. 17 Ch. D. 122 (1880).

⁴ These principles of law follow necessarily from the fact that the management and policy of the corporation are determined and controlled by the directors and not by the stockholders. The only cases wherein the

not control the discretion of directors as to whether to bring a suit or not.¹ A stockholder cannot bring a suit to recover for goods sold by the corporation. The corporation is the proper party to sue.² In general, a corporation represents and binds the stockholders in bringing and defending suits which involve the rights and obligations of the corporation, and binds them as fully as in the making of contracts.³

stockholders may interfere are cases where the directors are guilty of fraud, *ultra vires* acts or gross negligence in protecting the corporate interests.

"There may be claims against directors; there may be claims against officers; there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done." *MacDougall v. Gardiner*, L. R. 1 Ch. D. 13 (1875). See also 15 Fed. Rep. 360, note. Even a majority of the stockholders cannot go into court and have appeals dismissed where the directors order them to be continued. *Railway Co. v. Alling*, 99 U. S. 463 (1878). "Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." *Ellerman v. Chicago Junction, etc. Co.*, 49 N. J. Eq. 217 (1891). The discretion of the directors cannot

be questioned by the stockholders. *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620 (1894). Even though the holders of a majority of the stock are opposed to the board of directors, yet the former cannot obtain an injunction against the board of directors selling treasury stock. *Gillette v. Noyes*, 92 N. Y. App. Div. 313 (1904). A receiver will not be appointed at the instance of a stockholder for the purpose of bringing suits which the corporation should bring. *Hallenborg v. Cobre, etc. Co.*, 8 Ariz. 329 (1904). Creditors cannot object that the corporation has not set up the statute of limitations to other claims, where there is no proof that the creditors will not be paid in full. *Dozier v. Arkadelphia, etc. Mills*, 71 Ark. 407 (1903). See also § 684, *supra*.

¹ *Dickermann v. Northern T. Co.*, 176 U. S. 181, 188, 193 (1900), citing the above text; *La Grange v. State Treasurer*, 24 Mich. 468 (1872).

² *Cutshaw v. Fargo*, 8 Ind. App. 691 (1893). Stockholders cannot bring suit in behalf of the company to set aside a deed on the ground that the directors neglect to bring the suit, where the matter in dispute is being litigated in another form. *Bissell v. Taylor*, 7 Wash. 324 (1893).

³ *Farnum v. Ballard, etc. Shop*, 66 Mass. 507 (1853); *Oglesby v. Attrill*, 105 U. S. 605 (1881); *Came v. Brigham*, 39 Me. 35 (1854); *Lane v. Weymouth School Dist.*, 51 Mass. 462 (1845); *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886), *aff'd* 14 Fed. Rep. 753 (1883). It has been held that the minority bringing suit against a third

Thus, it is not for the stockholder to take out an appeal or *certiorari* which the corporation does not take out;¹ nor bring an action against other corporate agents for injury and loss to the corporation.² The great case of *Dodge v. Woolsey*,³ however, was on the very point now under discussion, and it was decided under the facts of that case, where the corporation refused to defend itself against an illegal tax, that a stockholder of the corporation might do that which the corporation should have done.⁴ A stockholder cannot maintain an action at law against outside parties for conspiracy to injure and ruin the corporation.⁵

person to enforce a right which the corporation ought to enforce must make the corporate officers co-defendants. *Slattery v. St. Louis, etc. Co.*, 91 Mo. 217 (1886). But see § 738, *supra*. A stockholder cannot appeal from a decree against the company. *Ex parte Cutting*, 94 U. S. 14 (1876). Stockholders are not entitled to notice of the suit. *Peirce v. Somersworth*, 10 N. H. 369 (1839). A corporation represents the stockholders in bringing or defending suits. *Gunderson v. Illinois Trust & Savings Bank*, 100 Ill. App. Rep. 461 (1902). Where a stockholder transfers stock to another person for the benefit of the company, he cannot call the latter to account or enforce the agreement, inasmuch as the company has the beneficial interest, although he might maintain a suit in behalf of the company if it declined to sue. *Parmenter v. Homans*, 125 N. Y. App. Div. 399 (1908).

¹ *Silk Mfg. Co. v. Campbell*, 27 N. J. L. 539 (1859). Under the Louisiana statute a stockholder may appeal from a judgment against the corporation. *Massie v. Louque*, 109 La. 769 (1901). Even though the corporation fails to perfect an appeal by filing a bond, yet a stockholder cannot take such appeal. *White, etc. Co. v. Union, etc. Co.*, 83 N. E. Rep. 540 (Ill. 1907). Under the statute of Ohio a stockholder may sometimes appeal where the corporation does not. *Henry v. Jeanes*, 47 Ohio St. 116 (1890). A stockholder has no right to

take an appeal from a decree against the corporation. *Chicago, etc. R. R. v. Northern Trust Co.*, 90 Ill. App. 60 (1899).

² *Forbes v. Whitlock*, 3 Edw. Ch. 446 (1841). See also *Quincy v. Steel*, 120 U. S. 241 (1887).

³ 18 How. 331, 345 (1855), where the court said: "Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency." See also *Memphis, etc. Co. v. Williamson*, 9 Heisk. (Tenn.) 314 (1872), where suit was brought on the bond which the plaintiff in *Memphis v. Dean*, 8 Wall. 64 (1868), gave in obtaining an injunction. *Cf. Corbus v. Alaska, etc. Co.*, 187 U. S. 455 (1903). Where a purchaser at tax sale is about to remove the corporate property and the officers do not act, the stockholders may maintain a bill in equity to enjoin the removal of the property and no request to the directors is necessary. *Starr v. Shepard*, 145 Mich. 302 (1906).

⁴ See also *Park v. Petroleum Co.*, 25 W. Va. 108 (1884); s. c., 26 W. Va. 486 (1885).

⁵ *Converse v. United States, etc. Co.*, 185 Mass. 422 (1904). A manager who is forced to resign and sell his stock because the corporation has

It is within the power of the directors to compromise a pending lawsuit by or against the corporation, and a stockholder cannot control the directors' decision.¹ After the receiver, in accordance with an order of the court, settles with the directors claims against them for breaches of trust, a stockholder cannot maintain a suit for such breaches of trust.² Even though a contract is of doubtful validity, the corporation may compromise the claim.³ In England it has

been defrauded by other parties, cannot hold such other parties liable for the depreciation in the value of the stock or for his proportion of the amount out of which they had defrauded the corporation, nor for damages from his enforced resignation and injury to reputation. *Ninneman v. Fox*, 43 Wash. 43 (1906). Where a promoter causes the stockholders in various electric companies to turn in their stock to a new corporation in exchange for bonds of the latter, and also gives to such stockholders the right to purchase, at \$30 a share, stock in the latter, a stockholder who has done so and then discovers that the promoter has made \$20,000,000 profit in stock of the new company, he may bring suit to compel the promoter to turn over the profit to the corporation and may join the new corporation as a party defendant. It is no defense that the board of directors of the latter thinks it inexpedient that the suit be brought. *Groel v. United States, etc. Co.*, 70 N. J. 616 (1905). The court said (p. 1064): "The authorities hold that it is a matter of discretion in the court whether to permit a suit to be brought by a stockholder on behalf of his corporation, and that the court will exercise its discretion, having in view the circumstances of the parties, their relationships to each other and to the cause of action, the refusal to sue," etc.

1 "It cannot be contended that the directors of a corporation do not possess authority, acting in good faith and in the exercise of their best judgment, to settle a pending action, or

that the settlement is not binding on their stockholders, even though it may subsequently appear that they failed to secure the best terms to which the corporation might have been entitled." *Donohoe v. Mariposa, etc. Co.*, 66 Cal. 317, 319 (1885). See also *Shawhan v. Zinn*, 79 Ky. 300 (1881). The board of directors may compromise claims and lawsuits. *New Albany v. Burke*, 11 Wall. 96 (1870); *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122 (1875), aff'g 39 Md. 600; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322 (1885); *Frankfort Bank v. Johnson*, 24 Me. 490 (1844); *Seeley v. San José, etc. Co.*, 59 Cal. 22 (1881). The sureties of a corporate treasurer are liable for a deficiency existing after the compromise by the corporation of a claim which the treasurer illegally created. *Goodyear, etc. Co. v. Caduc*, 144 Mass. 85 (1887). Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is no bar to such suit for the balance. A release by the board of directors is no defense. *Gilbert v. Finch*, 72 N. Y. App. Div. 38 (1902); aff'd, 173 N. Y. 455.

2 *Craig v. James*, 71 N. Y. App. Div. 238 (1902).

3 *Farmers', etc. Co. v. Meese*, 49 Neb. 861 (1896). An adjustment of a claim by the board of directors is binding on the stockholders unless fraud and bad faith are shown. *Cham-*

been held that even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal it is not *ultra vires*, and, as to the illegal act, it is for the corporation to decide whether or not it will sue.¹ A stockholder cannot sue to enjoin a person from slandering the title of property belonging to the corporation.² But a stockholder in a railroad company may file a bill to enjoin an unreasonable reduction of the rates made by act of the legislature;³ and a stockholder may enjoin his company from paying an illegal income tax.⁴ A stockholder may enjoin a rival company from appropriating the right of way and property of his own company, where a majority of the directors of the latter are allowing these acts to be done.⁵ A stockholder may bring suit in behalf of the corporation to compel the president to pay his subscription, where the president is in control of the company and refuses to pay such subscription.⁶

It has been held that a stockholder may bring suit on behalf of the corporation to remove a cloud from the corporate title to real estate,⁷ and that a stockholder may sue for the corporation to compel delin-

bers *v. Chambers, etc. Co.*, 185 Pa. St. 105 (1898). Where the bonds of a lessor railroad become due before the lease expires, and they may be refunded at a low rate of interest, and a *bona fide* controversy arises as to who is entitled to the saving, and a compromise is effected and approved by a majority in interest of the stockholders at a meeting called for that purpose, the fact that a majority of the directors of the lessor are also directors of the lessee does not invalidate the compromise if there was no actual fraud. *Continental Ins. Co. v. N. Y. etc. R. R.*, 103 N. Y. App. Div. 282 (1905); *aff'd*, 185 N. Y. 225. Where a corporation brought suit against a promoter for fraud and has failed, and a contract is then made by which all the stockholders are given an opportunity to sell their stock to the promoter, and the board of directors ratified the contract and agreed to stop all litigation, a dissenting stockholder cannot have the contract set aside for fraud, even though by the contract the president is paid for his services. *Hallenborg v. Cobre, etc. Co.*, 200 U. S. 239 (1906).

¹ *Anderson v. Midland Ry.*, [1902] 1 Ch. 369.

² *Langdon v. Hillside, etc. Co.*, 41 Fed. Rep. 609 (1890).

³ *Smyth v. Ames*, 169 U. S. 466 (1898).

⁴ *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429 (1895); *s. c.*, 158 U. S. 601.

⁵ *Weidenfeld v. Sugar Run R. R.*, 48 Fed. Rep. 615 (1892). *Robinson v. New York, etc. Ry.*, 123 N. Y. App. Div. 339 (1908).

⁶ No request to directors is necessary in such a case. *Knoop v. Bohmrich*, 49 N. J. Eq. 82 (1891). If a trustee who holds land for the benefit of a corporation commits a breach of trust, any stockholder may cause him to be removed. *Fisk v. Patton*, 7 Utah, 399 (1891). The president may institute a suit to compel a majority of the board of directors to account for fraud, even though they are opposed to the suit. *Recamier Mfg. Co. v. Seymour*, 5 N. Y. Supp. 648 (1889).

⁷ *Baldwin v. Canfield*, 26 Minn. 43, 56 (1879).

quent stockholders to pay in their unpaid subscription.¹ In one case it has been held that where there is a controversy among the stockholders as to how many directors one of the stockholders—a municipality—is entitled to, a stockholder may file a bill to settle it, since the corporation is not bound to decide or test the matter.² “A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding.”³ By reason of this principle of law and the further fact that a multiplicity of suits should be avoided, the courts will, in some instances, allow a stockholder to intervene in a suit brought by or against the corporation and thus enable him to assist and protect the corporate interest in such suit. This subject, however, is considered elsewhere.⁴ Where the corporation fraudulently does not defend, the remedy of a stockholder is not to appear and defend in the name of the corporation, but to intervene and defend in his own name.⁵ Where there is no officer or agent to defend in behalf of the corporation, a stockholder will be allowed to defend.⁶ A stockholder will be allowed to intervene and object to a reckless sale of the property of an insolvent corporation by the receiver thereof, where the corporation itself is not protecting the interests of the stockholder.⁷ A stockholder will be allowed to intervene and defend a suit pending against the corporation on a note where he alleges that the note is fraudulent, and the directors, by a conspiracy, do not intend to defend.⁸ Stockholders will be allowed to intervene and defend in the name of the

¹ Wallworth v. Holt, 4 Myl. & C. 619 (1840).

² Wheeling v. Baltimore, 1 Hughes, 90 (1862); s. c., 29 Fed. Cas. 914.

³ National Foundry, etc. Works v. Oconto Water Co., 68 Fed. Rep. 1006 (1895). See also § 209, *supra*. Pledges of stock are not in any sense creditors of the corporation, and are bound by judgments against the corporation the same as stockholders. Farmers' Bank, etc. v. Ohio River, etc. Co., 108 Ky. 447 (1900). A judgment in a suit between the corporation and the president which fixes his liability is not binding on stockholders in a suit to adjust equities among the stockholders on winding up. Gund v. Ballard, 103 N. W. Rep. 309 (Neb. 1905). A stockholder cannot prevent a judgment creditor of a corporation levying on corporate prop-

erty on the ground that the corporate property was not subject to execution, inasmuch as stockholders are bound by judgments against the corporation. Verner v. Simpson, 68 S. C. 459 (1904).

⁴ See § 848, *infra*.

⁵ Cornell v. Sims, 111 Ga. 828 (1900), 47 S. Rep. 286.

⁶ Doak v. Stahlman, 58 S. W. Rep. 741 (Tenn. 1899). A stockholder may intervene to vacate a foreclosure decree entered on consent of the president without authority, where there is no board of directors to defend. Frederick Milling Co. v. Frederick, etc. Co., 106 N. W. Rep. 298 (S. Dak. 1906).

⁷ State v. Holmes, 60 Neb. 39 (1900).

⁸ Majors v. Taussig, 20 Colo. 44 (1894).

company where they show that the officers are wrongfully refusing to make a valid defense, which is set forth in the papers.¹ There is no appeal in the federal court from an order denying the petition of a bondholder to intervene.²

Where a suit is brought against a corporation for the benefit of the president and a majority of the board of directors, and no answer is interposed, a stockholder will be allowed to intervene and defend without requesting the officers to make the defense.³ A receiver cannot have a judgment at law set aside on the ground that it was obtained by collusion. His remedy is in equity.⁴

The rule which ordinarily prevents a stockholder from instituting or defending a suit against third persons herein is clearly to be distinguished from all other classes of actions treated of in the fourth part of this work. The actions now being considered are those which exist for or against the corporation in a multitude of cases, and which are of daily occurrence to all great corporations. They are actions not involving frauds or *ultra vires* acts of the directors, but involve at the most only a neglect of the directors to begin or defend suits.

There is a class of cases which are midway between these two classes. This third class involves a neglect of the directors to defend a suit against the corporation, and the further fact that the defense is not made on account of the fraud and collusion of the directors with the complainants in the suit. This generally happens in foreclosures of mortgages on the property of the corporation, a subject which is considered elsewhere.⁵

¹ *Fitzwater v. National Bank, etc.* 62 Kan. 163 (1900). Even though the corporate property is sold on an execution obtained in a suit against the corporation, yet the stockholders cannot make a motion in such suit to set aside the sale unless it is made to appear that the corporate officers have been wilfully and fraudulently neglectful. *Home, etc. Co. v. McKibben*, 60 Kan. 387 (1899). Stockholders will not be allowed to intervene in a suit brought by a creditor against the corporation itself, even though they wish to set up the statute of limitations, and even though the directors had directed the company's lawyer to admit the allegations of the complainant, and even though the company is insolvent, and the stockholders are

liable on the stock, no fraud being shown. *Meyer v. Bristol, etc. Co.*, 163 Mo. 59 (1901). Even though the vice-president and general manager, who is being sued by the corporation for converting its funds, obtains control and intends to dismiss the suit, the minority stockholders cannot intervene unless they allege facts that would sustain a suit brought by them. *Ainsworth v. Evans*, 80 Pac. Rep. 344 (Ariz. 1905).

² *Land, etc. Co. v. Tatnall*, 132 Fed. Rep. 305 (1904).

³ *Shively v. Eureka, etc. Co.*, 129 Cal. 293 (1900).

⁴ *Woodward v. Arlington, etc. Co.*, 2 Pen. (Del.) 188 (1899).

⁵ See § 848, *infra*.

§ 751. *Suits by and against corporations must be in corporate name.*—It is stated by Blackstone that one of the distinguishing features of a corporation is that it may sue and be sued in its corporate name. This is an elementary principle of law. Consequently, the stockholders are not to be made parties in suits against the corporation.¹ Moreover, a suit by or against the corporation must be by or against it in its corporate name, and not in the names of its officers.² A judgment against a partnership sued as a corporation

¹ *Kelley v. Mississippi Cent. R. R.*, 1 Fed. Rep. 564 (1880). In a suit by a corporation to obtain property, in accordance with a contract, a trustee who is holding all the stock for the benefit of the stockholders is not a proper party. *Havana, etc. Ry. v. Ceбалlos*, 49 N. Y. App. Div. 263 (1900). In Ohio a person litigating with a corporation may have a change of venue when the corporation has more than fifty stockholders at its principal office in the county where the litigation is pending, if the party swears that he does not think he can obtain a fair and impartial trial in that county, and five credible persons residing in the county sustain his application. *Snell v. Cincinnati, etc. Ry.* 60 Ohio St. 256 (1899). Even though suit is brought in the name of all the stockholders instead of the corporation, the corporation may be substituted by amendment. *Hackett v. Van Frank*, 119 Mo. App. 648 (1906).

² An action against an individual, "president of the," etc., is not a suit against the corporation. The suit must be against the corporation in its corporate name. *Ogdensburg Bank v. Van Rensselaer*, 6 Hill, 240 (1843). Where suit has been commenced against the president personally, the court cannot direct that the suit continue as against the corporation, even though thereby the statute of limitations becomes a bar as against the latter. *Licausi v. Ashworth*, 78 N. Y. App. Div. 486 (1903). An action against the stockholders does not bind or affect the corporation unless it is

made a party by name and service. *Lillard v. Porter*, 2 Head (Tenn.), 177 (1858). When there is no prayer for process against a corporation by its corporate name, but only against its officers, and the body of the bill does not describe the corporation as a party, the corporation is not before the court, though it is in the title. *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438 (1831). An important exception to this rule arises, of course, where the corporation refuses to sue and a stockholder sues for it. See Part IV of this work generally. Process running to A as president of, etc. runs to A individually, and the company is not thereby made a party, and an amendment without new service cannot cure. *Plemmons v. Southern Imp. Co.*, 108 N. C. 614 (1891). Where the name of a party is stated in the complaint in such words as to imply a corporation, it will be presumed that it was a corporation. *Ohio Oil Co. v. Detamore*, 165 Ind. 243 (1905). Even though process runs to an officer of the corporation instead of to the corporation itself, yet if it appears and defends it cannot raise that objection. *Shorter University v. Franklin Bros.*, 75 Ark. 571 (1905). Where several lines of railroad use for convenience the name "Kanawha Dispatch" in handling freight, such Kanawha Dispatch cannot maintain a suit. *Kanawha Dispatch v. Fish*, 219 Ill. 236 (1905). See Ch. XXIX, *supra*. A citation directed to an agent of a corporation does not bring the corporation into

cannot be enforced against co-partners.¹ A defendant sued as a partnership cannot be held liable if it is a corporation.² The president of the company may employ an attorney to bring suit or to appear for the company.³ Stock is located where the corporation is incorporated, and a non-resident stockholder may file a bill in the United States court in the district where the corporation was organized to set aside an illegal forfeiture of the stock for non-payment of assessments, and in such suit he may bring in non-resident defendants by substituted service.⁴ A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account.⁵

A peremptory *mandamus* granted without notice is not the proper remedy to compel the treasurer of the corporation to pay a debt in accordance with the order of the executive committee.⁶ A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity.⁷

court. *Mutual, etc. Co. v. Uecker*, 101 S. W. Rep. 872 (Tex. 1907). A corporation may sue in its own name by its attorney without designating the president or any other officer. *Southern Sawmill Co. v. Ducote*, 46 S. Rep. 20 (La. 1908). An attachment or garnishment against "William Milnes, president Shenandoah," etc. Railroad, is not good as against the company. It is against Milnes as an individual. *Fidelity, etc. Co. v. Shenandoah Valley R. R.*, 33 W. Va. 761 (1890). A corporation may appeal from an order for the examination of one of its officers. *Sherman v. Beacon Const. Co.*, 58 Hun, 143 (1890). In a suit to enjoin a corporation from lowering the level of a lake, the president may be joined as a party defendant. *Cedar Lake Hotel Co. v. Cedar Creek, etc. Co.*, 79 Wis. 297 (1891). The question of joining the directors and agents for purposes of discovery is discussed elsewhere. See § 519, *supra*. Process should not run to a person as president of a company. It should run to the company itself. *State v. Montegudo*, 48 La. Ann. 1417 (1896). Proc-

ess to an individual as president does not bring the corporation into court. *Butler v. Holmes*, 68 S. W. Rep. 52 (Tex. 1902). A *mandamus* to compel the production of the books of the corporation should run to the corporation itself and not to the manager. *State v. North American, etc. Co.*, 105 La. 379 (1901); s. c., 31 S. Rep. 172 (1902).

¹ *Pittsburg, etc. Co. v. Beale*, 204 Pa. St. 85 (1902).

² *Welton v. Genesee, etc. Co.* 114 La. 842 (1905).

³ See § 716, *supra*. In a suit against a corporation and its president, both parties are liable for the fees of their attorneys. *Humes v. Decatur Land, etc. Co.*, 98 Ala. 461 (1893).

⁴ *Jellenik v. Huron, etc. Co.*, 177 U. S. 1 (1899). See also § 363.

⁵ *Consolidated, etc. Works v. Brew*, 112 Wis. 610 (1902). See also § 648, *supra*.

⁶ *Horton v. State*, 60 Neb. 701 (1900.)

⁷ *Hunter v. Robbins*, 117 Fed. Rep. 920 (1902). See also § 648, *supra*.

§ 752. *Service on a domestic corporation—Appearance—Answer—Proofs.*—If the suit is against the corporation, service is made upon it, not by service upon a stockholder,¹ but upon the chief officer of the corporation within the jurisdiction.² “At common law service

1 *Bache v. Nashville, etc. Soc.*, 10 Lea (Tenn.), 436 (1882); *Lillard v. Porter*, 2 Head (Tenn.), 177 (1858); *De Wolf v. Mallett*, 3 Dana (Ky.), 214 (1835). Service in Colorado by statute may be on a stockholder if there is no resident agent. Service cannot be avoided by a transfer of his stock by a stockholder for that purpose only. *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 499 (1890). See also § 753, notes, *infra*. Service upon the president and secretary as individuals is not service on the corporation. *Kirkpatrick, etc. Co. v. Central, etc. Co.*, 159 Ind. 639 (1903).

2 Service of notice of attachment in a garnishment case upon two of the officers and directors of a corporation has been held sufficient notice to the corporation. *Boyd v. Chesapeake, etc. Canal Co.*, 17 Md. 195 (1860). Notice of a motion for a rule to establish the election of directors is sufficient if served on the directors whose election is questioned, and it need not be served on the other directors or on the president. *Ex parte Holmes*, 5 Cow. 426 (1826). Upon affidavit that the corporation had no presiding officer or treasurer, and that the secretary had left the country, the court ordered service to be on the trustee. *Tom v. First Society, etc.* 19 Wend. 25 (1837). Where the president and treasurer of a corporation misinform a process-server and induce him to serve process upon another party which was intended to be served upon the president, the service is good as against the corporation. *Wilson v. California Wine Co.*, 95 Mich. 117 (1893). “At common law the process against a corporation could only be served on its head or principal officer

within the jurisdiction of the sovereignty where the artificial body existed.” *Young v. Dexter*, 18 Fed. Rep. 201, 208 (1883). Service upon the vice-president is good under a statute authorizing service on the president or other head. *Comet, etc. Co. v. Frost*, 15 Colo. 310 (1890). Service upon one who has ceased to be president, director, or other officer renders the judgment void. *Beardsley v. Johnson*, 121 N. Y. 224 (1890). Even though an officer resigns for the purpose of preventing service upon the company, yet, if the resignation is accepted, service cannot be made upon him. *Sturgis v. Crescent, etc. Co.*, 10 N. Y. Supp. 470 (1890). Service on one as secretary, when he never had been secretary, is not good. *Collier v. Morgan's etc. R. R.*, 41 La. Ann. 37 (1889). Where the corporation has suspended business, and the chairman of the directors was dead, the court directed service to be made on the deputy chairman and secretary who had last served as such for the corporation. *Gaskell v. Chambers*, 26 Beav. 252 (1858). Service on the chief resident agent has been held sufficient. *Newby v. Von Oppen*, L. R. 7 Q. B. 293 (1872). A notice of a lien served on the secretary is sufficient. *Heltzell v. Chicago, etc. R. R.*, 77 Mo. 315 (1883). Service on the president is sufficient. *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96 (1854). But not on a mere agent. *McCall v. Byram Mfg. Co.*, 6 Conn. 428 (1827). A suit against a supposed corporation is not good against its members, there being merely a copartnership. Service on the general manager does not make him a party defendant. *Leatherman v. Times Co.*, 88 Ky. 291

was made on such head officer of a corporation as secured knowledge of the process to the corporation.”¹ A decree of foreclosure based upon services accepted by the acting president, who was really the agent of the mortgagee, may be set aside as fraudulent.² The subject of service upon a foreign corporation is considered elsewhere.³

Generally the statutes of the state specify the corporate officers upon whom service may be made.⁴ The corporation may appear gen-

(1889). See § 758, *infra*. A director cannot avoid service by slamming the door in the face of the officer. *Boggs v. Inter-American, etc. Co.*, 66 Atl. Rep. 259 (Md. 1907). Where a contract is to be performed in another state, suit may be commenced in that state by service on the president while there. *Payne v. East, etc. Co.*, 109 La. 706 (1903). Service on a bookkeeper is not good under the Kentucky statute on the mere allegation that the “president and chief officers” were absent, without further specification. *Beattyville, etc. Co. v. Bamberger, etc. Co.*, 53 S. W. Rep. 31 (Ky. 1899). Where an agent authorized to accept service causes appearance to be entered without service, and the corporation for three years does not object, the appearance is good. *Alliance, etc. Co. v. Bartlett*, 9 N. M. 554 (1899). A judgment by default against a corporation must show that service was properly made on an officer of the corporation. *Southern, etc. Assoc. v. Gillespie*, 121 Ala. 295 (1899). Where the attorney for the plaintiff is president also of the defendant corporation, service of process upon him as president is not void. *United States, etc. Co. v. Spencer*, 46 W. Va. 590 (1899). A judgment obtained in another state by service on a person who had ceased to be secretary is not binding. *Thum v. Pyke*, 8 Idaho, 11 (1901). Under the United States statute that a federal receiver shall manage property according to the laws of the state where the property is, service in a suit against the receiver may be made upon a local agent where by the stat-

utes of the state such service could be so made as against the corporation itself. *Wolfe v. Pierce*, 23 Ind. App. 591 (1900). A “managing agent” upon whom process may be served in New York need not be the general manager, but may have had charge of only the matter in which the litigation arose. *Perrine v. Ransom, etc. Co.*, 60 N. Y. App. Div. 32 (1901). For purposes of making service a director and president of a railroad company is presumed to continue as such, even though elected annually and the year has expired. *Buell v. Baltimore, etc. R. R.*, 39 N. Y. App. Div. 236 (1899).

1 *Kansas City, etc. R. R. v. Daugherty*, 138 U. S. 298, 305 (1891).

2 *Fox v. Robbins*, 62 S. W. Rep. 815 (Tex. 1901). Where the secretary owns a claim against the company and assigns it and the assignee commences suit, service cannot be upon such secretary. *Atwood v. Sault, etc. Power Co.*, 148 Mich. 224 (1907).

3 See §§ 757, 758, *infra*.

4 A solicitor of insurance in Ohio is not a managing agent upon whom process may be served sufficient to support a judgment to be sued upon in Michigan. *Spiker v. American, etc. Soc.*, 140 Mich. 225 (1905). An agent of a domestic corporation who is temporarily in another county cannot be served there under the Nebraska statute. *Security, etc. Co. v. Ress*, 106 N. W. Rep. 1037 (Neb. 1906). A statute requiring corporations to appoint a state auditor as agent to accept service of process and notice is constitutional. *State v. St. Mary's, etc. Co.*, 58 W. Va. 108 (1905).

erally, or may appear specially for the purpose of objecting to the service.¹ Where service is made upon an agent who is not an agent within the meaning of a statute authorizing service, the corporation should promptly move to set it aside.² Formerly a corporation made complaint or answer in a suit by attaching the corporate seal to the bill of complaint or answer. But this rule left the pleading unverified, and consequently, by statute now, it is generally prescribed that some officer of the corporation shall verify the pleading for the corporation.³ Where the answer of a corporation is sworn to posi-

A timekeeper may be such an agent as may be served under a statute. *Jenkins v. Penn Bridge Co.*, 73 S. C. 526 (1906). Service by publication is sufficient for a personal judgment against a domestic corporation, if the statutes so provide. *Clearwater, etc. Co. v. Roberts, etc. Co.*, 51 Fla. 176 (1906). The master of a ship owned by a corporation may be managing agent upon whom service may be made in accordance with a statute. *Davidson, etc. Co. v. United States*, 142 Fed. Rep. 315 (1905); *aff'd*, 205 U. S. 187. As to the requirements of service and a return thereof by the sheriff, under the Missouri statute, see *Newcomb v. New York, etc. R. R.* 182 Mo. 687 (1904).

1 See § 759, *infra*. A corporation, like a natural person, may appear voluntarily by attorney, and such appearance gives jurisdiction to the same extent as if there was actual service of process. *Att'y-Gen. v. Guardian, etc. Ins. Co.*, 77 N. Y. 272 (1879).

2 *Coast Land Co. v. Oregon, etc. Co.*, 44 Ore. 483 (1904). Where service is made upon a corporate agent who has been served in prior cases, in which the corporation appeared, it is his duty or the duty of the attorney to return the papers and inform the plaintiff upon whom service can be made if the service was insufficient, otherwise the service will be held good. *Hill v. Morgan*, 9 Idaho 718 (1904). In a plea in abatement to quash service, the affidavit should not

be made by the party on whom service was made and who it is claimed was not a person upon whom service could be made. *Scott v. Stockholders' etc. Co.*, 129 Fed. Rep. 615 (1904).

3 In an answer by a corporation, "the answer should be made by the principal officer of the defendant corporation, who should be able to admit or deny the facts charged and interrogated about, or to state want of knowledge clearly and truly as a reason for not doing either." *Hale v. Continental L. Ins. Co.*, 16 Fed. Rep. 718 (1883). An injunction against a corporation is not dissolved by an answer verified by the present secretary, who became such after the acts occurred, and who verified that his acts therein referred to were true, and that the acts of others he believed to be true. Some officer cognizant of the facts must verify. *Fulton Bank v. New York, etc. Canal Co.*, 1 Paige, 311 (1829). At common law a corporation answers by attaching its seal. The answer is not evidence, since it is not sworn to. If a sworn answer is desired, some of the officers or members must be made co-defendants. *Baltimore, etc. R. R. v. Wheeling*, 13 Gratt. (Va.) 40 (1855). In legal proceedings answers which, if made by an individual, should be under oath, are made by corporations under their corporate seals. 1 *Daniell*, Ch. Pl. (6th Am. ed.) 146; *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212 (1860); *Bronson v. La Crosse R. R.*,

tively by an officer on his personal knowledge, the corporation is entitled to the benefit of the rule that the complainant must produce two witnesses or one with corroborating circumstances to overcome such answer.¹ Under the old practice an officer might be joined as a party defendant in order to obtain a sworn answer, especially where interrogatories were attached.² A cross-bill for discovery lies against a corporation, even though the officers might be called as witnesses.³ Originally a corporation could not file an answer without the corporate seal except by consent.⁴ In suing on a corporate obligation it need not be alleged that the officer signing the obligation had power to do so.⁵ Under a denial by a corporation that it executed a contract, it may show that the president was not authorized to sign its name thereto, nor the secretary to attach its seal thereto.⁶ Reports from officers and employees of a corporation to its executive officer in

2 Wall. 283, 302 (1863); *Baltimore & Ohio R. R. v. Gallahue*, 12 Gratt. (Va.) 655 (1855), answer of garnishee. See also *Brumly v. Westchester, etc. Soc.* 1 Johns. Ch. 366 (1815); *Vermilyea v. Fulton Bank*, 1 Paige, 37 (1828); *Bouldin v. Baltimore*, 15 Md. 18 (1859); *Union Bank v. Geary*, 5 Pet. 99 (1831); *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601 (1826); s. c., 11 Fed. Cas. 156. A statute requiring a corporation to obtain the consent of a judge to interpose a defense to a suit on a promissory note before it can interpose a defense is not applicable where the corporation is an indorser to a note. *Shorer v. Times, etc. Co.*, 119 N. Y. 483 (1890). Where the corporation answers under its seal and by one of its principal officers, his authority to answer cannot be questioned by other parties to the suit. *Central Trust Co. v. Washington, etc. R. R.*, 124 Fed. Rep. 813 (1903).

¹ *Kane v. Schuylkill, etc. Co.*, 199 Pa. St. 198 (1901).

² See § 519, *supra*.

³ *Indianapolis Gas Co. v. City of Indianapolis*, 90 Fed. Rep. 196 (1898). A corporation sued for a trespass cannot compel the plaintiff to specify what officers committed the trespass.

Commonwealth v. Nunn, 17 Colo. App. 117 (1902).

⁴ *Gildersleeve v. Wolfe Island, etc. Canal Co.*, 3 Ch. Chamb. (Can.) 358 (1871). It is necessary to attach the corporate seal to its answer to a bill in equity. *R. Frank Williams Co. v. U. S. etc. Co.*, 86 Md. 475 (1897). A bill in equity by a corporation may be signed by its counsel and need not be under the seal of the corporation. *Washington, etc. Assoc. v. Buser*, 57 S. E. Rep. 40 (W. Va. 1907).

⁵ *Johnson County v. Chamberlain, etc.* 104-N. W. Rep. 1061 (Neb. 1905). In suing to enforce a corporate contract it is not necessary to allege that the contract was within its powers. *San Antonio, etc. Co. v. Josey*, 91 S. W. Rep. 598 (Tex. 1906).

⁶ *Quackenboss v. Globe & Rutgers, etc. Co.*, 106 N. Y. App. Div. 466 (1905). A corporation may by special demurrer require the plaintiff to state what officers conducted the transaction complained of. *Cherokee Mills v. Gate City, etc.* 122 Ga. 268 (1905). In order to raise the question of *ultra vires* in regard to a foreign corporation, the foreign statute must be pleaded in order to bring up the powers conferred by such statute. *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903).

regard to an accident are privileged communications.¹ In a case involving fraud, the letters of officers of a corporation to each other may be put in evidence.²

The question of whether a party may testify as to a transaction between himself and a deceased director or *vice versa* is considered elsewhere.³

A creditor suing the corporation may call the directors as witnesses, but is not bound by their testimony.⁴ As against the officers of the company it may be proved by the books of the company that they had converted to their own use the funds of the company illegally.⁵ Corporate books may be used to prove a right against the corporation itself or against one of the stockholders, so far as regularity and legality of the corporate proceedings are concerned. They must, however, be identified and this may be done by having an officer swear that he is the proper custodian and that they are the original books.⁶ A corporation cannot be compelled to produce its president for examination as a witness.⁷

§ 753. *Allegation and proof of incorporation.*—If the corporation is plaintiff it is customary to allege that it has been and is incorporated.⁸ If the defendant pleads the general issue and fails to in-

¹ *Ex parte Schoepf*, 74 Ohio St. 1 (1906).

² *Weiss v. Haight, etc. Co.*, 148 Fed. Rep. 399 (1906).

³ See § 11, *supra*.

⁴ *Smith v. Smith, etc. Co.*, 125 Mich. 234 (1900).

⁵ *Saranac, etc. R. R. v. Arnold*, 167 N. Y. 368 (1901). On this point see also § 727, *supra*.

⁶ *Lowry Nat. Bank v. Fickett*, 122 Ga. 489 (1905). In a suit by the United States government to break up a combination and monopoly of corporations owning bridges and ferries across the Mississippi river at St. Louis, a court of equity may compel traffic associations to produce their books and papers, even though they are not parties to the suit and it is claimed that the books and papers are immaterial and are private books and papers. *United States v. Terminal, etc.*, 148 Fed. Rep. 486 (1906).

⁷ *Central, etc. Co. v. Board, etc.*, 125 Fed. Rep. 463 (1903).

⁸ Failure to allege incorporation is cured by judgment where the defendant failed to object. *St. Cecelia's Academy v. Hardin*, 78 Ga. 39 (1887). The following decisions have been made: Incorporation need not be alleged unless the fact of its existence enters into or constitutes a part of the cause of action. *Holden v. Great Western E. Co.*, 69 Minn. 527 (1897). The execution and delivery of an instrument to a corporation raises the presumption that the company was regularly incorporated. *West Side, etc. Co. v. Connecticut, etc. Co.*, 186 Ill. 156 (1900). An allegation that a corporation is "a Pennsylvania corporation" sufficiently alleges that fact. *Roberts v. Pioneer Iron Works*, 125 N. Y. App. Div. 207 (1908). A corporation in bringing suit need not allege that it is a corporation. *Brady v. National, etc. Co.*, 64 Ohio St. 267 (1901). "A corporation under the laws of the state of Virginia" is equivalent to "existing under the

terpose the plea of *nul tiel corporation* or an equivalent plea or de-

laws of Virginia". Mathieson, etc. Works v. Mathieson, 150 Fed. Rep. 241 (1906). Where the name of a corporation is set forth in full, it is not necessary to allege that it is a corporation. Snyder v. Philadelphia Co., 54 W. Va. 149 (1903); Holcombe v. Cable Co. 119 Ga. 466 (1904). Where the name of the defendant signifies that it is a corporation it is not necessary to allege that it is a corporation. Ft. Wayne, etc. Co. v. Nieman, 33 Ind. App. 178 (1904). It is not necessary to allege the particular state in which a foreign corporation was organized. Herman, etc. Co. v. Pacific, etc. Co., 2 Cal. App. 167 (1905). It is not necessary to allege in what particular state a defendant corporation was incorporated. Jones v. Pacific, etc. Co., 9 Idaho, 186 (1903). The words "a corporation" appearing after the name of the plaintiff in the title of a case is not an allegation of incorporation. Boyce v. Augusta Camp, 14 Okl. 642 (1904). In an indictment against a corporation it is not necessary to allege that it is a corporation. State v. Dry Fork R. R., 50 W. Va. 235 (1901). Incorporation need not be alleged. Loan, etc. Co. v. Stoddard, 89 N. W. Rep. 301 (Neb. 1902). Corporate existence need not be proved where the pleadings show that the defendant dealt with the plaintiff as a corporation. Grand Ronde, etc. Co. v. Cotton, 12 Colo. App. 375 (1898). A corporation plaintiff need not allege that it is a corporation; it suffices to state in the commencement of the declaration the name of the corporation. Union Cement Co. v. Noble, 15 Fed. Rep. 502 (1882); Smythe v. Scott, 124 Ind. 183 (1890); Shearer v. Peale, etc. Co., 9 Ind. App. 282 (1894); Exchange Nat. Bank v. Capps, 32 Neb. 242 (1891); Leader, etc. Co. v. Lowry, 9 Okla. 89 (1899). Cf. 1 Barb. Ch. Pr. 36, n. (foot p. 44, 2d ed.). In a suit against a corporation on a promissory note the incorporation need not be alleged, since the signature estops a denial of incorporation. Griffin v. Asheville Light Co., 111 N. C. 434 (1892). An examination before trial may be had to ascertain whether defendants are proper defendants or whether they are a corporation. Sweeney v. Sturgis, 24 Hun, 162 (1881). In a suit against a foreign corporation it is unnecessary to allege in what state it was incorporated. Machen v. Western, etc. Tel. Co., 63 S. C. 363 (1902). An allegation of incorporation made once suffices for two causes of action in one suit. West v. Eureka Imp. Co., 40 Minn. 394 (1889). The complaint need not allege whether the defendant is a foreign or domestic corporation. Rothschild v. Grand Trunk Ry., 19 N. Y. Civ. Pro. 53 (1890). The allegation "a corporation under the laws of Iowa" is sufficient. Saunders v. Sioux City Nursery, 6 Utah, 431 (1890). Incorporation must be alleged. Miller v. Pine Min. Co., 2 Idaho, 1206 (1892); State v. Chicago, etc. Ry., 4 S. D. 261 (1893). In California an averment of corporate existence is necessary in every count of a complaint against the corporation. People v. Central Pac. R. R., 83 Cal. 393 (1890). In a libel in admiralty such averment should be made. Sun Mut. Ins. Co. v. Mississippi, etc. Co., 14 Fed. Rep. 699 (1882). In Perine v. Grand Lodge, etc. 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. If the incorporation is denied it must be proved. Davis v. Nebraska Nat. Bank, 51 Neb. 401 (1897). In Massachusetts proof of incorporation need not be

fense under the Code, he admits the incorporation of the plaintiff.¹ The fact of incorporation is proved by putting in evidence the certifi-

given unless the defendant within a certain time files a demand for proof. *Cabana v. Holyoke Conclave*, 160 Mass. 1 (1893). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial in order to ascertain where they were incorporated. *Clark v. Wilcklow*, 75 Hun, 290 (1894). In Colorado the appearance by a corporation as a defendant admits its incorporation. *Gauthier Decorating Co. v. Ham*, 3 Colo. App. 559 (1893). "The bringing of an action in a name purporting to be a corporate name is a sufficient averment of the existence of the plaintiff as a corporation." *Canandaqua Academy v. McKechnie*, 19 Hun, 62 (1879). There has been considerable controversy as to whether, at common law, a corporation plaintiff need allege that it is incorporated. See *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532 (1727); *Central Mfg. Co. v. Harts-horne*, 3 Conn. 199 (1819); *Ewing v. Robeson*, 15 Ind. 26 (1860); *Zion Church v. St. Peter's Church*, 5 Watts & S. (Pa.) 215 (1843); *Vance v. Farmers', etc. Bank*, 1 Blackf. 80 (1820); *Emery v. Evansville, etc. R. R.*, 13 Ind. 143 (1859); *O'Donald v. Evansville, etc. R. R.*, 14 Ind. 259 (1860); *Rees v. Conococheague Bank*, 5 Rand. (Va.) 326 (1827); *Jackson v. Bank of Marietta*, 9 Leigh (Va.), 240 (1838); *Farmers', etc. Bank v. Troy City Bank*, 1 Doug. (Mich.) 457 (1844); *Lighte v. Everett F. Ins. Co.*, 5 Bosw. 716 (1860); *Lewis v. Bank of Kentucky*, 12 Ohio, 132 (1843); *Mississippi, etc. R. R. v. Gaster*, 20 Ark. 455 (1859); *Bank of Utica v. Smalley*, 2 Cow. 770 (1824); *Jackson v. Plumble*, 8 Johns. 378 (1811); *Dutchess Cotton Mfy. v. Davis*, 14 Johns. 238 (1817); *Bank of Michigan v. Williams*, 5 Wend. 482 (1830);

Bank of Waterville v. Beltser, 13 How. Pr. 270 (1856). Cf. *Chapman v. Barney*, 129 U. S. 677 (1889), to the effect that the allegation is necessary in the federal courts in cases where the jurisdiction depends on it; *Adams Exp. Co. v. Harris*, 120 Ind. 73 (1889); *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491 (1859). The corporation cannot demur on the ground that incorporation is not alleged. *Adams v. Lamson, etc. Co.*, 59 Hun, 127 (1891); *Rothschild v. Grand Trunk Ry.*, 14 N. Y. Supp. 807 (1891). *Contra*, *Schillinger, etc. Co. v. Arnott*, 14 N. Y. Supp. 326 (1891). See 116 N. W. Rep. 1097. ¹ *Bailey v. Valley Nat. Bank*, 127 Ill. 332 (1889). But see *Oregonian Ry. v. Oregon, etc. Co.*, 23 Fed. Rep. 232 (1885), rev'd on another point in 130 U. S. 1, holding that the defense of no corporate capacity to sue in a particular case is raised by plea in abatement, and the defense of no corporate capacity at all by a plea either in abatement or bar. Cf. *Pullman v. Upton*, 96 U. S. 328 (1878); and see *Bank of Auburn v. Weed*, 19 Johns. 300 (822), holding that the plea of *nul tiel corporation* is not good, and that the general issue should be pleaded. Denial of corporate existence of plaintiff can be only by plea in abatement. Denial of merit waives this defense. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386 (1828). *Contra*, *U. S. Bank v. Stearns*, 15 Wend. 314 (1836). A plea of *nul tiel corporation* cannot be filed with a plea of the general issue and the defendant should point out whether it is a partnership, etc. *Keokuk, etc. Co. v. Wetzel*, 228 Ill. 253 (1907).

A general denial does not put in issue the fact of incorporation. *Fletcher v. Co-operative, etc. Co.*, 58 Neb. 511 (1899). *Montgomery v. Sea-board, etc. Ry.*, 73 S. C. 503 (1906).

cate of incorporation; also the corporate minutes proving an organization by a corporate meeting, and also user of the corporate name in

Where a defendant is sued as a corporation and answers generally, it admits incorporation. *Faust v. Southern Ry.*, 74 S. C. 360 (1906). *Herald Shoe Co. v. Oklahoma, etc. Co.*, 15 Okla. 29 (1904). By appearing generally a corporation admits its corporate existence. *Pittsburg, etc. Ry. v. Lighthouse*, 78 N. E. Rep. 1033 (Ind. 1906). By pleading the general issue, incorporation is admitted. *Southern Ry. v. Hundley*, 44 S. Rep. 195 (Ala. 1907). A denial of an allegation in the complaint "that the plaintiff is a corporation duly organized as a national bank under the act of congress of June 3, 1864," is a negative pregnant, in that it implies that the bank was incorporated, but was not legally incorporated. *First Nat. Bank v. Gibson*, 60 Neb. 767 (1900). In Illinois where the summons is served on the defendant as a corporation, no proof of incorporation need be given if there is no plea of *nul tiel corporation*. *Chicago & A. R. R. v. Glenny*, 175 Ill. 238 (1898). A defendant sued as a corporation by appearing, answering, and defending waives proof of its incorporation. *Baldwin, etc. Co. v. Davis*, 15 Colo. App. 371 (1900). A plea of *nul tiel corporation* goes to the merits and is a plea in bar, and may be joined with a plea to the merits. *Law, etc. Soc. v. Hogue*, 37 Oreg. 544 (1900). A general demurrer does not raise the point that the complaint does not allege incorporation. *Sly v. Palo, etc. Co.*, 28 Wash. 485 (1902). The question of incorporation should be raised by plea in abatement. *Emerson Co. v. Nimocks*, 88 Fed. Rep. 280 (1898). On the trial the court may allow an amendment to the complaint as to the state in which a defendant corporation was incorporated. *Stuart v. The New York Herald Co.*, 73 N. Y. App. Div. 459 (1902).

A denial that the plaintiff is a corporation organized under the laws of the state of Illinois admits that it is a corporation and merely denies as to the state. *McCormick, etc. Co. v. Hovey*, 36 Oreg. 259 (1899). A general denial does not raise an issue as to the incorporation. *Chamberlain, etc. v. Kemper, etc. Co.*, 92 N. W. Rep. 175 (Neb. 1902). Where a corporation as defendant appears generally and files a demurrer and then answers to the merits in its corporate name, it admits its existence as a corporation, and cannot by a denial in the answer compel the plaintiff to prove the same. *Perris, etc. Dist. v. Thompson*, 116 Fed. Rep. 832 (1902). In an indictment against a corporation corporate existence need not be proved where it appears and pleads as such. *State v. Glucose, etc. Co.*, 117 Iowa, 524 (1902). An answer of *nul tiel corporation* precedes an answer to the merits. *De facto* existence must then be proved. An answer alleging want of parties raises the question of whether the corporation is more than a partnership. *Heaston v. Cincinnati, etc. R. R.*, 16 Ind. 275 (1861). A general denial in a suit in equity puts in issue the corporate character of the plaintiff. *Bank of Jamaica v. Jefferson*, 92 Tenn. 537 (1893). The plea of general issue does not deny the corporate existence. *Rembert v. South Carolina Ry.*, 31 S. C. 309 (1889). A denial upon information and belief that the plaintiff is a corporation puts in issue the incorporation. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293 (1892). The plea that the plaintiff "is not a corporation duly authorized by law to maintain this suit" is a good plea of *nul tiel corporation*. The burden is on the plaintiff to prove corporate existence. *Johnson v. Hanover Nat. Bank*, 88 Ala. 271 (1889). By the

business.¹ A certificate of incorporation under the laws of another state, even though certified under the seal of the state, does not prove

New York code, the corporate existence of a foreign corporation plaintiff is not put in issue where the answer does not expressly deny the same, and where the making of the corporate contract in question is admitted. *Commercial Bank v. Pfeiffer*, 108 N. Y. 242 (1888).

1Proof of incorporation may be by an exemplified copy of the charter and evidence of user. A special charter may be proved by the statute book. *U. S. Bank v. Stearns*, 15 Wend. 314 (1836). If *de facto* incorporation is denied, it may be proved by introducing the charter and proof of the exercise of the franchises and powers thereby created. *Marshall v. Keach*, 227 Ill. 35 (1907). In proving title to land deeded by a corporation the incorporation may be proved by the fact that the United States conveyed land to it and the state had donated land to it and the corporation had assumed to make deeds as a corporation. *Altschul v. Casey*, 45 Ore. 182 (1904). In a suit by a corporation on a bond the incorporation may be proved by the bond itself reciting that it is a corporation. *Campbell, etc. Co. v. American Surety Co.*, 129 Fed. Rep. 491 (1904); *aff'd*, 138 Fed. Rep. 531. In a criminal proceeding against a corporation the incorporation may be proved by showing that it acted and was accepted in the community as a corporation, or it may be shown by its statement filed with the secretary of state. *Standard Oil Co. v. Commonwealth*, 91 S. W. Rep. 1128 (Ky. 1906). Where incorporation is denied and there is no proof given of that fact, the plaintiff cannot recover. *Pike, etc. Co. v. Wathen*, 78 S. W. Rep. 137 (Ky. 1904). A court will take judicial notice of a railroad charter taken out under the general law. *Atlanta, etc. R. R. v. Atlanta, etc. R. R.*,

124 Ga. 125 (1905). The corporate existence may be proved by proof of its *de facto* existence. *State v. Pit-tam*, 32 Wash. 137 (1903). If the allegation of incorporation is not denied no proof is necessary. *Simon v. Calfee*, 80 Ark. 65 (1906). A person giving a bond to a corporation cannot defend by denying its capacity to sue; hence proof of incorporation is unnecessary. *Thompson v. Commercial, etc. Co.*, 20 Colo. App. 331 (1904). Proof that there is no certificate of incorporation filed in the office of the secretary of state should be by the testimony of that officer. *Cobb v. Bryan*, 83 S. W. Rep. 887 (Tex. 1904). Where the defendant represented in a letter that it was a corporation, its incorporation need not be proved. *Marx v. Raley & Co.*, 92 Pac. Rep. 519 (Cal. 1907). In Georgia the defendant has to disprove the incorporation of the plaintiff where its name indicates it is a corporation. *Van Winkle, etc. Works v. Mathers*, 58 S. E. Rep. 396 (Ga. 1907). Corporate existence may be proved in condemnation proceedings by a certified copy of the certificate of incorporation and a showing of compliance with the statutory requirements. *Calor, etc. Co. v. Franzell*, 109 S. W. Rep. 328 (Ky. 1908). Incorporation may be proved by putting in evidence the records, books, and minutes of the company showing an organization in pursuance of the charter. *Glenn v. Orr*, 96 N. C. 413 (1887). A certificate of incorporation, with evidence of organization and user, and of a judgment in another case recovered by the corporation against defendant, is sufficient proof that plaintiff "had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation *de facto*, which is all that is necessary to enable it to

incorporation unless a copy of the laws under which it was incorpo-

maintain an action against any one, other than the state, who has contracted with the corporation or who had done it a wrong." *Baltimore, etc. R. R. v. Fifth Bapt. Church*, 137 U. S. 568 (1891). The certificate of the secretary of state reciting that certain members were legally organized and established as a corporation does not prove them a corporation, but is hearsay evidence. *Fish v. Smith*, 73 Conn. 377 (1900). Even though a certificate of incorporation must be filed in the county auditor's office as well as the office of the secretary of state, yet a copy certified to by the county auditor raises a presumption of incorporation. *Spokane, etc. Co. v. Loy*, 21 Wash. 501 (1899). Fifty years' existence as a corporation is a sufficient proof of incorporation. *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42 (1891). It is sufficient to prove the *de facto* existence of the corporation defendant in a suit on contract. *Benesch v. John Hancock, etc. Co.*, 11 N. Y. Supp. 348 (1890). An act recognizing a corporation as such is sufficient proof of incorporation. *Boykin v. State*, 96 Ala. 16 (1892). If proof is given by plaintiff that a copartnership existed, and the defense is that it was a corporation, the defendant must prove that fact. Proof of a *de facto* corporation is sufficient to meet the plea of *nul tiel corporation*. *Cozzens v. Chicago, etc. Co.*, 166 Ill. 213 (1897). The *de facto* incorporation of a national bank may be shown by oral evidence that it is carrying on a general banking business as a national bank under a certain name. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348 (1893). Proof of the filing of the certificate of incorporation in the county clerk's office is sufficient proof of incorporation without proof of the filing in the office of the secretary of state. *Georgeson v. Cafrey*, 71 Hun, 472 (1893). Where the

stockholders are sued as individuals for the debts of the company, it is for them to prove that the corporation existed. The testimony of two persons that they complied with the laws and got a charter is insufficient, it appearing that the law required at least three incorporators. The charter itself is the best evidence. "A mere feigned compliance with the laws of the state of which it is claimed a corporation is a citizen" is not sufficient, nor is the mere adoption of the corporate name sufficient. *Owen v. Shepard*, 59 Fed. Rep. 746 (1894). Where the corporate existence is denied, proof of the execution of the articles of incorporation, and that a certain person acted as president, is not sufficient, there being no proof of the filing, etc. *Goodale, etc. Co. v. Shaw*, 41 Ore. 544 (1902). A duly authenticated copy of the articles of incorporation of a domestic corporation by the secretary of state and the register of deeds is sufficient proof of incorporation. *Dowagiac, etc. Co. v. Higinbotham*, 15 S. Dak. 547 (1902). Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. *Clark v. Jones*, 87 Ala. 474 (1888). The production of the corporate books showing an election of officers is sufficient to raise a presumption of the existence of the corporation. *Wood v. Jefferson County Bank*, 9 Cow. 194 (1828). "The production of the act of incorporation and proof of user under it by the corporate body afford presumptive proof in the first instance of the fact of incorporation." *People v. Beigler*, Hill & D. Supp. 133 (1843). See also, on the method of proof, *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532 (1875); *Spring Valley Water-works v. San Francisco*, 22 Cal. 434 (1863); *Eastern, etc. Co. v. Vaughan*, 14 N. Y. 546 (1856); *Hughes v. Antietam Mfg.*

rated are also put in evidence.¹ The testimony of a lawyer of a foreign country that certain acts, documents, etc., constituted a com-

Co., 34 Md. 316 (1870); Leonardsville Bank v. Willard, 25 N. Y. 574 (1862); Reynolds v. Myers, 51 Vt. 444 (1879); West Winsted Sav. Bank v. Ford, 27 Conn. 282 (1858); Society for Prop. Gosp. v. Pawlet, 4 Pet. 480 (1830); Alderman, etc. v. Finley, 10 Ark. 423 (1850); Oldtown, etc. R. R. v. Veazie, 39 Me. 571 (1855); Pullman v. Upton, 96 U. S. 328 (1877); Penobscot, etc. R. R. v. Dunn, 39 Me. 587 (1855); Heaston v. Cincinnati, etc. R. R., 16 Ind. 275 (1861); Orono v. Wedgewood, 44 Me. 49 (1857); Litchfield Bank v. Church, 29 Conn. 137, 148 (1860); U. S. v. Insurance Companies, 22 Wall. 99 (1874); De Witt v. Hastings, 40 N. Y. Super. Ct. 463 (1876); aff'd, 69 N. Y. 518; Commonwealth v. Bakeman, 105 Mass. 53 (1870); South Bay, etc. Co. v. Gray, 30 Me. 547 (1849); Utica Ins. Co. v. Tilman, 1 Wend. 555 (1828); Jackson v. Leggett, 7 Wend. 377 (1831). The federal courts of course take judicial notice of the general statutes of all the states. Fourth Nat. Bank v. Francklyn, 120 U. S. 747 (1887). The existence of a plank-road corporation is not proved by the fact that the governor had appointed inspectors of it and they had certified that the road was completed. Bill v. Fourth, etc. Road, 14 Johns. 416 (1817). See 111 S. W. Rep. 714 (Ky. 1908).

¹ Law, etc. Soc. v. Hogue, 37 Ore. 544 (1900). A copy of a certificate of incorporation, signed by the secretary of state and sealed with the seal of the state, is evidence of incorporation, even in another state. Commonwealth v. Corkery, 175 Mass. 460 (1900). A *de facto* foreign corporation may be proved, where corporate existence is a collateral matter, by proving the statutes of the foreign state and the secretary of state's certificate, under the seal of the state, to the effect that the

company had been duly incorporated and had filed the necessary articles with the proper officials. Petty v. Hayden, 115 Iowa, 212 (1901). In a suit by an alien corporation to collect unpaid calls the statutes under which the corporation is formed may be proved by the testimony of an English solicitor who produces copies of such statutes. Nashua, etc. Bank v. Anglo-American, etc. Co., 189 U. S. 221 (1903). As to the mode of proving the incorporation of a company in England and the filing of contracts, see Barber v. International Co., 73 Conn. 587 (1901); s. c., 74 Conn. 652. A certificate of incorporation in another state under the seal of the state is admissible in evidence without being exemplified under the federal statutes. U. S. Vinegar Co. v. Foehrenbach, 74 Hun, 435 (1893); aff'd, 148 N. Y. 58. In a suit on a subscription to a foreign corporation the statutes governing such foreign corporation may be proved by a copy testified to by a witness who has examined and compared the copy with the original. Anglo-American, etc. Co. v. Dyer, 181 Mass. 593 (1902). An exemplified copy of the charter of incorporation created by special statute and proof of user thereunder is sufficient proof of incorporation. United States, etc. Co. v. McClure, 42 Ore. 190 (1902). In California a foreign corporation may prove its incorporation by putting in evidence a copy of its appointment as an agent filed in the office of the secretary of state. Anglo-Californian Bank v. Field, 146 Cal. 644 (1905). Where a foreign incorporation is denied it must be strictly proved. Florsheim & Co. v. Fry, 109 Mo. App. 487 (1905). The rules of an exchange may be proved by an examined or authenticated copy, but not by a witness merely swearing that the paper

plainant a corporation under the laws of that country, raises a presumption that it was duly incorporated.¹ A corporation may enjoin the secretary of state from taking its certificate of incorporation out of the state, even though he proposes to prove perjury by the officers in swearing to the certificate.² The United States courts will take judicial notice of an act of congress incorporating a railroad company.³

§ 754. *Confession of judgment.*—A corporation may confess judgment, but generally this can be done only by order of the board of directors.⁴

In New York, by statute, a corporation cannot confess judgment in contemplation of insolvency.⁵

produced by him was a copy, without showing that he had compared it with the original. A private statute, incorporating a company in another state, should be proved by producing the official printed statutes. *Miller v. Johnston*, 71 Ark. 174 (1903). A copy of the certificate of incorporation certified by the secretary of a territory may not be sufficient to prove the corporate existence of a foreign corporation, especially where there is no proof of the laws of the foreign state authorizing incorporation, there being no such thing as a common law corporation. *Milwaukee, etc. Co. v. Gordon*, 95 Pac. Rep. 995 (Mont. 1908). A copy of the charter of an Illinois bank certified by the recorder of deeds of Chicago as a true copy, together with the affidavit of the cashier that the bank had been organized and had acted under such charter for ten years, and had never been dissolved, but was still doing business, and that attached thereto were the minutes of the meeting of organization and of the charter of the company, raises a presumption of regular incorporation. *State Bank, etc. v. Carr*, 130 N. C. 479 (1902). A foreign corporation proves incorporation by its papers and proceedings, and by putting in evidence the statute authorizing incorporation. *Savage v. Russell*, 84 Ala. 103 (1888).

¹ *Badische, etc. v. Klipstein & Co.*, 125 Fed. Rep. 543 (1903).

² *Delaware, etc. Co. v. Layton*, 50 Atl. Rep. 378 (Del. 1901).

³ *Heffelfinger v. Choctaw, etc. R. R.*, 140 Fed. Rep. 75 (1905).

⁴ A president and treasurer have no power to confess judgment for the corporation. *Adams v. Cross, etc. Co.*, 27 Ill. App. 313 (1888). *Contra*, *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96 (1854). "Upon a confession of judgment by a corporation, the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, . . . and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question." *White v. Crow*, 17 Fed. Rep. 98 (1883); *aff'd*, 110 U. S. 183. The treasurer cannot confess judgment. *Stevens v. Carp River Iron Co.*, 57 Mich. 427 (1885). A corporation may confess judgment. *Solomon v. Schneider & Co.*, 56 Neb. 680 (1898); *Shute v. Keyser*, 29 Pac. Rep. 386 (Ariz. 1892). As to the power of the president and other officers to confess judgment, see ch. XLIII, *supra*.

⁵ *Re Waterbury*, 8 Paige, 380 (1840); *Kingsley v. First Nat. Bank*, 31 Hun, 329 (1884); *National Shoe, etc. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467 (1882).

§ 755. *Injunction and contempt.*—An injunction against a corporation should run to the corporation in its corporate name. All officers and agents upon whom it is served, or to whose knowledge it comes, are guilty of contempt of court if they disregard it.¹ The corporation and also all of its officers and agents who wilfully violate the injunction may be fined for contempt of court.²

¹ King v. Barnes, 113 N. Y. 476 (1889). An injunction against a corporation in New York may be served on a division superintendent of the division interested. Moreover, knowledge of the injunction is as good as service. Disobedience is contempt. Rochester, etc. R. R. v. New York, etc. R. R., 48 Hun, 190 (1888). The directors are bound to obey an injunction against the company if it comes to their notice. Hatch v. Chicago, etc. R. R., 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799; People v. Sturtevant, 9 N. Y. 263 (1853). See also High, Injunctions; also § 745, *supra*. The company may be indicted for not obeying the order of the court. Regina v. Birmingham, etc. Ry., 9 Car. & P. 469 (1840). An injunction against a foreign corporation may apply to its acts out of the state as well as in it. Prince Mfg. Co. v. Prince's, etc. Co., 51 Hun, 443 (1889). In a proceeding by a New York receiver of a dissolved New York corporation against a former director for interfering with the assets against the injunction of the New York court, held, that the director could not evade the injunction by going out of the state. Williams v. Hintermeister, 26 Fed. Rep. 889 (1886). Though a bank may be in contempt, it does not follow that each servant or agent of the bank also is in contempt. Southern Development Co. v. Houston, etc. Ry., 27 Fed. Rep. 344 (1886). *Of* § 758, *infra*. An injunction may bind a corporation, though not a party to the suit. Eagle Mfg. Co. v. Miller, 41 Fed. Rep. 351 (1890); *rev'd* on another point in 151 U. S. 186. If the employee violates the injunction, not knowing of it, and is arrested, he may sue his corporation

for damages for withholding notice of the injunction. Guirney v. St. Paul, etc. Ry., 43 Min. 496 (1890). In Golden Gate, etc. Co. v. Yuba County Super. Ct., 65 Cal. 187 (1884), it was held that a corporation may be punished for contempt of court. An injunction against a corporation is binding on all its officers, although they are not parties. Sidway v. Missouri, etc. Co., 116 Fed. Rep. 381 (1902).

² *Re Tift*, 11 Fed. Rep. 463 (1881). An injunction against certain directors of the corporation from using patented articles is violated by their forming a new corporation to do the same acts, they being directors also of the latter. Iowa, etc. Wire Co. v. Southern, etc. Wire Co., 30 Fed. Rep. 123 (1887). An injunction against a corporation running a ferry cannot be evaded by the corporation transferring its boats to its president individually. The corporation was fined, and the president imprisoned for contempt. "Injunction orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them; they may be violated by aiding, countenancing, and abetting others in violation thereof as well as by doing it directly; and courts will not look with indulgence upon schemes, however skillfully devised, designed to thwart its orders." Mayor, etc. v. New York Ferry, etc. Co., 64 N. Y. 622 (1876). A foreign corporation violating an injunction may be fined for contempt of court. Service is made in the same way as in ordinary cases. Its agent violating the injunction may also be fined. U. S. v. Memphis, etc. R. R., 6 Fed. Rep. 237 (1881).

§ 756. *Contempt and sequestration.*—Although a corporation is an existence entirely distinct from its officers or members, yet the latter may be held answerable, and in contempt of court, for neglect or refusal to perform the orders, decrees or judgments of courts.¹ Moreover, the corporation itself is bound to obey the court, and for failure to do so the court will sequester the corporate property. Sequestration is a chancery remedy whereby the property of a party is seized by officers of the court of chancery to punish contempts and to compel obedience to the order or decree of the court.² It is used not only to compel the corporation to do an act commanded by a court of chancery, but also to subject the corporate property to the payment of a money decree which a court of chancery has made against the corporation.³ Sequestration is the taking of property from the owner for

1 A contempt of court by a corporation may be punished by punishing the corporate officers who do the act or control the action of the corporation. *Sercomb v. Catlin*, 128 Ill. 556 (1889). The case of *Lacharme v. Quartz Rock, etc. Co.*, 1 H. & C. 134 (1862), whereby an order was enforced by reaching the corporate officers, is based on the English statute giving the court such a power. In the ancient case of *Salmon v. Ham-borough Co.*, 1 Cas. in Ch. 204 (1671), where the corporation defendant did not obey an order of the court and had no property, the House of Lords issued an order directed to the corporate officers ordering them to obey the former order or be committed for contempt. Cf. 4 Wait, Pr. 206; *Curson v. African Co.*, 1 Vern. 121 (1632). Papers against a corporation are not to be directed against its officers personally, even as officers. *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 438 (1831). Where the corporation is enjoined from doing a certain thing, then the officers are personally liable for contempt if they do the thing enjoined. See § 755, *supra*. In *Davis v. Mayor, etc.*, 1 Duer, 451, 484 (1853), the court said that it was admitted that a *mandamus* directed to the corporation in its corporate name bound all the officers and members (citing municipal corporation cases). Chan-

cellor Bland, in *McKim v. Odom*, 3 Bland (Md.), 422 (1829), with good reason objected to the technical and illogical rule that corporate officers cannot be compelled to do an act which the corporation is commanded to do. A somewhat similar instance of the power of the court arises in a *mandamus* to make a transfer of stock. See § 390, *supra*.

2 See 2 Daniell, Ch. Pr., p. 1052, etc.; 1 Barb. Ch. Pr., p. 71, etc., 444; Ang. & A. Corp., § 667, etc. As regards corporations, this remedy was used to compel the corporation to appear and answer a bill in equity and also to subject the property of the corporation to the payment of a money decree of a court of chancery. Sequestrations in chancery correspond greatly to executions at law. Sequestration "is most certainly of the nature of an execution." It is demandable of right. It issues though the corporation has no property. *Reid v. Northwestern R. R.*, 32 Pa. St. 257 (1857). The case of *Jones v. Boston Mill Corp.*, 21 Mass. 507 (1827), holds that sequestration is a proper remedy to enforce a decree.

3 If the sequestration is to compel the corporation to do something other than pay money, the corporate property is merely seized and held by the court until the corporation complies. If, however, the sequestration is to compel the payment of a money de-

a time till the rents, issues, and profits satisfy a demand. The judgment in such case does not dissolve the corporation.¹

A sequestration reaches all the goods and chattels and the rents and profits of land belonging to the corporation;² but there is some doubt as to whether choses in action and the title to real estate can be subjected to this remedy by a court of chancery. It is clear that originally the corporate realty could not be so reached.³

§ 757. *Foreign corporations may sue and be sued—Stockholders' suits against foreign corporation—Garnishment—Statute of limitations—Usury.*—A foreign corporation is considered a resident of the state wherein it was created; and it is regarded as a citizen of that state in all questions of jurisdiction.⁴

cree, the corporate property seized will be sold and the proceeds applied to that debt. See authorities cited *supra*.

1 Proctor v. Sidney, etc. Co., 8 N. Y. App. Div. 42 (1896).

2 See authorities in note 2, p. 2531.

3 2 Daniell, Ch. Pr., p. 1054; Coats v. Elliott, 23 Tex. 606 (1859). Sequestration is the proper remedy to subject the net profits of a turnpike company to the payment of a judgment. Neither sequestration nor a common-law execution can effect a sale of the road, however, since the franchise is a trust from the state. Ammant v. New Alexandria, etc. Road, 13 Serg. & R. (Pa.) 210 (1825). But where, under the statutes, a receiver is appointed in sequestration proceedings, the decisions are inclined to hold otherwise. Atlas Bank v. Nahant Bank, 40 Mass. 480 (1839). But see Foster v. Townshend, 68 N. Y. 203 (1877); N. Y. Code Civ. Proc., § 1772. In proceedings under N. Y. Code Civ. Proc., § 1784, etc., all the corporate personality and realty vest in the receiver. See, in construction of the New York statute, Bangs v. McIntosh, 23 Barb. 591 (1857); Devendorf v. Beardsley, 23 Barb. 656 (1857); Judson v. Rossie Galena Co., 9 Paige, 598 (1842). See also Devoe v. Ithaca, etc. R. R., 5 Paige, 521 (1835), as to the practice. As regards choses in action the old authorities differed. 1 Barb. Ch. Pr.,

p. 71, says that the choses in action cannot be reached by sequestration. 2 Daniell, Ch. Pr., p. 1052, says that possibly choses in action in the possession of third persons cannot be reached. The later authorities, however, are inclined to extend this remedy to choses in action. Grew v. Breed, 53 Mass. 363 (1847); Hosack v. Rogers, 11 Paige, 603 (1845); White v. Geraerd, 1 Edw. Ch. 340 (1832). It has been doubted whether sequestration proceedings could reach the books and papers of the corporation, Lowton v. Colchester, 2 Meriv. 395 (1817); but it would seem that such papers should be subject to sequestration so far as they contain information or give title to property which has been sequestered.

4 Louisville, etc. R. R. v. Letson, 2 How. 497 (1844); Haight & Freese Co. v. Weiss, 156 Fed. Rep. 328 (1907); Stafford v. American Mills Co., 13 R. I. 310 (1881); Cowardin v. Universal L. Ins. Co., 32 Gratt. (Va.) 445 (1879), holding that it is subject to attachment as a non-resident; Marshall v. Baltimore, etc. R. R., 16 How. 314 (1853); Covington, etc. Co. v. Shepherd, 20 How. 227 (1857); Myers v. Dorris, 13 Blatchf. 22 (1870); s. c., 17 Fed. Cas. 1105; Merrick v. Van Santvoord, 34 N. Y. 208 (1866); Daly v. National L. Ins. Co., 64 Ind. 1 (1878); Hadley v. Freedman's, etc. Co., 2 Tenn. Ch. 122 (1874); Harding v. Chicago,

It is discretionary with a court as to whether it will grant equitable relief against a foreign corporation. Especially is this the case in regard to suits brought by stockholders. The courts will often refuse to grant relief, inasmuch as there may be no means of enforcing the decree.¹ A suit to compel a foreign corporation to issue new certificates of stock for certificates lost will lie.² A stockholder in a foreign corporation may sue in the courts of New York to enjoin fraudulent acts and hold the directors and third persons personally liable.³ But a stockholder's suit to enjoin the company from leasing its property for an adequate sum must be brought in the state where the company is incorporated.⁴ A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts and to have a receiver appointed.⁵ The courts have frequently refused to entertain jurisdiction over a foreign corporation in cases where the decree of the court cannot be enforced.⁶ The statute of Ohio that no suit may be maintained in the courts of that state for death occurring in another state unless the deceased was a citizen of Ohio is constitutional.⁷

Garnishee process does not lie against a foreign corporation to reach a sum of money due from such corporation to a non-resident.⁸

etc. R. R., 80 Mo. 659 (1883); *McGregor v. Erie Ry.*, 35 N. J. L. 115 (1871); *Stout v. Sioux City*, etc. R. R., 8 Fed. Rep. 794 (1881), holding that a foreign corporation which had filed its charter with the secretary of state and otherwise complied with the local statute was a domestic corporation under the law of Nebraska. A foreign corporation may be sued in Massachusetts by a resident. *Young v. Providence, etc. Co.*, 150 Mass. 550 (1890). A non-resident may sue a foreign corporation in Massachusetts. *Youmans v. Minn. etc. Trust Co.*, 67 Fed. Rep. 282 (1895). A provision in a charter that the company should be sued only in the state where it is incorporated does not prevent suit against it in another state. *Shields v. Union, etc. Ins. Co.*, 119 N. C. 380 (1896). Foreign corporations may be sued in Tennessee. *Telephone Co. v. Turner*, 88 Tenn. 265 (1889). A non-resident may sue a foreign corporation in South Carolina when the cause

of action arose within the state. *Central R. R., etc. Co. v. Georgia, etc. Co.*, 32 S. C. 319 (1890). As to restrictions by the state on the right of a foreign corporation to remove cases to the federal courts, see §§ 696-700, *supra*.

1 See § 734, *supra*.

2 *Guilford v. Western U. Tel. Co.*, 59 Minn. 332 (1894). A South Carolina corporation may be sued in New Hampshire by a purchaser of a certificate of stock to compel a transfer thereof on the books of the company. *Westminster Nat. Bank v. New England, etc.*, 73 N. H. 465 (1906).

3 See § 734, *supra*.

4 See § 734, *supra*.

5 See § 734, *supra*.

6 See § 734, *supra*.

7 *Chambers v. Baltimore, etc. R. R.*, 207 U. S. 142 (1907).

8 A debt due from a limited partnership to a corporation, both organized under the laws of Massachusetts, cannot be attached in New York. Na-

The cars of an Illinois railroad corporation passing through another state in the transportation of freight or return cannot be attached in

tional *Broadway Bank v. Sampson*, 179 N. Y. 213 (1904). In a suit between non-residents, the defendant being a foreign corporation, plaintiff cannot garnishee money owed by another foreign corporation, since under the New York law the defendant could not sue such latter corporation in the New York courts. *Bridges v. Wade*, 113 N. Y. App. Div. 350 (1906). In Arkansas a debt due from a foreign railroad corporation, which has a line in the state, may be garnisheed, even though the debt was for labor performed in another state. The exemption laws where the suit is brought control. *Stone v. Drake*, 79 Ark. 384 (1906). A foreign railroad corporation, owning and operating a railroad in West Virginia, may be garnisheed in that state, irrespective of where the debt was contracted or payable, and even though the creditor is a non-resident. *Baltimore, etc. R. R. v. Allen*, 58 W. Va. 388 (1905). A New Jersey corporation doing all its business in North Carolina, may be garnisheed in the latter state in a suit between two residents of Virginia, the suit having grown out of a contract made in North Carolina. *Goodwin v. Claytor*, 137 N. C. 224 (1904). In Illinois a resident may garnishee a non-resident corporation for money due to another non-resident who is a judgment debtor of the former. *Hannibal, etc. R. R. v. Crane*, 102 Ill. 249 (1882). Where two foreign corporations make a contract in the state a debt arising therefrom may be garnisheed in that state. *Krafve v. Roy, etc. Co.*, 98 Minn. 141 (1906). Under the statutes of Georgia wages due from a non-resident corporation to a non-resident employee may be garnisheed in that state. *Harvey v. Thompson*, 60 S. E. Rep. 11 (Ga. 1907), overruling previous decisions to the contrary. A non-resident corpora-

tion cannot be garnisheed for a debt due to another non-resident corporation unless the former is legally doing business in the state. *Riter-Conley, etc. Co. v. Mzik*, Ohio Circuit (1901), p. 164. A citizen of Alabama cannot garnishee in Alabama a foreign corporation to pay a claim which he has against a non-resident where the debt from the foreign corporation was not contracted in Alabama and was not to be paid there. *Louisville, etc. R. R. v. Steiner*, 30 S. Rep. 741 (Ala. 1900). Garnishment does not lie against a non-resident corporation to reach a fund held by the latter, but payable in another state. *National Bank, etc. v. Furtick*, 2 Marvel, 35 (Del. 1897). A citizen of North Carolina cannot garnishee in Pennsylvania a debt due from a Connecticut corporation to a citizen of North Carolina. *Strause v. Aetna, etc. Co.*, 126 N. C. 223 (1900). Where one foreign corporation in New York sells goods to another foreign corporation in New York, the debt may be attached in New York. *India Rubber Co. v. Katz*, 65 N. Y. App. Div. 349 (1901). No attachment lies on insurance money due by the resident branch of a foreign insurance company to another foreign company. *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882). An insurance by a Missouri corporation on Nebraska property cannot be garnisheed in Illinois upon the burning of the property. *American Cent. Ins. Co. v. Hetler*, 37 Neb. 849 (1893). A citizen of Arkansas may garnishee a railroad company of Missouri operating in Arkansas for money due to one of its employees in Missouri. *Kansas City R. R. v. Parker*, 69 Ark. 401 (1901). An attachment or garnishment in Michigan of a debt due from an Illinois corporation to a Washington corporation, and payable in Washington, is not good, even though the Illi-

that state, neither can sums of money due from railroads in that state to such foreign railroad corporation for freight on interstate shipments be attached.¹ A foreign corporation cannot set up the statute of limitations where a non-resident could not set it up.² But a foreign corporation which has filed its papers and received a license to do business in the state, according to the statutes, is not in contemplation of law a non-resident, within the meaning of the statute of limitations.³ A foreign corporation may set up the statute of limitations in Tennessee, if it has had an office in the state during the entire period.⁴ The defense of usury is considered elsewhere.⁵ At common law a corporation cannot be sued except in a *county* where it has property or transacts a substantial part of its business unless the statutes provide otherwise.⁶

nois corporation is doing business in Michigan. *Reimers v. Seatco Mfg. Co.*, 70 Fed. Rep. 573 (1895). The question of garnishment by service on the debtor corporation in a state other than its domicile is fully discussed in *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468 (1895). See also *Alabama, etc. R. R. v. Chumley*, 92 Ala. 317 (1890); *Straus v. Chicago Glycerine Co.*, 46 Hun, 216 (1887); *aff'd*, 108 N. Y. 654. Insurance due from a New York corporation to a citizen of New York cannot be attached in Massachusetts by Massachusetts creditors of the insured. *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209 (1893). A foreign corporation cannot be garnished by service upon an agent within the state. *Associated Press v. United Press*, 104 Ga. 51 (1898).

¹ *Davis v. Cleveland, etc. R. R.*, 146 Fed. Rep. 403 (1906).

² A foreign corporation cannot plead the statute of limitations, inasmuch as it has been "out of the state." *Larson v. Aultman, etc. Co.*, 86 Wis. 281 (1893), reviewing the authorities. A foreign corporation cannot plead the New York statute of limitations. It must plead the statute of limitations of its own state. *Robeson v. Central R. R.*, 76 Hun, 444 (1894). "A foreign corporation sued in New York state cannot avail itself of the statute of limitations." *Boardman v.*

Lake Shore, etc. R. R., 84 N. Y. 157, 185 (1881); *Rathbun v. Northern, etc. Ry.*, 50 N. Y. 656 (1872). As to the mode of pleading the statute of limitations of another state against an action for fraud in inducing the purchase of stock, see *Tudor v. Ebner*, 104 N. Y. App. Div. 562 (1905); *aff'd*, 182 N. Y. 562. A foreign corporation cannot plead the statute of limitations in Kansas. *Williams v. Metropolitan, etc. Ry.*, 68 Kan. 17 (1903).

³ *Sidway v. Missouri, etc. Co.*, 187 Mo. 649 (1905). A foreign corporation doing business in the state during the whole period of a statute of limitations may interpose such statute as a defense to a suit. *Colonial, etc. Co. v. Northwest, etc. Co.*, 14 N. Dak. 147 (1905). In Texas a foreign corporation may plead the statute of limitations. *Thompson v. Texas, etc. Cattle Co.*, 24 S. W. Rep. 856 (Tex. 1893). The statute of limitations runs in behalf of a foreign corporation after it has acquired a domicile in the state for purposes of litigation. *Travellers' Ins. Co. v. Fricke*, 99 Wis. 367 (1898). A foreign corporation may plead the statute of limitations. *St. Paul v. Chicago, etc. Ry.*, 45 Minn. 387 (1891).

⁴ *Turcott v. Yazoo, etc. R. R.*, 101 Tenn. 102 (1898).

⁵ See § 766, *infra*.

⁶ *Park Bros. & Co. v. Oil City*

By the comity of states the courts of a state will entertain a suit brought by a foreign corporation.¹ A North Carolina corporation

Boiler Works, 204 Pa. St. 453 (1903).

¹ Silver Lake Bank v. North, 4 Johns. Ch. 370 (1820); Newburg Petroleum Co. v. Weare, 27 Ohio St. 343 (1875); Lewis v. Bank of Kentucky, 12 Ohio, 132 (1843); Smith v. Weed S. Machine Co., 26 Ohio St. 562 (1875), holding also that it need not allege in its pleading the terms of its charter showing its capacity to sue; Hanna v. International Petroleum Co., 23 Ohio St. 622 (1873); Lathrop v. Commercial Bank of Scioto, 8 Dana (Ky.), 114 (1839); Louisville, etc. R. R. v. Letson, 2 How. 497 (1844); Bank of Augusta v. Earle, 13 Pet. 519 (1839); Bank of Michigan v. Williams, 5 Wend. 478 (1830); Beaton v. Farmers' Bank, 12 Pet. 102, 135 (1838); Marine, etc. Bank v. Jauncey, 1 Barb. 486 (1847), holding that its authority to sue need not be set forth in its pleading; Tombigbee R. R. v. Kneeland, 4 How. 16 (1846); New York Dry Dock v. Hicks, 5 McLean, 111 (1850); s. c., 18 Fed. Cas. 151; Lucas v. Bank of Georgia, 3 Ala. (O. S.) 147 (1829); Guaga Iron Co. v. Dawson, 4 Blackf. 202 (1836); New Jersey, etc. Bank v. Thorp, 6 Cow. 46 (1826); Mutual Benefit L. Ins. Co. v. Davis, 12 N. Y. 569 (1855); Direct U. S. Cable Co. v. Dominion Tel. Co., 84 N. Y. 153 (1881); Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367 (1881), holding that it has the same right to remedies and liens as citizens; Williams v. Creswell, 51 Miss. 817 (1876), where a District of Columbia corporation was complainant; American Mut. L. Ins. Co. v. Owen, 81 Mass. 491 (1860); Leasure v. Union, etc. Ins. Co., 91 Pa. St. 491 (1879); Portsmouth Livery Co. v. Watson, 10 Mass. 91 (1813); Bank of Edwardsville v. Simpson, 1 Mo. 184 (1822); National Bank v. De Bernales, 1 Car. & P. 569 (1825); Henriques v. Dutch West India Co., 2 Ld. Raym. 1532

(1727); Lycoming F. Ins. Co. v. Langley, 62 Md. 196 (1884); British American Land Co. v. Ames, 47 Mass. 391 (1843), holding that a corporation of a foreign country may sue; Importing, etc. Co. v. Locke, 50 Ala. 332 (1874); Savage Mfg. Co. v. Armstrong, 17 Me. 34 (1840); American Colonization Soc. v. Gartrell, 23 Ga. 448 (1857). In the case the charter declared the corporation to be created for a specified purpose, "and for no other purpose," and its right to sue in another state was questioned. Bank of Marietta v. Pindall, 2 Rand. (Va.) 465, 473 (1824); Hahnemannian L. Ins. Co. v. Beebe, 48 Ill. 88 (1868), where the right to sue in another state for libel was questioned; U. S. v. Insurance Cos., 22 Wall. 99 (1874), holding that corporations created merely for domestic and business purposes in the seceding states during the rebellion may sue in the federal courts; Insurance Co. v. The "C. D., Jr.," 1 Woods, 72 (1870); s. c., 13 Fed. Cas. 65, holding that it may sue either in state or federal courts; Fidelity Ins. etc. Co. v. Niven, 5 Houst. (Del.) 416 (1878), holding that if empowered to act as an administrator it may sue as such in another state. A foreign corporation may institute suit on a claim which has arisen outside of the state. Alley v. Bowen, etc. Co., 76 Ark. 4 (1905). A non-resident may bring suit in Georgia against a foreign corporation for a tort committed in Alabama, it appearing that the corporation did business in Georgia and had agents therein. Reeves v. Southern Ry., 121 Ga. 561 (1905). In a suit by a New Jersey corporation to protect its title to land in Florida, it is no defense that the company was organized in New Jersey to do all its business in Florida for the purpose of avoiding the laws of Florida relative to incorporation. Indian River

may bring suit in the state of New Jersey against a New York corporation and recover judgment on a note, even though the North Carolina corporation has not complied with the statutes of New York relative to doing business in that state.¹ Frequently the statutes regulate this subject, as in New York, where no non-resident can sue a non-resident corporation in the courts of New York unless the cause of action arose in that state or affects property there.² Although a non-resident cannot sue a foreign corporation in New York, yet the claim may be assigned to a resident and suit then be brought in the state court.³ No foreign corporation doing business in New York, except banks, may sue in New York, on a contract made there, unless it has obtained a certificate authorizing it to do business in New York.⁴ A foreign corporation may sometimes bring suit in the state on a contract made outside of the state without filing a certificate to do business in the state.⁵ A decision of the state court that a foreign insurance company cannot collect assessments on a policy issued in the state, because the company is not qualified under the state law to do business in such state does not present any federal question.⁶ The question of proof of incorporation is considered elsewhere.⁷

§ 758. *Service in suits against a foreign corporation.*—At common law a foreign corporation could not be sued outside of the state creating it, inasmuch as service on its officers was held insufficient. This view of the law is now abandoned. Jurisdiction over a foreign corporation may be acquired, in suits on contracts made or business

Mfg. Co. v. Wooten, 46 S. Rep. 185 (Fla. 1908). A foreign corporation may bring suit. *Schmidt, etc. Co. v. Mahoney*, 60 Neb. 20 (1900). An English corporation may bring suit in a Kansas court. *Colonial, etc. Co. v. Catlin*, 57 Pac. Rep. 140 (Kan. 1899). A foreign corporation engaged in interstate commerce may sue in a state court without showing that it has complied with the laws of the state entitling it to do business there. *Zion, etc. Assoc. v. Mayo*, 22 Mont. 100 (1899).

¹ *Allen v. Alleghany Co.*, 196 U. S. 458 (1905).

² Code of Civ. Proc., §§ 1779, 1780; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315 (1889).

³ *Hadden v. Dooley*, 92 Fed. Rep. 274 (1899). The New York statute is avoided by an assignment of the

cause of action to a resident. *McBride v. Farmers' Bank*, 26 N. Y. 450 (1863).

⁴ Laws of 1901, chs. 96, 538. A foreign corporation cannot maintain in New York a suit on a judgment obtained by it in another state against another foreign corporation. *Anglo-Am. etc. Co. v. Davis, etc. Co.*, 169 N. Y. 506 (1902). In regard to a contract made in another state by a foreign corporation, the latter may enforce such a contract in New York state without a license to do business. *Batchelder, etc. Co. v. Knopf*, 54 N. Y. App. Div. 329 (1900).

⁵ *MacMillan Co. v. Stewart*, 69 N. J. L. 212 (1903); *Slaytor-Jennings Co. v. Specialty, etc. Co.*, 69 N. J. L. 214 (1903).

⁶ *Swing v. Weston, etc. Co.*, 205 U. S. 275 (1907), aff'g 140 Mich. 344.

⁷ See § 753, *supra*.

done within the jurisdiction, by service upon an officer of the corporation, or upon its agent engaged in the state.¹ Service upon a

¹ *St. Clair v. Cox*, 106 U. S. 350 (1882); *Hayden v. Androscoggin Mills*, 1 Fed. Rep. 93 (1879), where service was on the president. This last decision was questioned in *Boston Electric Co. v. Electric Gas L. Co.*, 23 Fed. Rep. 838. In general, see *Peckham v. North Parish*, 33 Mass. 274, 286 (1834); *Martens v. International, etc. Soc.*, 53 N. Y. 339 (1873); *City F. Ins. Co. v. Carrugi*, 41 Ga. 660 (1871); *Henning v. Planters' Ins. Co.*, 28 Fed. Rep. 440 (1886), holding that the judgment is conclusive only when it shows that the corporation was doing business in the jurisdiction; *Barnett v. Chicago, etc. R. R.*, 4 Hun, 114 (1875); *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305 (1884). Service on a soliciting agent is not sufficient. *McGuire v. Great, etc. Ry.*, 155 Fed. Rep. 230 (1907). Service on a resident attorney of a foreign corporation which does no business in the state is insufficient. *Thach v. Continental, etc. Assoc.*, 114 Tenn. 271 (1905). As to the presumption that a judgment obtained in another state against a foreign corporation was based upon legal service, see *Old Wayne, etc. Ass'n v. McDonough*, 164 Ind. 321 (1905). The soliciting of advertisements by traveling agents of a publishing company is not doing business within the state as regards service of process upon one of them. *Boardman v. S. S. M'Clure Co.*, 123 Fed. Rep. 614 (1903). Service upon a person soliciting orders for a foreign corporation, but who is not an agent of the corporation, is not sufficient. *Strain v. Chicago, etc. Co.*, 126 Fed. Rep. 831 (1903). Service on the assistant secretary of a foreign corporation is insufficient where there is no claim that the corporation is doing business in the state. *Earle v. Chesapeake, etc. Ry.*, 127 Fed. Rep. 235 (1904). A judgment against a foreign corporation, when sued upon in another state, may be attacked on the ground that the corporation did not do business in the state where the judgment was obtained, or that process was not served upon it there. *Johnston v. Mutual, etc. Co.*, 104 N. Y. App. Div. 550 (1905). Service upon an advertising agent of a foreign corporation is not sufficient. *Rich v. Chicago, etc. Ry.*, 34 Wash. 14 (1904). A soliciting and advertising agent of a foreign railroad company which has no property or office within the state is not an agent upon whom service may be made in Illinois, especially where he has no power to make contracts for the company. *Wall v. Chesapeake, etc. Ry.*, 95 Fed. Rep. 398 (1899). Service upon the president of a foreign corporation, who is in the state to testify as a witness, may be set aside, unless the objection has been waived by practical assent to such service. *Weston v. Citizens', etc. Bank*, 64 N. Y. App. Div. 145 (1901). A suit by a non-resident against a foreign corporation for causes arising out of the state by service on the treasurer gives no jurisdiction. *Newell v. Great Western Ry.*, 19 Mich. 336 (1869). But in Massachusetts a bill lies to subject the assets of a foreign corporation to the payment of its debts. *Silloway v. Columbia Ins. Co.*, 74 Mass. 199 (1857). And attachment lies against it. *Ocean Ins. Co. v. Portsmouth Marine Ry.*, 44 Mass. 420 (1841). And if it has a place of business in the state it may be sued under the statute. *National Bank of Commerce v. Huntington*, 129 Mass. 444 (1880). At common law, service on the officer in charge of the resident business of a foreign corporation gives jurisdiction for a cause of action arising in the jurisdiction. *Newby v. Von Oppen, etc. Co.*, L. R. 7 Q. B. 293 (1872). But service of injunction papers on a resident selling

foreign corporation should be upon an agent representing the corporation in the business which it does in the state, and he should be one

agent is insufficient. *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416 (1855). A corporation incorporated by the United States may be reached by service on the president anywhere in the country. *Eby v. Northern Pac. R. R.*, 13 Phila. 144 (1879). An Iowa corporation could not be sued in the District of Columbia (*Lathrop v. Union Pac. Ry.*, 1 MacArth. 234—1873) until a statute authorized service. *Dallas v. Atlantic, etc. R. R.*, 2 MacArth. 146 (1875). Where foreign corporations are forbidden to do business in the state under a penalty of a fine, unless a certificate is filed, this is the only penalty. Contracts made by a foreign corporation without filing a certificate are enforceable. *Toledo, etc. Co. v. Thomas*, 33 W. Va. 566 (1890). An attachment of property in the state does not make the cause one arising in the state. *Whitehead v. Buffalo, etc. Ry.*, 18 How. Pr. 230 (1859). A foreign corporation doing business in the state may be sued. *Thomas v. Placerville, etc. Co.*, 65 Cal. 600 (1884). Service of notice of attachment on a director suffices. *Boyd v. Chesapeake, etc. Canal Co.*, 17 Md. 195 (1860). Service on the treasurer is insufficient to compel a transfer of patents. *Desper v. Continental, etc. Co.*, 137 Mass. 252 (1884). Service on a stockholder of a foreign corporation is not good. *Rand v. Upper Locks and Canals*, 3 Day (Conn.), 441 (1809); *O'Brien v. Shaw's Flat, etc. Co.*, 10 Cal. 343 (1858). A default is effectual only when the papers show a proper service. *Willamette, etc. Co. v. Williams*, 1 Oreg. 112 (1854); *Bawknight v. Liverpool, etc. Ins. Co.*, 55 Ga. 194 (1875), holding that in Georgia a foreign corporation cannot be sued *in personam* except upon a contract made there. The remedy upon a foreign contract or foreign judgment is *in rem* by attachment and

garnishment. *Camden Rolling-mill Co. v. Swede Iron Co.*, 32 N. J. L. 15 (1866), holding that a foreign corporation which has no place of business in New Jersey cannot be sued in the courts of that state on a contract made in another state, but otherwise on a contract made in the state. See *National Cond. Milk Co. v. Brandenburgh*, 40 N. J. L. 111 (1878); *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. (Pa.) 173 (1827), holding that an attachment will lie against it. To same effect, *St. Louis, etc. Ins. Co. v. Cohen*, 9 Mo. 416 (1845); *Andrews v. Michigan Cent. R. R.*, 99 Mass. 534 (1868); *Barr v. King*, 96 Pa. St. 485 (1880), holding that it may be garnished on execution; *Smith v. Mutual L. Ins. Co.*, 96 Mass. 336 (1867), holding that a citizen of another state cannot sue in the courts of Massachusetts a corporation which is foreign to that state on a cause of action which did not arise within the jurisdiction.

The leading case of *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5 (1819), states the common-law rule as to suits against a foreign corporation. Process against a foreign corporation cannot be served upon its officers who may be found within the jurisdiction of the court unless such service is authorized by the statutes of the state where suit is brought. *Pomeroy v. New York, etc. R. R.*, 4 Blatchf. 120 (1857); s. c., 19 Fed. Cas. 965; *Eaton v. St. Louis, etc. Co.*, 7 Fed. Rep. 139 (1881); *Latimer v. Union Pac. Ry.*, 43 Mo. 105 (1868); *Weight v. Liverpool, etc. Co.*, 30 La. Ann. 1186 (1878), holding that process cannot be served on a local agent; *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882), as to judgment by service on an agent doing business in the state. Also *Block v. Atchison, etc. R. R.*, 21 Fed. Rep. 529 (1884); *Emerson, etc. Co.*

whose duty, it may fairly be presumed, would be to notify the governing power of the corporation of the service.¹ In England it is held that a foreign corporation doing business in the jurisdiction may be sued if it is served within the jurisdiction, even though the cause of action arose elsewhere.² Even though an Illinois railroad corporation owns practically the entire capital stock of a Texas railroad corporation, yet the former cannot be brought into court in Texas by serving officers of the latter.³ Service upon a foreign corporation doing business in a territory may be made upon the general manager in the territory, even though the corporation has not appointed a local agent for that purpose as required by the statutes.⁴

There has been a vast amount of litigation as to when the service of process upon an officer or agent of a foreign corporation is sufficient to confer jurisdiction over the corporation. In most of the states there are statutes which provide for service in suits against foreign corporations by service on an officer or agent, the particular officer or agent being specified.⁵ Service upon a director of a foreign corpora-

v. McCormick, etc. Co., 51 Mich. 5 (1883), holding that foreign corporations may sue each other in Michigan if both are doing business within the state and the cause of action accrued there. See also *Pennoyer v. Neff*, 95 U. S. 714 (1877); *American Exp. Co. v. Conant*, 45 Mich. 642 (1881); *Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222 (1853); *Pope v. Terre Haute, etc. Co.*, 87 N. Y. 137 (1881); *Good Hope Co. v. Railway, etc. Co.*, 22 Fed. Rep. 635 (1884); *Camden Rolling-mill Co. v. Swede Iron Co.*, 32 N. J. L. 15 (1866). If, under the statute, the foreign corporation appoints an agent in the state to accept service, a personal judgment may be rendered against the corporation. *Wilson v. Martin-Wilson, etc. Co.*, 149 Mass. 24 (1889). See on this subject generally, an article in 43 Central L. J. 497. See also § 752, *supra*.

¹ *Central of Georgia Ry. v. Eichberg*, 68 Atl. Rep. 690 (Md. 1908).

² Service in a suit against a foreign bank may be on the manager of a local branch. *Logan v. Bank of Scotland*, [1904] 2 K. B. 495.

³ *Peterson v. Chicago, etc. Ry.*, 205 U. S. 364 (1907).

⁴ *Henrietta Mining, etc. Co. v. Johnson*, 173 U. S. 221 (1899). A statute requiring foreign corporations to appoint an agent to accept service does not prevent service on an agent who has not been appointed. *Curtis v. Jordan*, 115 La. 918 (1905).

⁵ Service of a summons in a cause of action arising out of the state may be made on the head of a department in New York, the company, a foreign corporation, having an office in New York. *Tuchband v. Chicago, etc. R. R.*, 115 N. Y. 437 (1889). Under the New York statute service on a foreign corporation cannot be made by serving its attorney. *Taylor v. Granite State Prov. Assoc.*, 136 N. Y. 343 (1893). A statute authorizing service upon any employee where a corporation is doing business in the state, does not authorize an employee to accept service. *New River, etc. Co. v. Seeley*, 120 Fed. Rep. 193 (1903). Even though a Pennsylvania insurance company accepts four policies in Wisconsin, yet after the policies are issued the company is not doing business in Wisconsin so far as service of process upon it is concerned, under the Wisconsin statute. *Frawley, etc. v. Pennsylvania*,

tion in accordance with a statute is legal where the company has been

etc. Co., 124 Fed. Rep. 259 (1903). A foreign railroad corporation cannot be served even under a statute by serving an agent of another railroad company who sells tickets for the former company, the former company having no office or place of business in the state. *Allen v. Yellowstone, etc. Co.*, 154 Fed. Rep. 504 (1907). Service on a travelling salesman is not sufficient. *Adams Mach. Co. v. Castleberry*, 106 S. W. Rep. 940 (Ark. 1907). A salesman of a certain article for a corporation is not an agent upon whom service can be made. *Wold v. Colt Co.*, 114 N. W. Rep. 243 (Minn. 1907). Service on a local agent who sells tickets on commission is not sufficient. *Goepfert v. Compagnie, etc. Transatlantique*, 156 Fed. Rep. 196 (1907). Under the South Carolina statutes, service on a traveling salesman of a foreign corporation is good when he was in the state in regard to the same matter. *Abbeville, etc. Co. v. Western, etc. Co.*, 61 S. C. 361 (1901). Under the statutes of North Carolina service may be made on a superintendent of construction of a foreign corporation. *Clinard v. White*, 129 N. C. 250 (1901). Service of summons in a foreclosure suit against a foreign corporation must be made in strict accordance with the statute. *Venner v. Denver, etc. Co.*, 15 Colo. App. 495 (1900). In Nebraska service may be made upon a managing agent of a foreign corporation doing business in the state. *Klopp v. Creston City, etc. Co.*, 34 Neb. 808 (1892). In Michigan, if service is made on a person as a principal officer of a foreign corporation, and that person shows by affidavit that he was not such, the service is set aside. *First Nat. Bank v. Burch*, 76 Mich. 608 (1889). Service on the resident agent of a foreign corporation is sufficient. *Vorheis v. People's, etc. Soc.*, 86 Mich. 31 (1891). See *Hiller v. Burlington, etc. R. R.*, 70 N. Y. 223 (1877); *Childs v. Harris Mfg. Co.*, 104 N. Y. 477 (1887); *Pope v. Terre Haute, etc. Co.*, 87 N. Y. 137 (1881). Service cannot be upon an officer who has resigned and the resignation accepted. *Ervin v. Oregon, etc. Nav. Co.*, 22 Hun, 598 (1880). As to Pennsylvania, see *Hussey Mfg. Co. v. Deering*, 20 Fed. Rep. 795 (1884). See *Barnett v. Chicago, etc. R. R.*, 4 Hun, 114 (1875), to the effect that sometimes the judgment is binding, though the corporation has no property in the jurisdiction. The legislature may change the mode of service. *Railroad Co. v. Hecht*, 95 U. S. 168 (1877). The statute must be strictly followed. *St. Clair v. Cox*, 106 U. S. 350 (1882). Attachment does not lie against a foreign corporation after a receiver of it has been appointed in the state where it exists. *Thomas v. Merchants' Bank*, 9 Paige, 216 (1841). See also § 871, *infra*. For service under the Pennsylvania statute, see *Benwood Iron Works v. Hutchinson*, 101 Pa. St. 359 (1882); *Hussey Mfg. Co. v. Deering*, 20 Fed. Rep. 795 (1884). Service on a resident agent whose agency is for other states only is not good. *Schmidlapp v. La Confiance Ins. Co.*, 71 Ga. 246 (1883). Service under the Utah statute, *Walker v. Continental Ins. Co.*, 2 Utah, 231 (1879); the Missouri statute, *McNichol v. U. S. etc. Agency*, 74 Mo. 457 (1881). Service must be on the *de facto* officers. *Berrian v. Methodist Soc.*, 4 Abb. Pr. 424 (1857). Service on a clerk under the statute. *Libbey v. Hodgdon*, 9 N. H. 394 (1838). Service under the New Jersey statute. *National Cond. Milk Co. v. Brandenburgh*, 40 N. J. L. 111 (1878). On a contract made in the state, service on an agent suffices in New York, though the foreign corporation does no business and has no property in the state. *Barnett v. Chicago, etc. R. R.*, 4 Hun, 114 (1875). Frequently the statute allows service on a "managing agent." Difficulty

doing business in the state and the cause of action arose in the state.¹ A local broker receiving business and transmitting it to a city broker-

arises in defining this term. It has been held that a person is a "managing agent" if he is a general manager. *Carr v. Commercial Bank*, 19 Wis. 272 (1865); a local insurance agent, *Bain v. Globe Ins. Co.*, 9 How. Pr. 448 (1854); a local agent, *American Exp. Co. v. Johnson*, 17 Ohio St. 641 (1867); a general freight agent, *Palmer v. Pennsylvania Co.*, 35 Hun, 369 (1885); *aff'd*, 99 N. Y. 679; the agent who made the contract. *Estes v. Belford*, 22 Fed. Rep. 275 (1884). But a stock transfer agent is not a managing agent. *Reddington v. Mariposa, etc. Co.*, 19 Hun, 405 (1879); nor is an assistant secretary, *Sterett v. Denver, etc. Ry.*, 17 Hun, 316 (1879); nor is a horse-car superintendent, *Emerson v. Auburn, etc. R. R.*, 13 Hun, 150 (1878); nor is a ticket agent, *Doty v. Michigan Cent. R. R.*, 8 Abb. Pr. 427 (1859); nor is a baggage-master, *Flynn v. Hudson River R. R.*, 6 How. Pr. 308 (1851); nor is a boat captain, *Upper Miss. Transp. Co. v. Whittaker*, 16 Wis. 220 (1862). The term "special agent" includes a conductor. *New Albany, etc. R. R. v. Grooms*, 9 Ind. 243 (1857); *New Albany, etc. R. R. v. Tilton*, 12 Ind. 3 (1859); *Ohio, etc. R. R. v. Quier*, 16 Ind. 440 (1861); the person in charge who attends to the business, *Angerhoefer v. Bradstreet Co.*, 22 Fed. Rep. 305 (1884); but not the traveling agent, *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422 (1863); nor the collecting attorney, *Moore v. Freeman's Nat. Bank*, 92 N. C. 590 (1885). For many other cases on these and similar statutes and on the general principles governing service of process on corporations, see 8 Southern Law Rev. 199; and 1 Barb. Ch. Pr. 52. In Oregon the statute is construed to hold that a domestic corporation must

be sued in the county of the principal office, or where the cause arose. *Holgate v. Oregon Pac. R. R.*, 16 Oreg. 123 (1888). *Contra*, *Glaize v. South Carolina R. R.*, 1 Strobb. L. (S. C.) 70 (1846). A vice-president and general superintendent is an "officer" upon whom service may be made under a statute. *Norfolk, etc. R. R. v. Cottrell*, 83 Va. 512 (1887). Service on the foreign corporation is sufficient where the company has an office and general agent doing a substantial business in the state. But see § 759, *infra*. *Cf.* *Barnes v. Mobile, etc. R. R.*, 12 Hun, 126 (1877).

Where service on an agent is allowed if certain officers cannot be found in the county, the return of service on an agent must show that the officers were not within the jurisdiction. *Miller v. Norfolk, etc. R. R.*, 41 Fed. Rep. 431 (1889). Approved in *Youngstown, etc. Co. v. White's Adm'r*, 49 S. W. Rep. 36 (Ky. 1899). Service upon a director of a foreign corporation sustained under the New York statute. *McElroy v. Continental Ry.*, 6 N. Y. Supp. 306 (1889). A Maine corporation may sue a New Jersey corporation in Massachusetts, where the latter company has filed an agreement with the state of Massachusetts to the effect that it might be sued there. *Consolidated, etc. Co. v. Lamson, etc. Co.*, 41 Fed. Rep. 833 (1890). Foreign corporations doing business in the state may be sued on a cause of action that arose out of the state, and service may be made on an agent or depot-master if the statutes authorize service to be made in this way. *Humphreys v. Newport News, etc. Co.*, 33 W. Va. 135 (1889). Service may be on the superintendent of insurance at Albany, although the action is in the city court of New

¹ *Lumbermen's, etc. Co. v. Meyer*, 197 U. S. 407 (1905).

age corporation may be an agent of the latter sufficient to sustain service, under the Illinois statute.¹ Service in the federal court on a foreign corporation may be made on an officer specified in the state statute.²

The New York court of appeals holds that even though a foreign corporation has no office or business in the state, yet if its president resides and has an office in the state, from which he manages and controls the corporate business, service upon him is sufficient and a judgment thereon is sufficient and binds the parties so far as corporate property in the state is concerned.³ But the supreme court of the United States holds that service in New York upon a director of a foreign corporation who resides in New York does not give jurisdiction where the corporation did no business in New York.⁴ And that even though the chief office of a West Virginia corporation is stated in the charter to be New York City, and even though service is made upon its treasurer in New York, yet this does not give jurisdiction if it has never done any business and has no assets in that state.⁵ A foreign corporation is not necessarily doing business in the state, sufficient to authorize service upon one of its directors under the New York statute, merely because its transfers of stock are regis-

York. *People v. City Court Justices*, 11 N. Y. Supp. 773 (1890). Where by statute the state superintendent of insurance is made agent to accept service of process on foreign insurance companies doing business in the state, service on him by mail is insufficient. *Farmer v. National Life Assoc.*, 50 Fed. Rep. 829 (1892). Under the Michigan statutes service may be made on foreign corporations by service on a resident agent who is in charge of the property. *Shafer Iron Co. v. Iron County Circuit Judge*, 88 Mich. 464 (1891). Under the statutes of Michigan service on a foreign corporation may be made on a traveling salesman in a cause of action which arose within the state. *Ryerson v. Steere*, 114 Mich. 352 (1897). An advertising agent is not an "agent" upon whom service may be made under the New Jersey statute. *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150 (1890). A local agent of a domestic insurance company is not an agent employed in the general management of the business. *State Ins.*

Co. v. Waterhouse, 78 Iowa, 674 (1889). Service may be upon a general superintendent, when the statute authorizes it on a managing agent. *Barrett v. American, etc. Co.*, 56 Hun, 430 (1890); *aff'd*, 138 N. Y. 491. An employee who attends to the publication of a periodical, and the printing, binding, and mailing, is not a "managing agent." *Ruland v. Canfield Pub. Co.*, 10 N. Y. Supp. 913 (1890). An agent is not an "officer." *Banks v. Gay Mfg. Co.*, 108 N. C. 282 (1891). The attachment papers in an attachment against a foreign corporation must show the jurisdiction of the court. *Oliver v. Walter, etc. Co.*, 10 N. Y. Supp. 771 (1890).

1 *Board of Trade v. Hammond, etc. Co.*, 198 U. S. 424 (1905).

2 *Toledo, etc. Co. v. Computing, etc. Co.*, 142 Fed. Rep. 919 (1906).

3 *Grant v. Cananea, etc. Co.*, 189 N. Y. 241 (1907).

4 *Conley v. Mathieson, etc. Works*, 190 U. S. 406 (1903).

5 *Kendall v. American, etc. Co.*, 198 U. S. 477 (1905).

tered in the state and its directors meet there and it keeps a bank account there.¹ Sometimes the statutes require a foreign corporation to appoint a resident agent to accept service before it does business in the state.² A foreign corporation that has filed a certificate appointing a resident agent may at any time cease doing business in the state, and thereafter service upon the agent is not good where such agent has ceased to be agent for that purpose, even though no certificate to that effect is filed with the secretary of state.³ But this does not apply to business already transacted in the state.⁴ A statute may provide that where a foreign corporation doing business in the state

¹ *Honeyman v. Colorado, etc. Co.*, 133 Fed. Rep. 96 (1904).

² *Goodwin v. Colorado, etc. Co.*, 110 U. S. 1 (1884); *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114 (1875). See also §§ 696-700, *supra*; also note 2, p. 2557. A judgment obtained by such service cannot be impeached in other jurisdictions. *Lafayette Ins. Co. v. French*, 18 How. 404 (1855); *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882). Transacting business without filing is equivalent to filing. *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471 (1880). The appointment of such an agent does not affect the right of the corporation, as a citizen of another state, to sue and be sued in the federal courts. *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149 (1869); *Gray v. Quicksilver Min. Co.*, 21 Fed. Rep. 288 (1884). For decisions under the Massachusetts statute requiring foreign insurance companies to appoint an agent to accept service, see *Thayer v. Tyler*, 76 Mass. 164 (1857); *National Mut. F. Ins. Co. v. Pursell*, 92 Mass. 231 (1865); *Leonard v. Washburn*, 100 Mass. 251 (1868); *Gillespie v. Commercial, etc. Ins. Co.*, 78 Mass. 201 (1858); *Morton v. Mutual L. Ins. Co.*, 105 Mass. 141 (1870). An appointment, under statute, of a resident agent to accept service continues until a new appointment is made, *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81 (1887).

³ *Forrest v. Pittsburgh, etc. Co.*, 116 Fed. Rep. 357 (1902). But see *Collier v. Mutual, etc. Assoc.*, 119 Fed. Rep.

617 (1902). The right to make service on the state insurance commissioner ceases after the insurance company ceases to do business in the state. *Friedman v. Empire etc. Co.*, 101 Fed. Rep. 535 (1899). Service on an agent appointed in accordance with the statute is good, even though the corporation ceases doing business in the state and has sold its property. *Hill v. Empire, etc. Co.*, 156 Fed. Rep. 797 (1907).

⁴ Service may be made on a state officer, as allowed by statute, as against a foreign insurance company, even though it has withdrawn from the state, in a suit on a policy issued before such withdrawal. *Mutual Reserve, etc. Ass'n v. Phelps*, 190 U. S. 146 (1903). *Woodward v. Mutual Reserve, etc. Ass'n*, 178 N. Y. 485 (1904). Where by statute service on the state auditor shall be sufficient as against a foreign corporation, unless a resident agent has been appointed, service on him is good on a cause of action arising while a designation of an agent was in force, even though thereafter such designation was revoked. *Davis v. Kansas, etc. Co.*, 129 Fed. Rep. 149 (1904). After a foreign insurance company revokes its appointment of a local agent to accept service, a person not a resident of that state cannot sue the company in that state on a policy existing before such revocation. *Williams v. Mutual, etc. Assoc.*, 58 S. E. Rep. 802 (N. C. 1907).

has no officer or agent in the state upon whom process may be served, service may be made upon the secretary of the corporation commission.¹ Even though a foreign corporation transacts business in the state, yet service of process upon it outside of the state does not authorize a personal judgment.² A foreign corporation may file a special appearance and a plea to the jurisdiction.³ A foreign corporation waives its right to object to service, if it interposes a counterclaim.⁴ Service may be set aside for fraud.⁵

A judgment against a foreign corporation based on service upon the president while temporarily in the state is not enforceable in other states, the corporation not being engaged in business or having any agent in the state where the judgment was obtained.⁶ In a suit against a foreign corporation the general rule is that the suit may be in any county in the state.⁷

§ 759. *Jurisdiction of the federal courts*—"Dummy" corporations—*Residence of corporations*—*Jurisdiction where service is on an officer temporarily in the state*—*Federal corporations*.—In the circuit court of the United States it was formerly the law that a corporation incorporated beyond the circuit in which the suit was brought might be made a defendant by such service as suffices in the state wherein the suit was brought, if it did business there.⁸ But

1 *Fisher v. Traders', etc. Co.*, 136 N. C. 217 (1904). A citizen of Pennsylvania who takes out a policy of insurance in Indiana in an Indiana insurance company, cannot obtain judgment thereon in Pennsylvania by serving the insurance commissioner of Pennsylvania, even though the Indiana corporation has done business in Pennsylvania without complying with the statute requiring it to consent to the insurance commissioner of Pennsylvania accepting service for it. *Old Wayne, etc. Assoc. v. McDonough*, 204 U. S. 8 (1907).

2 *Louisville, etc. R. R. v. Missouri, etc. Ry.*, 88 S. W. Rep. 413 (Tex. 1905).

3 *Groel v. United, etc. Co.*, 68 N. J. Eq. 249 (1904). See § 752, *supra*.

4 *Merchants', etc. Co. v. Clow & Sons*, 204 U. S. 286 (1907).

5 *Cavanagh v. Manhattan, etc. Co.*, 133 Fed. Rep. 818 (1905).

6 See § 759, *infra*.

7 *Boyer v. Northern, etc. Ry.*, 8 Idaho, 74 (1901).

8 *New England Mut. Ins. Co. v. Woodworth*, 111 U. S. 138, 146 (1883); *Eaton v. St. Louis, etc. Co.*, 7 Fed. Rep. 139 (1881); *M'Coy v. Cincinnati, etc. R. R.*, 13 Fed. Rep. 3 (1882); *St. Louis, etc. Co. v. Consolidated, etc. Co.*, 32 Fed. Rep. 802 (1887); *Hunter v. International Ry. Imp. Co.*, 26 Fed. Rep. 299 (1886); *Block v. Atchison, etc. R. R.*, 21 Fed. Rep. 529 (1884); *Carpenter v. Westinghouse Air-brake Co.*, 32 Fed. Rep. 434 (1887). But see *Good Hope Co. v. Railway, etc. Co.*, 22 Fed. Rep. 635 (1884), holding that service on the president, who was there to adjust a difficulty, was insufficient. *Cf. Estes v. Belford*, 22 Fed. Rep. 275 (1884), where a patent-right had been used in the jurisdiction. Service on an agent of a domestic corporation does not give jurisdiction over a foreign corporation, though the latter operates through the former. *U. S. v. American Bell Tel. Co.*, 29 Fed. Rep. 17 (1886). Unless the state statute provide otherwise, no jurisdiction is acquired by attachment of

by the act of congress of 1887 a suit in the federal courts can be instituted only in the district where either the plaintiff or defendant resides, where the jurisdiction of the court is due to the parties being citizens of different states.¹ An allegation that a corporation is a citizen of a certain state is not sufficient to give jurisdiction to the federal court, but it should be shown that it was incorporated in that state.² After decree it is too late for one of the parties to claim that it was a corporation of a different state from the one shown by the papers, and hence that the federal court had no jurisdiction of the case.³

The objection that neither of the parties resides in the district where suit is brought is waived by appearing generally.⁴ A case,

property and service of papers on resident officers of a foreign corporation. *Boston Electric Co. v. Electric Gas L. Co.*, 23 Fed. Rep. 838 (1885), reviewing the authorities. Where the foreign corporation has appointed a resident agent to accept service, the federal court has jurisdiction by service on such agent. *Ex parte Schollenberger*, 96 U. S. 369 (1877); *Knott v. Southern L. Ins. Co.*, 2 Woods, 479 (1874); s. c., 14 Fed. Cas. 785; *Merchants' Mfg. Co. v. Grand Trunk Ry.*, 13 Fed. Rep. 358 (1882), where a foreign corporation sued an alien corporation; *Lung Chung v. Northern Pac. Ry.*, 19 Fed. Rep. 254 (1884), where service was insufficient; *Gray v. Quicksilver Min. Co.*, 21 Fed. Rep. 288 (1884). The fact that a state is a stockholder in a corporation does not deprive the United States courts of jurisdiction where the corporation is a party. *Bank of U. S. v. Planters' Bank*, 9 Wheat. 904 (1824). In the federal courts service on a ticket solicitor of a railroad defendant for a cause of action arising in another circuit is insufficient. *Maxwell v. Atchison, etc. R. R.*, 34 Fed. Rep. 286 (1888). As to the affidavit to be made by the corporation in order to remove a case to the United States court, see *Mix v. Andes Ins. Co.*, 74 N. Y. 53 (1878). An order to show cause may be served on the cashier of an insolvent bank, although the bank is in

a receiver's hands. *Platt v. Archer*, 9 Blatchf. 559 (1872); s. c., 19 Fed. Cas. 822. A Connecticut corporation cannot be sued by an alien in the California circuit court of the United States. *Denton v. International Co.*, 36 Fed. Rep. 1 (1888); *Filli v. Delaware, etc. R. R.*, 37 Fed. Rep. 65 (1888). But see *Riddle v. New York, etc. R. R.*, 39 Fed. Rep. 290 (1889). See also *Connor v. Vicksburg, etc. R. R.*, 36 Fed. Rep. 273 (1888). *Preston v. Fire Extinguisher Mfg. Co.*, 36 Fed. Rep. 721 (1888).

1 Stat. at L. 1887, sess. II, ch. 373. See also cases in preceding note.

2 *Knight v. Litcher, etc. Co.*, 136 Fed. Rep. 404 (1905).

3 *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188 (1905).

4 *Interior Constr. & Imp. Co. v. Gibney*, 160 U. S. 217 (1895). If the necessary diversity of citizenship exists, the federal court may by consent entertain a suit and appoint a receiver, although none of the parties reside in the district. *Horn v. Pere Marquette R. R.*, 151 Fed. Rep. 626 (1907). A New York corporation may, by bill filed in the Virginia district of the United States court, have a receiver appointed of property there of a New Jersey corporation, if the defendant does not object to the jurisdiction. Stockholders and creditors of the defendant company cannot by intervening raise the question of juris-

however, cannot be removed from the state to the federal court, where neither of the parties reside in the state.¹ Where a suit against a foreign corporation for damages for a tort is removed to the United States court the suit will not be dismissed on the ground that the tort occurred outside of the jurisdiction of the court.² Condemnation proceedings in the state court may be removed to the United States court if there is diverse citizenship and the amount involved is over \$2,000 and interest.³ A defendant cannot remove a case to the federal court on the ground that it arises under the constitution and laws of the United States, unless the complaint or bill in equity shows on its face that it does so arise.⁴

Questions relative to a stockholder's suit being removed to the federal court when it has been commenced in the state court are considered elsewhere.⁵ A state statute interfering with the removal of causes to the United States court is void.⁶ Although a state has no power to require a foreign corporation to agree not to remove cases into the federal courts, yet a state may exclude a foreign corporation from doing intrastate business in the state if it does remove cases to

diction. *Central T. Co. v. McGeorge*, 151 U. S. 129 (1894). The objection that a suit in the federal court is not brought in the district where one of the parties resides is waived by the defendant corporation appearing and not objecting, and an intervening stockholder cannot afterwards raise the objection. *Citizens', etc. Co. v. Union, etc. Co.*, 106 Fed. Rep. 97 (1900).

¹ Where a citizen of Michigan sues a corporation of Missouri in the state court in Louisiana, the defendant cannot remove the case to the United States court. *Ex parte Wisner*, 203 U. S. 449 (1906). *Kansas City, etc. R. R. v. Interstate Lumber Co.*, 37 Fed. Rep. 3 (1888). See also *Zambrino v. Galveston, etc. Ry.*, 38 Fed. Rep. 449 (1889); *Riddle v. New York, etc. R. R.*, 39 Fed. Rep. 290 (1889). As to removal on the ground of interference with interstate commerce, see *South Carolina v. Port Royal, etc. Ry.*, 56 Fed. Rep. 333 (1893). Where a state sues a corporation in a state court, the defendant cannot remove the case into the federal court on the

ground of diverse citizenship, inasmuch as the state is not a citizen. *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482 (1894).

² *Denver, etc. R. R. v. Roller*, 100 Fed. Rep. 738 (1900).

³ *Madisonville, etc. Co. v. Saint Bernard, etc. Co.*, 196 U. S. 239 (1905).

⁴ Even though in a suit by a telegraph company to enjoin a purchaser of a railroad at a foreclosure sale from interfering with a telegraph line on the railroad right of way, the telegraph company alleges that it has accepted the Post Road Act of Congress of 1866, and that it had a right to maintain its telegraph line on the railroad right of way, under the statutes of the United States, yet this is not an allegation that the suit arises under the laws of the United States sufficient to enable the defendant to remove the case to the federal court on that ground. *Western Union Tel. Co. v. Ann Arbor R. R.*, 178 U. S. 239 (1900).

⁵ See § 734, *supra*.

⁶ See §§ 697-700, *supra*.

the federal courts.¹ But a foreign corporation doing business in Missouri may enjoin its secretary of state from cancelling its state license to do business in that state, because it has removed a case to the United States court, even though the statutes of Missouri prescribe that the license shall be revoked if a case is removed to the United States court.² A state can neither prohibit nor impose conditions on the power of a foreign corporation to transact interstate business within the state, even though it may prohibit such corporation from transacting intrastate business within the state. Hence a New Jersey manufacturing company may sell goods in Colorado, through a selling Colorado corporation, and may sue the Colorado corporation in the United States court on the contract, even though the former has not complied with the Colorado statutes as to filing its charter and paying an annual license tax, and even though it may not be able to maintain a suit in the state court. The jurisdiction of the federal court cannot be impaired by such legislation.³ In determining whether the federal court has jurisdiction, the court may disregard nominal parties.⁴ Where a state statute or city ordinance is in violation of a

¹ *Security, etc. Co. v. Prewitt*, 202 U. S. 246 (1906). Where an insurance company is sued at law in the state court on a policy, it cannot maintain a suit in equity in the United States court to cancel a policy on the ground of fraud, even though it alleges that it does not remove a suit in the state court to the United States court because thereby its license will probably be revoked by the state on account of such removal. *Cable v. United States, etc. Co.*, 191 U. S. 288 (1903).

² *Chicago, etc. Ry. v. Swanger*, 157 Fed. Rep. 783 (1908).

³ *Butler, etc. Co. v. United States Rubber Co.*, 156 Fed. Rep. 1 (1907). *Dunlop v. Mercer*, 156 Fed. Rep. 545 (1907), the latter case being a case where two Arizona corporations had been doing business in Minnesota without complying with the statute, and both became bankrupt, and the trustee of one petitioned that the trustee of the other return certain property. The court held that a state statute prohibiting a suit in such a case did not apply to the federal courts.

⁴ See §§ 734, *supra*, 827, *infra*. In a suit by a vendee against a vendor of stock to compel specific performance, the corporation is but a nominal party and is not considered in deciding whether the suit may be removed to the federal court. *Lucas v. Milliken*, 139 Fed. Rep. 816 (1905). The corporation as a party defendant is to be considered in determining whether the federal court has jurisdiction. *McClelland v. McKane*, 154 Fed. Rep. 164 (1907). In determining whether a stockholder's suit to cancel stock and bonds which he alleges are illegal may be removed to the federal court the corporation being an indispensable party will be considered a party complainant only when it is shown that its officers or persons controlling it are actually opposed to the suit. *Groel v. United, etc. Co.*, 132 Fed. Rep. 252 (1904). The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a party defendant, and resides in the same state as the complaining corporation. The trustee in such a suit

contract, the federal court has jurisdiction irrespective of citizenship.¹ The United States court has jurisdiction of a suit by the trustee of bondholders of a water-works company to enjoin the city from constructing its own water-works in violation of an exclusive right granted to the company.² A stockholder in a railroad company may enjoin the company and state officers from enforcing a state statute unreasonably reducing railroad rates, and the United States court has jurisdiction on the ground that it deprives the company of its property without due process of law and denies the equal protection of the law, but a preliminary injunction will not be granted if the railroad is already charging only the reduced rate.³ The United States court has jurisdiction of a suit brought by a railroad corporation of one state against the members of a railroad commissioner in another state, such suit not being against the state itself.⁴ A trustee of a mortgage of a water-works company cannot file a bill in the United States court against the company and the city in which the water-works are located, where the company and the city are citizens of the same state and it transpires that the interests of the trustee and company are the same, the suit being practically against the city.⁵

is merely a formal party. *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900). In a suit between stockholders as to the title to stock the corporation is a proper party defendant, but is a nominal party, and is not considered in determining whether the suit is removable to the United States court. *Higgins v. Baltimore, etc. R. R.*, 99 Fed. Rep. 640 (1900). See also § 338, *supra*.

¹ See §§ 902, 913, 931, *infra*. A city under charter authority to provide water for itself and to allow the use of its streets therefor for a term not exceeding twenty-five years may grant to a water-works company such right for twenty-five years and may agree in that grant not to construct works for itself during that time, unless the company fails to furnish a substantial supply or to perform its other agreements. If the city afterwards, in violation of this agreement, attempts to construct its own works, the company may obtain an injunction against it and may file its bill for that purpose in the United States court. *Walla Walla City v. Walla Walla Water Co.*,

172 U. S. 1 (1898). Even though a contract between a city and a water-works company expires pending litigation as to the validity of a reduction of rates, yet the court is not thereby ousted from jurisdiction of the case. *Kimball v. City of Cedar Rapids*, 100 Fed. Rep. 802 (1900).

² *Mercantile Trust Co. v. Columbus*, 203 U. S. 311 (1906). The federal court has jurisdiction irrespective of citizenship in a suit instituted by a street railway company to enjoin a city from violating its grant. *Des Moines, etc. Ry. v. City of Des Moines*, 151 Fed. Rep. 854 (1907).

³ *Perkins v. Northern, etc. Ry.*, 155 Fed. Rep. 445 (1907).

⁴ *Mississippi R. R. v. Illinois Central R. R.*, 203 U. S. 335 (1906).

⁵ *Boston, etc. Co. v. City of Racine*, 97 Fed. Rep. 817 (1899). Where a water-works mortgage is foreclosed and on the sale the purchaser is a citizen of another state, he can bring suit in the federal court to collect, under a contract between the old company and the city for the supply of water, even though the company itself

An Ohio stockholder in an Illinois railroad corporation may bring suit in the United States court in Illinois against the corporation, and other Illinois corporations and a New York trustee of a mortgage on the property to set aside an alleged illegal lease and deed of the property of the first-named corporation. The New York corporation may be served by publication.¹ Stock is located where the corporation is incorporated, and a non-resident stockholder may file a bill in the United States court in the district where the corporation was organized to set aside an illegal forfeiture of the stock for non-payment of assessments, and in such suit he may bring in non-resident defendants by substituted service.² A suit in equity does not lie in the United States court in Nevada, at the instance of a resident of that state, to recover stock owned by non-residents in an Arizona corporation where service upon them is made only upon the publication. The stock is not within that district, within the meaning of the federal statute.³ A federal court has jurisdiction of an injunction case relative to a license fee where the value of the right to be protected or the extent of the injury to be prevented is over \$2,000, and interest even though the license itself is not that amount.⁴ In a suit by the trustee of a mortgage to enjoin the condemnation of the mortgaged property, the mortgagor is a necessary party, and, if it is a citizen of the same state as the party that is condemning, the federal court has no jurisdiction.⁵

The federal courts refuse to follow the New York decisions and statute allowing suit to be brought against a foreign corporation by service upon the president while temporarily within the state, the corporation not being engaged in business in the state. On removal of the case to the federal court the service will be set aside.⁶ A special appearance for that purpose may be put in. In fact the

could not have brought suit in the federal court, it being a citizen of the same state as the city. *Portage City, etc. Co. v. City of Portage*, 102 Fed. Rep. 769 (1900). See also § 931, *infra*.

¹ *Citizens', etc. Co. v. Illinois, etc. R. R.*, 205 U. S. 46 (1907).

² *Jellenik v. Huron, etc. Co.*, 177 U. S. 1 (1899). See also § 363, *supra*. In ascertaining the jurisdiction of the United States court in a suit relative to stock, it is presumed to be worth par. *Bernier v. Griscom-Spencer Co.*, 161 Fed. Rep. 438 (1908).

³ *McKane v. Burke*, 132 Fed. Rep. 688 (1904).

⁴ *Humes v. City of Fort Smith*, 93 Fed. Rep. 857 (1899). In a suit in a state court by a city against a telegraph company for \$1,772 for the use of streets or for a forfeiture of the defendant's rights in the streets, defendant by petition stating that the amount involved is over \$2,000 may remove the case to the United States court. *City of Memphis v. Postal, etc. Co.*, 145 Fed. Rep. 602 (1906).

⁵ *Old Colony, etc. Co. v. Atlanta Ry.*, 100 Fed. Rep. 798 (1899).

⁶ *Goldey v. Morning News*, 156 U. S. 518 (1895); *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 31 (1890). A for-

supreme court of the United States has held that service in New York upon a director of a foreign corporation who resides in New York

eign corporation may appear specially and remove the case from the state to the federal court and then cause service to be set aside on the ground that it had no office and did no business in the state, and that service was on its president, who happened to be in the state and endeavored to settle the case. *Louden, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 1008 (1904). Service upon the president who happens to be passing through the territory is not sufficient. *Caledonian Coal Co. v. Baker*, 196 U. S. 432 (1905). Service on an officer of a foreign corporation who is casually in the state is not good, where the corporation does no business in the state and has no property in the state connected with the suit. *Case v. Smith, etc. Co.*, 152 Fed. Rep. 730 (1907). Service on the secretary of a foreign corporation who is in the state to attend the taking of a deposition in a suit in which the company is interested, is not sufficient, where the corporation never did any business in the state excepting one transaction. *Ladd, etc. Co. v. American, etc. Co.*, 152 Fed. Rep. 1008 (1907). Service on the president while casually in the state is not good, even though the company solicited and obtained orders for goods in the state by correspondence. *Buffalo Glass Co. v. Manufacturers', etc. Co.*, 142 Fed. Rep. 273 (1905). An officer of a foreign corporation may be served, even though he came into the state to adjust the claim on which suit is brought. *Brush Creek, etc. Co. v. Morgan, etc. Co.*, 136 Fed. Rep. 505 (1905). Service on the president casually in the state was set aside in *Buffalo, etc. Co. v. American, etc. Co.*, 141 Fed. Rep. 211 (1905). The return of the United States marshal in making service in a suit against a foreign corporation must show that the company was trans-

acting business in the state. *Jackson v. Delaware, etc. Co.*, 131 Fed. Rep. 134 (1904). Service upon the secretary while temporarily in the state is not good, the company having no property in the state and no business in the state except isolated transactions, and this particular transaction not having been with the secretary. *Southern, etc. Co. v. American, etc. Co.*, 115 La. 237 (1905). Service on an officer of a foreign corporation temporarily in the state on other business is not sufficient. *Honerine, etc. Co. v. Tallerdar, etc. Co.*, 30 Utah, 326 (1906). A foreign corporation sued in state courts by service on a director casually in the state may remove to United States court and have the suit dismissed. *Bentlif v. London, etc. Corp.*, 44 Fed. Rep. 667 (1890). On removal to the federal court, a suit commenced by service on the president, who casually was in the jurisdiction on private business, will be dismissed, the company never having transacted business or maintained an office in the state. *Reifsnider v. American, etc. Co.*, 45 Fed. Rep. 433 (1891). "Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state so that service can be made upon it." *Fitzgerald, etc. Co. v. Fitzgerald*, 137 U. S. 98 (1890), holding, however, that where a corporation appears, demurs, removes the case into the federal court, and answers, it cannot attack the jurisdiction of the court, even though service was on the president, who was enticed into the state. Where a foreign corporation sued in a state court wishes to remove the case to the federal court, and there have the service set aside on the ground of

does not give jurisdiction where the corporation did no business in New York.¹ The New York court of appeals holds on the other hand that even though a foreign corporation has no office or business in the state, yet if its president resides and has an office in the state, from which he manages and controls the corporate business, service upon him is sufficient and a judgment thereon is sufficient and binds the parties so far as corporate property in the state is concerned.² If a foreign corporation desires to deny that it has been properly

want of jurisdiction, it must enter a special appearance in the state court for the purpose of objecting to the jurisdiction, and then, after filing the objection, but before a hearing thereon, remove the whole case into the federal court. *Tallman v. Baltimore*, etc. R. R., 45 Fed. Rep. 156 (1891). Where a Kansas mortgage loan company makes its securities payable in New York and deposits securities with the trustee in New York, it may be sued in New York by service upon the president who is casually in that state. *Watkins, etc. Co. v. Elliott*, 62 Kan. 291 (1900). Where a foreign corporation has made a contract within the state and then withdraws its office and service is made upon the president within the state according to the statutes of the state, the federal court will uphold such service. *McCord, etc. Co. v. Doyle*, 97 Fed. Rep. 22 (1899). Even though a director of a foreign corporation lives in the district, yet service upon him is not good where he does not transact and is not charged with any corporate business, but the rule is otherwise if the corporation has property within the state, within the meaning of the New York statute. *Reilly v. Philadelphia, etc. Ry.*, 109 Fed. Rep. 349 (1901). Service on the president of a foreign corporation in a cause of action not arising in the state gives no jurisdiction. *State v. Ramsey County Dist. Ct.*, 26 Minn. 233 (1879). Service on the secretary who is casually in the state is not good. *Middlebrooks v. Springfield F. Ins. Co.*, 14 Conn. 301 (1841). A foreign cor-

poration cannot be bound by obtaining service upon an officer who is casually in the state, where the statute is silent on the subject. *Aldrich v. Anchor Coal Co.*, 24 Oreg. 32 (1893). Service of process upon the president of a foreign corporation who is temporarily within the state is not good service in Pennsylvania. *Phillips v. Burlington Library Co.*, 141 Pa. St. 462 (1891). Service on a domestic corporation cannot be made by personal service on the president outside of the jurisdiction. *Dillard v. Central Va. Iron Co.*, 82 Va. 734 (1887). Judgment in another state against a foreign corporation doing business there, service being on an officer who is accidentally in the state, is conclusive and valid. *Moulin v. Trenton, etc. Ins. Co.*, 24 N. J. L. 222 (1853). Service on a corporation which does no business in the state cannot be made by service on an agent who is temporarily in the state. *Crook v. Girard, etc. Co.*, 87 Md. 138 (1898). The manager may be served, although only temporarily in the state on special business, such suit being connected with such business. *Houston v. Filer, etc. Co.*, 85 Fed. Rep. 757 (1898).

1 *Conley v. Mathieson, etc. Works*, 190 U. S. 406 (1903). Service on the president of a foreign corporation does not give jurisdiction unless the corporation is doing business in the state or has an office in the state. *Knapp v. Wallace*, 92 Pac. Rep. 1054 (Ore. 1907).

2 *Grant v. Cananea, etc. Co.*, 189 N. Y. 241 (1907).

served, it may put in a special appearance and raise the objection of no jurisdiction.¹ In New Jersey, it is held that the proper common-law practice, where service is made upon a foreign corporation's president, while he was casually in the state, is not to move to set it aside,² but to file a plea to the jurisdiction.³

The federal court has jurisdiction over subordinate suits affecting the property in its possession, irrespective of the citizenship of the parties.⁴ The question of the jurisdiction of the federal courts in a suit by or against a federal receiver is considered elsewhere, as is also the question of the right of such a receiver to remove such a suit from the state court into the federal court.⁵ The federal court may have

1 *Provident, etc. Soc. v. Ford*, 114 U. S. 635 (1885); *Friezen v. Allemania F. Ins. Co.*, 30 Fed. Rep. 349 (1886), holding that a general appearance waives the objection to jurisdiction. See also *Brooks v. New York, etc. R. R.*, 30 Hun, 47 (1883), holding that a general answer has the same effect; also *Cook v. Champlain Transp. Co.*, 1 Denio, 91 (1845); *North Missouri R. R. v. Akers*, 4 Kan. 453 (1868), holding that after entering appearance it cannot question the jurisdiction of the court in an action upon contract. See also § 752, *supra*; *McCormick v. Pennsylvania Cent. R. R.*, 49 N. Y. 303 (1872); *Lung Chung v. Northern Pac. Ry.*, 19 Fed. Rep. 254 (1884); *Moch v. Virginia F. & M. Ins. Co.*, 10 Fed. Rep. 696 (1882). The fact that a defendant appears in the state court, in order to remove the case to the federal court, does not constitute a general appearance, preventing an objection to the jurisdiction of the person, but amounts only to a special appearance. *International, etc. Co. v. Heartt*, 136 Fed. Rep. 129 (1905). A foreign corporation cannot withdraw a general appearance in order to appear specially to set aside service. *Raymondville, etc. Co. v. St. Gabriel, etc. Co.*, 140 Fed. Rep. 964 (Penn. 1905). Where a foreign corporation, served in the state where it is incorporated, answers by a plea to the jurisdiction and also files pleas to the merits, reserving its rights under the former

plea, it waives any objection to the jurisdiction. *St. Louis, etc. Ry. v. Whitley*, 77 Tex. 126 (1890). See also note 6, p. 2550.

2 *Puster v. Parker, etc. Co.*, 64 N. J. Eq. 599 (1903).

3 *Puster v. Parker, etc. Co.*, 59 Atl. Rep. 232 (N. J. 1904).

4 *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895).

5 See § 868, *infra*. Where a receiver has power by statute to enforce the statutory liability, and files a bill in equity in the state court against various stockholders to recover an assessment already levied by the court, a non-resident stockholder who is one

jurisdiction of a suit at law brought by a non-resident against an alien corporation, even though under the statutes of the state wherein the court is sitting, the state courts would have no jurisdiction of the case.¹ An alien corporation may be sued wherever service may legally be obtained upon it.²

A requirement that a foreign corporation shall file its charter with the secretary of state does not turn such corporation into a domestic corporation so far as the jurisdiction of the United States courts is concerned, even though the statute says that it shall have that effect.³ Merely being licensed to do business in the state does not make

of the defendants may remove his part of the case into the federal court. *Calderhead v. Downing*, 103 Fed. Rep. 27 (1900).

1 *Barrow S. S. Co. v. Kane*, 170 U. S. 100 (1898).

2 If it has financial agents in New York city, and an office there for the transaction of its monetary and financial business in the United States, service in New York upon the head of the firm which acts as the agents of the corporation is a sufficient service upon the corporation itself. *Re Hohorst*, 150 U. S. 653 (1893). An alien corporation may remove a case to the federal courts. *Purcell v. British, etc. Co.*, 42 Fed. Rep. 465 (1890).

3 *St. Louis, etc. Ry. v. James*, 161 U. S. 545 (1896); *Stephens v. St. Louis, etc. R. R.*, 47 Fed. Rep. 530 (1891). See also § 910, *infra*. Even though a state statute requires a foreign corporation doing business in the state to file certain papers and declares that it thereby becomes a domestic corporation, yet so far as the jurisdiction of the United States courts is concerned it is still a foreign corporation. *Southern Ry. v. Allison*, 190 U. S. 326 (1903). Where by the terms of the statute authorizing a foreign railroad company to purchase a railroad within the state at foreclosure sale, the foreign railroad company shall thereby become a domestic corporation, such statute has that effect and the company cannot remove a case to the United States court on the ground of its being a citizen of an-

other state. *Carolina, etc. Co. v. Southern Ry.*, 57 S. E. Rep. 444 (N. C. 1907). A railroad corporation of the state of Indiana, even though it is afterwards incorporated in Kentucky, remains a corporation of Indiana alone so far as the jurisdiction of the United States court is concerned. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899). The Kentucky statute requiring foreign railroad corporations doing business in the state to become domestic corporations by a certain procedure does not prevent such railroad corporations suing as foreign corporations in the federal court. *Taylor v. Illinois Cent. R. R.*, 89 Fed. Rep. 119 (1898). Even though a Nebraska railroad corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stockholders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to the federal court. *Walters v. Chicago, etc. R. R.*, 104 Fed. Rep. 377 (1900); *aff'd*, 186 U. S. 479. Under the statute of North Carolina requiring foreign telephone companies to file copies of their charter and by-laws and thereby become domestic corporations, before doing business in the state, a foreign telephone company that has complied with this statute cannot remove a case to the federal court on the ground of diverse citizenship. *Debnam v. Southern, etc. Co.*, 126 N. C. 831 (1900). A contrary conclusion was reached in *South Caro-*

a foreign corporation a resident of the state.¹ Where a domestic railroad is leased to a foreign corporation, under a statute which thereby expressly makes the latter a domestic corporation, it becomes such for purposes of jurisdiction.² A statute prohibiting foreign corporations from maintaining suits in the state courts unless certain statutes are complied with, does not prevent suits in the federal court and does not prevent a corporation defending in the state court.³

Although a bill in equity sets forth that a corporation is merely a pretended corporation as a part of a fraudulent scheme, and is really nothing but a partnership, nevertheless, if such corporation has an existing charter, it exists as a corporation, sufficiently at least to oust the federal court of jurisdiction of the case.⁴ But where property is transferred to a non-resident corporation for the sole purpose of enabling the parties to litigate a claim in the United States courts, the United States courts will refuse to take jurisdiction.⁵ As to juris-

lina as to a foreign railroad corporation. *Wilson v. Southern Ry.*, 36 S. E. Rep. 701 (S. C. 1900).

¹ *Martin v. Baltimore, etc. R. R.*, 151 U. S. 673 (1894).

² *Western, etc. R. R. v. Roberson*, 61 Fed. Rep. 592 (1894). The fact that by statute a foreign corporation by filing certain papers is declared to be a domestic corporation does not prevent it from removing a case to the federal court as being a foreign corporation. *Markwood v. Southern Ry.*, 65 Fed. Rep. 817 (1895). Although a statute authorizes a foreign corporation to build a road in this state, this does not make the corporation a domestic corporation so far as the jurisdiction of the federal courts is concerned. *Chapman v. Alabama, etc. R. R.* 59 Fed. Rep. 370 (1894).

³ *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893 (1903). A state statute which does not invalidate a contract made by a foreign corporation which has not complied with the statutes, but prohibits its bringing suit thereon, does not prevent suit in the United States court. *Vitagraph Co. v. Twentieth, etc. Co.*, 157 Fed. Rep. 699 (1907).

⁴ *Empire, etc. Transp. Co. v. Empire, etc. Min. Co.*, 150 U. S. 159 (1893). In *Irvine Co. v. Bond*, 74 Fed. Rep. 849 (1886), an owner of land in Cal-

ifornia incorporated a company under the laws of West Virginia and transferred to it, in payment for stock, certain portions of his land. He owned all the stock, and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was legal so far as the jurisdiction of the United States court was concerned. As regards the jurisdiction of the federal courts the incorporation of a company cannot be questioned on the ground that the charter required a certain amount of money to be paid in before business was commenced, and that business had been commenced without that amount being paid. *Wells Co. v. Gastonia Co.*, 198 U. S. 177 (1905); *rev'g Gastonia, etc. Co. v. Wells Co.*, 128 Fed. Rep. 369 (1904).

⁵ *Lehigh, etc. Co. v. Kelly*, 160 U. S. 327 (1895). The federal courts have no jurisdiction of a suit brought by the holder of coupons where it appears that he does not own them, but is merely allowing his name to be used to give jurisdiction to the court. *Lake County, etc. v. Dudley*, 173 U. S. 243 (1899). Where bonds and stock in a Pennsylvania corporation of little or no value are assigned to a citizen of New Jersey without consideration, although absolutely, for

diction the federal courts will sometimes look beyond corporate existence. Hence, where there are two corporations of the same name, chartered in two states, each owning a part of a certain property which is covered by mortgage, the foreclosure decree based on an allegation of diverse citizenship will not be disturbed on the ground that the wrong state was named in the bill as the state in which one of the parties was incorporated.¹ The federal court has no jurisdiction of a suit in behalf of the trustee of a water-works company mortgage to test the validity of a city ordinance repudiating the water-works grant, where the arrangement of parties is merely a contrivance to give jurisdiction to the United States court, after the highest court in the state in which the controversy arose has decided that the ordinance is legal.² The jurisdiction of a suit in the United States court is not collusive, even though the suit is brought by an amicable arrangement between the parties and the defendant admits the allegations of the complaint.³ As regards the jurisdiction of the federal court, the citizenship of a corporation is in the state wherein the corporation is incorporated, and not in the state or states wherein the stockholders are citizens.⁴ Where a railroad runs through several

the purpose of giving jurisdiction to the United States court for a receiver, this is a fraud on the court's jurisdiction, and the suit will be dismissed. *Kreider v. Cole*, 149 Fed. Rep. 647 (1907).

1 *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188 (1905).

2 *City of Dawson v. Columbia Trust Co.*, 197 U. S. 178 (1905); rev'g 130 Fed. Rep. 152. See 120 Fed. Rep. 1008.

3 *In re Metropolitan*, 208 U. S. 90 (1908), holding also that the circuit court of the United States for the Southern District of New York has jurisdiction to appoint receivers of an insolvent New York street railway company under a bill of a general creditor alleging diverse citizenship of the parties, and that more than \$2,000 is involved, and alleging also the insolvency of the defendant, and praying for the administration of its assets, where the defendant answers, admitting the allegations of the bill, and joins in the prayer for the appointment of the receiver. The court held also that the defense that complainants are not judgment creditors is waived by such an answer.

4 *St. Louis, etc. Ry. v. James*, 161 U. S. 545 (1896). In *Interstate Commerce Commission v. Texas & Pac. Ry.*, 57 Fed. Rep. 948 (1893), the court held that the principal office and domicile of the defendant was in New York city, where the company held its stockholders' and directors' meetings and kept its stock books and records, even though the general or administrative offices of the heads of departments were in Texas. The company itself existed under a charter granted by congress. "The members of a corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled." *Shaw v. Quincy Min. Co.*, 145 U. S. 444 (1892). A corporation is a resident only of the state that incorporates it, so far as the jurisdiction of the federal courts is concerned. *Myers v. Murray, etc. Co.*, 43 Fed. Rep. 695 (1890). The place of residence of a corporation is the state wherein it is incorporated. So held under the act for the removal of causes. *Miller v. Wheeler, etc. Co.*, 46 Fed. Rep. 882 (1891); *Overman Wheel Co. v. Pope*

federal districts in a state, it is a citizen and inhabitant of the district where it does the general business and has its headquarters and general offices.¹

A large number of decisions are given in the notes below on the various phases of the jurisdiction of the federal courts in suits brought against foreign corporations.²

Mfg. Co., 46 Fed. Rep. 577 (1891); *Railway Co. v. Whitton*, 13 Wall. 270, 283 (1871), holding that a corporation is deemed to be a citizen of the state creating it for the purpose of conferring jurisdiction upon the courts of the United States, and the legislation of other states will not affect this presumption; *Insurance Co. v. Francis*, 11 Wall. 210 (1870), holding that an allegation that a New York corporation is located and doing business in Mississippi was not an allegation that it was a citizen of the latter state; *Steamship Co. v. Tugman*, 106 U. S. 118 (1882), holding that the residence of the corporation does not at all depend on the residence of its stockholders. In the United States court an allegation that the corporation is a citizen and resident of a certain state is insufficient. It should also be alleged that it was incorporated under the laws of that state. *Dalton v. Milwaukee, etc. Co.*, 118 Fed. Rep. 876 (1902).

¹ *Galveston, etc. Ry. v. Gonzales*, 151 U. S. 496 (1894).

² A corporation organized in one state cannot be sued in the federal court in another state by a citizen of a third state. *Shaw v. Quincy Min. Co.*, 145 U. S. 444 (1892), holding also that the defendant may appear specially. Service upon the highest officer within the county is sufficient where the statutes so prescribe. *Kansas City, etc. R. R. v. Daughtry*, 133 U. S. 298 (1891). Service upon an attorney of a corporation, appointed under a state statute to accept service, is good service for the federal courts. *Re Louisville Underwriters*, 134 U. S. 488 (1890). Under a state statute authorizing service of process upon a local

agent of a foreign corporation, jurisdiction may be obtained by the federal courts. *Société Foncière v. Milliken*, 135 U. S. 304 (1890). Even though a New York contracting company is interested in a contract in Ohio, yet it cannot be sued in the United States court in Ohio, inasmuch as it is not "found" in that district, it having no place of business there. *Eirich v. Donnelly, etc. Co.*, 104 Fed. Rep. 1 (1900). An alien corporation doing business in Oregon may be sued there in the federal courts. It is an "inhabitant" to that extent. *Miller v. Eastern, etc. Min. Co.*, 45 Fed. Rep. 345 (1891). The status of a corporation in regard to the jurisdiction of the federal courts is stated in *U. S. v. Southern Pac. R. R.*, 49 Fed. Rep. 297 (1892). A foreign corporation doing business in Ohio and having a managing agent there may be garnished there under the statutes of Ohio. *Rainey v. Maas*, 51 Fed. Rep. 580 (1892). A railroad corporation is a resident of each federal district through which it runs. *East Tennessee, etc. R. R. v. Atlanta, etc. R. R.*, 49 Fed. Rep. 608 (1892). Where an alien corporation appoints a resident agent to accept service, it becomes an "inhabitant," and may be sued in the federal court. *Gilbert v. New Zealand Ins. Co.*, 49 Fed. Rep. 884 (1892). The word "inhabitant," applies to corporations, in respect to statutory jurisdiction of courts. *Gilbert v. New Zealand Ins. Co.*, 49 Fed. Rep. 884 (1892). A corporation is not an "inhabitant" of any state except the one wherein it is incorporated. *Campbell v. Duluth, etc. Ry.*, 50 Fed. Rep. 241 (1892). The place of residence of a corporation is the state wherein it

A consolidated railroad running into two states is a separate corporation in each state, and, being sued in one state, cannot remove the case to the federal court on the ground that it is a citizen of the

is incorporated. So held under the act for the removal of causes. *Miller v. Wheeler, etc. Co.*, 46 Fed. Rep. 882 (1891); *Overman Wheel Co. v. Pope Mfg. Co.*, 46 Fed. Rep. 577 (1891). The decision that a foreign corporation filing a certificate as required by statute is not a non-resident as regards the right to remove cases to the federal courts in *Scott v. Texas, etc. Co.*, 41 Fed. Rep. 225 (1889), was overruled in *Brandon v. Miller*, 118 Fed. Rep. 361 (1902). A corporation is a resident only of the state wherein it is incorporated, as regards the jurisdiction of the United States courts. Although another party defendant is an actual resident in the district where suit is brought, yet the foreign corporation cannot be sued there on that account. *Bensinger, etc. Co. v. National Cash Reg. Co.*, 42 Fed. Rep. 81 (1890). If two corporations sued on a tort are liable severally, one may remove the case, although the other cannot, to the federal court. *Spangler v. Atchison, etc. R. R.*, 42 Fed. Rep. 305 (1890). A foreign corporation defendant may remove a case to the federal court although it has filed a statutory certificate authorizing service on a designated agent. *Amsden v. Norwich, etc. Ins. Soc.* 44 Fed. Rep. 515 (1890). A statute prohibiting a foreign corporation from suing in the state courts unless it has filed a copy of its articles, etc. in the state, if it is doing business in the state, does not prevent such a corporation from bringing suit in the federal courts, although it has not filed its articles, etc. *Bank of British N. A. v. Barling*, 44 Fed. Rep. 641 (1890). A judgment creditor of an insolvent corporation may file a bill in equity in the federal court to subject the property to the payment of the debt, although a suit is pending in the state court to re-

duce the amount of complainant's claim to a less figure. *Coffin v. Chattanooga, etc. Co.*, 44 Fed. Rep. 533 (1891). A suit cannot be brought in the federal court against a corporation except in the district where the company is incorporated. *National Typog. Co. v. New York Typog. Co.*, 44 Fed. Rep. 711 (1890). When a defendant foreign corporation seeks to remove a case to the federal courts it need not aver that it is a non-resident. An averment of its citizenship is insufficient; *Myers v. Murray, etc. Co.*, 43 Fed. Rep. 695 (1890), overruling *Hirschl v. J. I. Case, etc. Co.*, 42 Fed. Rep. 803 (1890). A non-resident corporation may be sued in the federal courts although it has an office and does business in the state. *Henning v. Western U. Tel. Co.*, 43 Fed. Rep. 97 (1890). The fact that the C., B. & Q. R. R. Co., an Illinois corporation, first took a lease of and then purchased the road of the B. & M. R. R. Co. in Iowa, does not make the former company an Iowa corporation. It continues an Illinois corporation. *Conn. v. Chicago, etc. R. R.*, 48 Fed. Rep. 177 (1891).

A railroad corporation of one state purchasing a railroad in another state does not thereby become a resident of the latter state so as to prevent its removing cases to the federal court. *Morgan v. East Tennessee, etc. R. R.*, 48 Fed. Rep. 705 (1883). Although a New York corporation does practically all of its business in Missouri, yet it is a citizen of New York. *Baughman v. National, etc. Co.*, 46 Fed. Rep. 4 (1891). Entering appearance may waive the right to object to the jurisdiction of a federal court. *Blackburn v. Selma, etc. R. R.*, 2 Flipp. 525 (1879); s. c., 3 Fed. Cas. 526. To same effect, *De Sobry v. Nicholson*, 3 Wall. 420 (1865); *Hayden v. Androscoggin*

other state.¹ A corporation incorporated by the United States may, by reason of that fact, bring suits in or remove them to the federal courts, unless the statute provides otherwise.² A Pennsylvania

Mills, 1 Fed. Rep. 93 (1879), holding that it may be sued in federal courts, though its property has been attached, if doing business in the state and process can be served; this decision was questioned in *Boston Electric Co. v. Electric Gas L. Co.*, 23 Fed. Rep. 838 (1885). In this case a Maine corporation had its principal office in Massachusetts, where also a majority of its officers and directors resided. *Held*, that the federal courts of Massachusetts had no jurisdiction over it, though suit was begun by attachment and service upon the corporate officers. *Hatch v. Chicago, etc. R. R.*, 6 Blatchf. 105 (1868); s. c., 11 Fed. Cas. 799, holding that having an office and doing business in another state does not affect its citizenship; *Williams v. Missouri, etc. Ry.*, 3 Dill. 267 (1875); s. c., 29 Fed. Cas. 1377; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149 (1869).

1 See § 910, *infra*. Where a railroad ran through five states and was owned by five separate corporations, one in each state, and then a new corporation was created in one of these states, and all the five conveyed their property to that one, in accordance with an agreement of consolidation contemplating such new corporation and conveyances, the new corporation was held to be a citizen only of the state in which it was first incorporated, and not a citizen of even one of the other states which permitted consolidation upon such terms as might be agreed upon. The court said: "The courts have recognized at least three distinct forms of railroad consolidation: (1) an agreement of consolidation between two companies, and the continuance in existence of both corporations; (2) the merger of one corporation into another, and the continuance in existence of one of the two, and the extinction of the other;

(3) the creation of the consolidated corporation as a new corporation, and the extinction at the same time of the constituent companies as separate entities." *Westheider v. Wabash R. R.*, 115 Fed. Rep. 840 (1902). This same consolidation, however, came before the federal court in Missouri, and it was there held that the consolidation of four railroad corporations of four different states creates a consolidated corporation, which is a citizen of each of the four states, and hence it cannot remove a suit to the federal court in one of the states on the ground of its being a non-resident. *Winn v. Wabash R. R.*, 118 Fed. Rep. 55 (1902).

2 *Pacific R. R. Removal Cases*, 115 U. S. 2 (1885); *Union Pac. R. R. v. McComb*, 1 Fed. Rep. 799 (1880); *Eby v. Northern Pac. R. R.*, 36 Leg. Int. 164 (1879); *Hughes v. Northern Pac. Ry.*, 18 Fed. Rep. 106 (1883). A case to the contrary is *Myers v. Union Pac. Ry.*, 16 Fed. Rep. 292 (1882). A corporation organized under an act of congress may institute its suits in the United States courts. *U. S. etc. Co. v. Gallegos*, 89 Fed. Rep. 769 (1898). As to national banks, see *Cruikshank v. Fourth Nat. Bank*, 16 Fed. Rep. 888 (1883); *Farmers' Nat. Bank v. McElhinney*, 42 Fed. Rep. 801 (1890); *Farmers', etc. Nat. Bank v. Dearing*, 91 U. S. 29 (1875), followed in *Rhoner v. First Nat. Bank*, 14 Hun, 126 (1878), holding that an attachment cannot be issued against national banks until after final judgment; and overruling *Southwick v. First Nat. Bank*, 7 Hun, 96 (1876), and *Bowen v. First Nat. Bank*, 34 How. Pr. 408 (1867). It has been held that they are so far foreign corporations that they may be required to give security for costs. See *National Park Bank v. Gunst*, 1 Abb. N. Cas. 292 (1876). But they may obtain an attachment on property to the same extent that a

"partnership association" organized under the statutes of Pennsylvania is not a corporation so far as the jurisdiction of the United States is concerned.¹

domestic corporation may. *Market Nat. Bank v. Pacific Nat. Bank*, 64 How. Pr. 1 (1882). A suit in a state court against the officers of a national bank on the ground that they had violated the national bank act is removable to the United States court. *Bailey v. Mosher*, 95 Fed. Rep. 223 (1899). A company incorporated in a territory cannot thereby remove a case to the United States courts. *Adams Exp. Co. v. Denver, etc. Ry.*, 16 Fed. Rep. 712 (1883). A right to change of venue to the residence of the defendant may enable a corporation defendant to change it to the place where it does its business, though incorporated elsewhere. *Guinn v. Iowa Cent. Ry.*, 14 Fed. Rep. 323 (1882). A District of Columbia insurance company cannot remove cases to a federal court for that cause alone. *Scheffer v. National Life Ins. Co.*, 25 Minn. 534 (1879). National banks are citizens of the state wherein they are located. *National Park Bank v. Nichols*, 4 Biss. 315 (1869); s. c., 17 Fed. Cas. 1228; *Manufacturers' Nat. Bank v. Baack*, 8 Blatchf. 137 (1871); s. c., 16 Fed. Cas. 671; *Davis v. Cook*, 9 Nev. 134 (1874). *Cf. Kennedy v. Gibson*, 8 Wall. 498 (1869); *U. S. Rev. Stat.*, § 640; *Wilson County v. National Bank*, 103 U. S. 770 (1880); *Osborn v. Bank of U. S.* 9 Wheat. 738 (1824); *Cooke v. State Nat. Bank*, 52 N. Y. 96 (1873); *St. Louis Nat. Bank v. Allen*, 5 Fed. Rep. 551 (1881); *First Nat. Bank v. Bohne*, 8 Fed. Rep. 115 (1881); *Third Nat. Bank v. Harrison*, 8 Fed. Rep. 721 (1881); *Union Nat. Bank v. Miller*, 15 Fed. Rep. 703 (1883), holding that the act of July 12, 1882, placed national and other banks, as to their right to sue in the federal courts, on the same footing. *Cf. Acts of Congress*, 1888, ch. 866. A railway corporation created by act of congress "is, in every state and territory of the Union in which it may

lawfully exercise its powers, a domestic institution," and may be sued in the federal courts in any district where it is doing business and has an agent upon whom service can be made. Where a lease is made without statutory authority, the lessor may be served with process as though no lease had been made. Where the statutes of a state prescribe the mode in which service may be made, all corporations subsequently doing business in the state are bound by service so made. *Van Dresser v. Oregon, etc. Nav. Co.*, 48 Fed. Rep. 202 (1891). "The circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim. . . . While the court does not say in terms that, to authorize the removal of a cause from a state to a federal court, it must appear from the plaintiff's complaint that he relies upon some provision of the constitution, laws, or treaties of the United States, it does decide that he must so far rely, or that his claim must so far be predicated, upon some provision of the constitution, law, or treaty of the United States, as would authorize him to bring an original action in the circuit court." *State v. Atchison, etc. Ry.*, 77 Fed. Rep. 339, 341, 343 (1896).

¹ *Great Southern, etc. Co. v. Jones*, 177 U. S. 449 (1900), overruling *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. Rep. 585 (1898).

A company organized under the statutes of Pennsylvania and having mixed characteristics of a partnership and corporation is a corporation so far as removal to the federal court is concerned. *Bushnell v. Park*, 43 Fed. Rep. 209 (1891). As to unincorporated joint-stock companies, see *Chapman v. Barney*, 129 U. S. 677 (1889).

PART V.

BONDS, MORTGAGES, FORECLOSURES, RECEIVERS, AND REORGANIZATIONS.

CHAPTER XLVI.

BONDS, NOTES, ETC., OF A CORPORATION—GUARANTIES AND ACCOM- MODATION PAPER.

- § 760. A corporation may borrow money—Loans in excess of the charter or contract limit—Overissues of bonds.
761. Bills, notes, and acceptances may be made and issued by corporations.
762. Bonds may be issued by corporations—Bonds may be valid although the mortgage securing them is invalid—Bonds to preferred creditors—Reissues.
763. Pledge of bonds by a corporation and enforcement thereof.
764. Forged bonds—Priorities among bonds—Incomplete bonds—References to the mortgage—Variance between bond and mortgage—Purposes of the issue—Certification and registration of bonds.
765. Attachments levied on bonds—Form of bonds—Gold clause—Seal—Cancellation and subrogation—Consolidated bonds.
766. Bonds issued below par for cash, property, or construction work—Dividend of bonds—Bonds, notes, or mortgages given without consideration—Statutory and constitutional prohibitions relative to issues of bonds—Fraudulent issues of bonds—*Bona fide* purchasers of bonds issued at less than their par value are protected—Fraudulent issues of bonds to the directors, or through directors who are “dummies” or to construction companies in which the directors are interested.
- § 766a. Who may complain of an issue of bonds at less than par—Stockholders—The state—The corporation itself—Bondholders—Corporate creditors.
- 766b. Usury as affecting bonds issued at less than par.
- 766c. Bonds delivered or to be delivered to contractors for construction work—Failure of the contractor to complete the work—Remedy of contractor for failure of corporation to deliver—Right of adverse claimants to particular bonds or stock.
767. Negotiable character of bonds of a corporation payable to order, bearer, or holder—Lost or stolen bonds—Registered bonds.
768. The negotiability of the bonds extends also to the mortgage.
769. Miscellaneous features of bonds—Issue in payment for the property of another corporation—Consolidations—Bondholders’ suit—Bonds exchangeable into stock.
770. Suits at law on bonds—Demand of payment—Form of action—Statute of limitations.
771. Coupons and interest on bonds—Negotiability of coupons—Participation in foreclosure—Interest on overdue bonds and coupons—Purchase of coupons when presented for payment.
772. Suit to collect coupons—Execution cannot be levied upon the mortgaged property—Demand of payment—Statute of limitations.

§ 773. Income bonds.

774. Accommodation paper by a corporation—*Bona fide* holders.

775. Guaranty by one corporation of the bonds or dividends of another corporation—Guaranty by an individual.

776. Debentures.

777. Debenture stock secured by an American mortgage.

778. Mode of authorizing drafting, signing, sealing, and acknowledging corporate obligations to pay money—Liability of the corporation and the corporate officers on irregularly executed instruments—Charter provisions as to authorizing the instruments.

§ 760. *A corporation may borrow money—Loans in excess of the charter or contract limit—Overissues of bonds.*—The power of a corporation to borrow money is implied, and exists without being expressly granted by charter or statute.¹ A bank may borrow money,

1 *Ingraham v. National Salt Co.*, 130 Fed. Rep. 676 (1904); *Eastman v. Parkinson*, 113 N. W. Rep. 649 (Wis. 1907); *Peoria Star Co. v. Cutright*, 115 Ill. App. Rep. 492 (1904); *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884); *Philadelphia, etc. R. R. v. Stichter*, 21 Am. L. Reg. 713 (Pa. 1882); s. c., 11 W. N. Cas. 325; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844); *Beers v. Phoenix Glass Co.*, 14 Barb. 358 (1852); *Mead v. Keeler*, 24 Barb. 20 (1857); *Partridge v. Badger*, 25 Barb. 146 (1857); *Clark v. Titcomb*, 42 Barb. 122 (1864); *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *Barnes v. Ontario Bank*, 19 N. Y. 152 (1859); *Smith v. Law*, 21 N. Y. 296 (1860); *Nelson v. Eaton*, 26 N. Y. 410 (1863); *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 177 (1879); *Coats v. Donnell*, 94 N. Y. 168 (1883); *Oxford Iron Co. v. Spradley*, 46 Ala. 98 (1871); *Alabama, etc. Ins. Co. v. Central, etc. Assoc.*, 54 Ala. 73 (1875); *Taylor v. Agricultural, etc. Assoc.*, 68 Ala. 229 (1880); *Hays v. Galion Gas, etc. Co.*, 29 Ohio St. 330, 340 (1876); *Hope Ins. Co. v. Perkins*, 38 N. Y. 404 (1868). A corporation may borrow money and give notes therefor. *Grommes v. Sullivan*, 81 Fed. Rep. 45 (1897); *Magee v. Mokelumne Hill, etc. Co.*, 5 Cal. 258 (1855), where a statute prohibiting corporations from issuing bills, notes, etc., "upon loans or for circulation as money," was held to be

intended to prevent their loaning their credit, and not to restrict their right to borrow for business purposes; followed in *Smith v. Eureka Flour Mills Co.*, 6 Cal. 1 (1856); *Santa Cruz R. R. v. Spreckles*, 65 Cal. 193 (1884), holding that the loan may be obtained from a director; *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248 (1873), *Commercial Bank, etc. v. Newport Mfg. Co.*, 1 B. Mon. 13 (1840); *Lucas v. Pitney*, 27 N. J. L. 221 (1858); *Hackettstown v. Swackhamer*, 37 N. J. L. 191 (1874); *Thompson v. Lambert*, 44 Iowa, 239 (1876); *Larwell v. Hanover Sav. Fund Soc.*, 40 Ohio St. 274 (1883); *Bradley v. Ballard*, 55 Ill. 413 (1870); *Fay v. Noble*, 66 Mass. 1 (1853); *Craven County Com'rs v. Atlantic, etc. R. R.*, 77 N. C. 289 (1877); *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256 (1825); *Moss v. Harpath Academy*, 7 Heisk. (Tenn.) 283 (1872); *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515 (1845); *Rockwell v. Elkhorn Bank*, 13 Wis. 653 (1861); *Furniss v. Gilchrist*, 1 Sandf. 53 (1847); *Holbrook v. Basset*, 5 Bosw. 147 (1859); *Life & F. Ins. Co. v. Mechanics' F. Ins. Co.*, 7 Wend. 31 (1831); *Australian, etc. Co. v. Mounsey*, 4 K. & J. 733 (1858); *Re National, etc. Co.*, 1 Dr. & Sm. 55 (1860); *Ulster Ry. v. Banbridge, etc. Ry.*, Ir. Rep. 2 Eq. 190 (1868); *Bank of Australasia v. Breillat*, 6 Moore, P. C. 152 (1847); *Laing v. Reed*, L. R. 5

but it is so unusual that the loaner must inquire into the authority of the officer or agent acting for the bank which borrows the money. Special authority or ratification by the board of directors must be shown.¹ However, although the officers of a bank have no power to borrow money for the bank without special authority from the board of directors, yet if for a long time they have been accustomed to do so, this is the same as though express authority had been given.² And it recently has been held that "it is now well settled that the executive officers of national banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use."³

Even if the corporation has no implied power to borrow, it will be compelled to repay the money actually received by it.⁴

It is legal for the company to borrow money of its directors. The

Ch. 4 (1869); *Re Cork, etc. Ry.*, L. R. 4 Ch. 748 (1869); *MacLae v. Sutherland*, 3 El. & Bl. 1, 39 (1854); *Gibbs's Case*, L. R. 10 Eq. 312 (1870)—an insurance company. See also *Hawtayne v. Bourne*, 7 M. & W. 595 (1841); *Lowndes v. Garnett, etc. Co.*, 33 L. J. (Ch.) 418 (1864); *Ex parte Pitman*, L. R. 12 Ch. D. 707 (1879); *Hill's Case*, L. R. 9 Eq. 605, 618 (1870); *Burmester v. Norris*, 6 Ex. 796 (1851), holding that a mining company cannot borrow. Under a power to borrow on bonds or debenture, the company may borrow without issuing bonds or debentures. *Commercial Bank v. Great Western Ry.*, 3 Moore's P. C. Rep. (N. S.) 295 (1865). A canoe club may borrow money to erect a building. *Bradbury v. Boston Canoe Club*, 153 Mass. 77 (1891). A building association has power to borrow money and give security for it. *North, etc. Assoc. v. First Nat. Bank*, 79 Wis. 31 (1891). A trading corporation has power to borrow money and mortgage its property and pay a bonus. *Farrell v. Carribou Gold, etc. Co.*, 30 Nova Scotia, 199 (1897).

¹ *Western Nat. Bank v. Armstrong*, 152 U. S. 346 (1893).

² *Armstrong v. Chemical Nat. Bank*, 83 Fed. Rep. 556 (1897); *aff'd*, 176 U. S. 618 (1900).

³ *Cherry v. City Nat. Bank*, 144 Fed. Rep. 587 (1906).

⁴ *Manville v. Belden Min. Co.*, 17 Fed. Rep. 425 (1883); *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884); *Union, etc. Co. v. Rocky Mountain Nat. Bank*, 2 Colo. 248 (1873); *Humphrey v. Patrons' Mercantile Assoc.*, 50 Iowa, 607 (1879); *Larwell v. Hanover, etc. Assoc.*, 40 Ohio St. 274 (1883); *Re Magdalena Steam Nav. Co.*, Johns. (Eng. Ch.) 690 (1860); *Bradley v. Ballard*, 55 Ill. 413, 417 (1870); *Darst v. Gale*, 83 Ill. 136, 141 (1876); *Hays v. Galion Gas, etc. Co.*, 29 Ohio St. 330, 340 (1876); *Hoare's Case*, 30 Beav. 225 (1861); *Troup's Case*, 29 Beav. 353 (1860). Compare *White v. Carmarthen, etc. Ry.*, 1 Hem. & M. 786 (1863). *Contra*, *Burmester v. Norris*, 6 Exch. 796 (1851). Where a statute prohibits savings banks from borrowing money, it cannot be avoided by taking a certificate of deposit for such money. Such certificate of deposit cannot be enforced. *State v. Corning, etc. Bank*, 113 N. W. Rep. 500 (Iowa, 1907). Where money is borrowed by the president for the benefit of the company, the company is liable, although he borrowed in his individual name. *Watson v. Proximity Mfg. Co.*, 61 S. E. Rep. 273 (N. C. 1908).

fiduciary relation of the directors toward the stockholders does not prevent such a loan.¹ A street railroad company may borrow money and give a promissory note for the same, and a *bona fide* holder is protected even though it was given to a director in payment for services in procuring the franchise.² Where a corporation has power to borrow money, neither it nor its stockholders can evade payment of a loan by the defense that the money was used for an unauthorized business, and that the party loaning the money knew that fact.³ But a note or bill of exchange issued or accepted by a corporation for purposes which the corporation is not authorized to engage in cannot be enforced by the payee or by an indorsee taking the same with notice.⁴

¹ See § 692, *supra*.

² *Kneeland v. Braintree Street Ry.*, 167 Mass. 161 (1896).

³ *Bradley v. Ballard*, 55 Ill. 413 (1870). Neither the corporation nor stockholders can repudiate a loan made by the corporation, even though it was in excess of its authorized indebtedness, and even though the money was used for an *ultra vires* purpose. *Traer v. Lucas, etc. Co.*, 124 Iowa, 107 (1904). A person who loans money to a company is not affected by the fact that the company uses the money for *ultra vires* purposes, he not knowing thereof. *Re David Payne & Co., Ltd.*, [1904] 2 Ch. 608, overruling *Re Durham, etc. Soc.*, 25 L. T. Rep. 83. A holder of notes of the corporation may collect them even though they were issued to purchase stock in violation of an anti-trust statute, he having no notice of such purpose, although he knew of the purchase of the stock. *National Salt Co. v. Ingraham*, 143 Fed. Rep. 805 (1906). A lender of money to a corporation is not bound to see that it is applied to corporate purposes. *Watson v. Proximity Mfg. Co.*, 61 S. E. Rep. 273 (N. C. 1908). A preference for money borrowed to purchase stock *ultra vires* is illegal, the lender knowing that the money was to be so used. *Adams, etc. Co. v. Deyette*, 5 S. D. 418 (1894); s. c., 8 S. D. 119. Even though a person loaning money on the bonds and mortgage of a corporation knows that the money

is to be used for an *ultra vires* purpose, yet he may enforce the same. *Wright v. Hughes*, 119 Ind. 324 (1889); *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165 (1883), holding that, if a bank borrows money, the fact that its officers misappropriated the money cannot defeat the right to recover it from the bank. A person loaning money to a corporation on its note may collect it, even though he knew the money was to be used for an *ultra vires* purpose, provided he did not take part in such use and such use was not made a condition of the loan. *Marion, etc. Co. v. Crescent, etc. Co.*, 27 Ind. App. 451 (1901). It is no defense to a note that the corporate officer embezzled the proceeds, the lender having no knowledge of that fact. *Reagan v. First Nat. Bank*, 157 Ind. 623 (1902).

⁴ *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116 (1856); *Stark Bank v. U. S. Pottery Co.* 34 Vt. 144 (1861); *Pearce v. Madison, etc. R. R.*, 21 How. 441 (1858), where a note given by a railroad company for the purchase of a steamboat was held void; *Ehrgott v. Bridge Manufactory*, 16 Kan. 486 (1876), where the payee took the note in payment of a third person's debt. Parties taking a corporate bill of exchange in payment of business which they knew the corporation was not authorized to carry on cannot enforce it. *Balfour v. Ernest*, 5 C. B. (N. S.) 601 (1859).

The common law places no limit upon the amount which the corporation may borrow. The amount borrowed may be greater than the capital stock.¹

Although a statute forbids a corporation from borrowing more than a specified amount, yet if the corporation actually does borrow in excess of that amount it cannot escape payment to the lender.² A debt contracted in excess of the statutory limit cannot

¹ *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. 280 (1844).

² *Ossipee, etc. Mfg. Co. v. Canney*, 54 N. H. 295 (1874); *De Camp v. Dobbins*, 29 N. J. Eq. 36 (1878); *Humphrey v. Patrons' Mercantile Assoc.*, 50 Iowa, 607 (1879); *Garrett v. Burlington Plow Co.*, 70 Iowa, 697 (1886); *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291 (1881). A lender of money to a bank is not bound to know that its aggregate loans exceed the amount allowed by its charter. *Citizens' Bank v. Bank, etc.*, 103 S. W. Rep. 249 (Ky. 1907). Municipal bonds issued in excess of a limit fixed by constitutional provision are void. *Bona fide* holders are not protected. *Millerstown v. Frederick*, 114 Pa. St. 435 (1886). The defense of debt in excess of the amount allowed must be pleaded. *German Sav. Inst. v. Jacoby*, 97 Mo. 617 (1889). Where the charter prescribes that the debts shall not exceed one-half of the capital stock, capital stock means the paid-in capital stock and not the capital stock as stated in the charter. *Lehigh, etc. Ry. Co.'s Appeal*, 129 Pa. St. 405 (1889). Although the power of a railroad to borrow be limited, yet preferred stock may be issued, secured by a mortgage, where the power to mortgage has been given, and such preferred stock may be deprived of the power to vote. *Miller v. Ratterman*, 47 Ohio St. 141 (1890). Where by statute corporate debts must not exceed two-thirds of the capital stock unless secured by "real-estate securities," a mortgage on real estate is such "real-estate securities." *First Nat. Bank v. Sioux City, etc. Warehouse Co.*, 69 Fed. Rep. 441

(1895); *aff'd*, 173 U. S. 99. A note for a loan in excess of a statutory limit is valid to at least the extent of the limit. *Moon, etc. Co. v. Waxahachie, etc. Co.*, 13 Tex. Civ. App. 103 (1896); *aff'd*, 89 Tex. 511 (1896). A bank cannot collect from a corporation money loaned in excess of the amount limited by the articles of such corporation. *First Nat. Bank v. Kiefer Milling Co.*, 95 Ky. 97 (1893). Where the charter prohibits the directors making a contract for over \$250 unless a stockholders' meeting authorizes the same, a contract for \$2,000 without such authorization is void. *Georgetown, etc. Co. v. Central, etc. Co.*, 34 S. W. Rep. 435 (Ky. 1896). Where the charter limits the indebtedness to \$1,000, a person loaning it \$1,500 can recover only \$1,000. *Kraniger v. People's Bldg. Soc.*, 60 Minn. 94 (1895). A defense that the debts exceed the charter limit is not good as against claims existing before the charter limit was reached, and is not good except as to the excess over the charter limit. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249 (1896). A by-law prohibiting directors from contracting debts beyond a certain amount does not invalidate a loan by the directors to a corporation in excess of that amount, where the stockholders knew of the loan and did not object thereto, and allowed the money to be used on the plant of the company. The corporation being a private one, no one else is interested. The corporation cannot repudiate the debt. *Bensiek v. Thomas*, 66 Fed. Rep. 104 (1895). See also *Flint v. Boston, etc. Co.*, 183 Mass. 114 (1903).

be attacked by the corporation or its stockholders or subsequent creditors.¹ Thus, a national bank is liable on a debt contracted by it, even though its entire indebtedness exceeds the amount allowed by act of congress.² Although a gas company has no power to issue bonds in excess of its capital stock, yet this does not restrict its right to issue notes.³ A *bona fide* purchaser is protected, even though there was an excess of power.⁴ The attorney-general may enjoin a corporation from incurring debts in excess of a limit fixed by the charter.⁵ A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do not know of it.⁶

Bonds secured by mortgage and issued by a corporation are valid and enforceable although they exceed in amount the limit prescribed by charter or statute.⁷ Where one street railroad buys out

¹ *Beach v. Wakefield*, 107 Iowa, 567 (1898).

² *Weber v. Spokane Nat. Bank*, 64 Fed. Rep. 208 (1894), rev'g 50 Fed. Rep. 735. Neither the corporation nor stockholders can repudiate a loan made by the corporation, even though it was in excess of its authorized indebtedness, and even though the money was used for an *ultra vires* purpose. *Traer v. Lucas, etc. Co.*, 124 Iowa, 107 (1904). The payment of a debt incurred in excess of the amount authorized by statute cannot be enjoined by a stockholder where the corporation has received and retained the benefits. *Rankin v. Southwestern, etc. Co.*, 12 N. Mex. 49 (1903).

³ Quoted and approved in *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588 (1904). In this case it was held that the fact that the charter of a gas company provides that it might issue bonds for \$500,000, and secure them by mortgage, did not prevent the company borrowing additional sums of money, nor from guaranteeing bonds in other companies which it had lawfully acquired.

⁴ *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505 (1893).

⁵ *Lehigh, etc. Ry. Co.'s Appeal*, 129 Pa. St. 405 (1889). Cf. § 635, *supra*. Concerning the constitutional and statutory provision limiting corporate

debts in Pennsylvania, see *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 110 (1889).

⁶ *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). Even though money is not borrowed in the manner required by the by-laws, yet, if the company uses the money, it must repay the same. *St. Joseph's, etc. Soc. v. St. Hedwig's Church*, 4 Pen. (Del.) 141 (1902). See also § 725, *supra*.

⁷ A mortgage securing a debt in excess of the amount allowed by statute is nevertheless binding on the corporation and its subsequent creditors. *Sioux City, etc. Warehouse Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899). In England the rule is *contra*. *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868), where debentures issued in excess of authority were held void; *Wenlock v. River Dee Co.*, L. R. 10 App. Cas. 354 (1885); *Re Pooley Hall Colliery Co.*, 21 L. T. (N. S.) 690 (1869), where similar debentures were said to be "not voidable, but absolutely void." The holder was allowed to come in as a general creditor. And see two cases turning upon the construction of "rules" or by-laws. *Davis's Case*, L. R. 12 Eq. 516 (1871), and *Wilson's Case*, L. R. 12 Eq. 521 (1871). But see *Gordon v. Sea, etc. Ins. Co.*, 1 H. & N. 599 (1857). Subsequent creditors can-

another and assumes the bonds of the latter, it cannot question such bonds on the ground that they exceed the capital stock, in violation

not complain that a corporation has incurred debts in excess of the amount allowed by its charter. The state alone can complain. *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898). A mortgage to secure bonds in excess of the amount allowed in the charter cannot be repudiated by the mortgagor, and not even the *cestui que trust* of the mortgagor can complain, if he has participated in the same. *Union T. Co., etc. v. Mercantile, etc. Co.*, 189 Pa. St. 263 (1899). Neither the mortgagor nor creditors of the mortgagor can attack its mortgage on the ground that it was for more than one-half the cost of the company's property, in violation of the statute. *International, etc. Co. v. Davis, etc. Co.*, 70 N. H. 118 (1900). Debts in excess of the charter amount are void as to subsequent creditors without notice, and the recording of a mortgage securing the same is not such notice. *Bell, etc. Co. v. Kentucky, etc. Co.*, 106 Ky. 7 (1899). Bonds are valid although the amount exceeds twice the capital stock of the company, the limit fixed by statute. *Fidelity, etc. Co. v. West Pennsylvania, etc. R. R.*, 138 Pa. St. 494 (1891). *Cf. Pittsburg, etc. R. R.'s Appeal*, 4 Atl. Rep. 385 (Pa. 1886). A mortgage is enforceable although it is given to secure a debt contracted in excess of the amount limited by the charter of the corporation. *Allis v. Jones*, 45 Fed. Rep. 148 (1891), holding also that a subsequent creditor whose claim also is open to his objection cannot have the mortgage set aside. Bonds in excess of the charter limit may be valid. *Des Moines Gas Co. v. West*, 50 Iowa, 16 (1878); *Warfield v. Marshall, etc. Co.*, 72 Iowa, 666 (1887). A corporate mortgage is valid though it secures a sum in excess of the amount allowed by statute. *Warfield v. Marshall, etc. Co.*, 72 Iowa, 666 (1887). Although

the statutes authorize a mortgage for an amount not exceeding two-thirds of the capital paid in, yet if a mortgage is given for an amount in excess of the limit, but not in excess of two-thirds of the authorized capital, *bona fide* holders of the bonds may enforce the mortgage. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). A contractor who takes part in the issue of bonds in excess of the capital stock, an act prohibited by statute, is estopped from questioning the validity of the mortgage securing the bonds. *Reed's Appeal*, 122 Pa. St. 565 (1888). Although bonds issued by the company to raise money are unauthorized and illegal by statute, yet the holders may collect from the company the amount received by the company on the bonds. *Re Cork, etc. Ry.* L. R. 4 Ch. 748 (1869). But see *Davis's Case*, L. R. 12 Eq. 516 (1871). A mortgage is not void although the bonds are in excess of the statutory limit. *New Britain Nat. Bank v. A. B. Cleveland Co.*, 91 Hun, 447 (1895); *aff'd*, 158 N. Y. 722 (1899). A mortgage under the New York act cannot exceed the capital stock or two-thirds of the value of the property at the time of the execution of the mortgage, even though a part of the bonds are not to be issued until subsequently. *Flynn v. Coney, etc. R. R.*, 26 N. Y. App. Div. 416 (1898). *Cf. Baker v. Guarantee, etc. Co.*, 31 Atl. Rep. 174 (N. J. 1895). Bonds in excess of the charter limit of two of the three states in which the company is incorporated are nevertheless valid in the third. *Atwood v. Shenandoah, etc. R. R.*, 85 Va. 966 (1889). In *Commonwealth v. Smith*, 92 Mass. 448 (1865), it is held that mortgage bonds issued in excess of the charter limit are void. When the constitution of a state forbids "county, political, or other municipal corporations" within the state to "become in-

of the statute.¹ It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years.² Even though bonds are issued in violation of law, which first requires the capital stock to be paid up, yet the corporation must pay back what it received for the bonds and must pay the full par value to *bona fide* holders, but after proof of illegality of issue no one is presumed to be a *bona fide* purchaser.³

A mortgage usually does and should specify how many bonds it is intended to secure.⁴ Where there is an overissue of bonds by reason of the issue of a greater amount of bonds than the mortgage recites and secures, great difficulty is found in determining whether all of the bonds participate in the benefit of the mortgage security. The rule is that all *bona fide* holders participate in the security even though this includes some or all of the overissue, where it is im-

debted in any manner" beyond a named percentage "on the value of the taxable property within such county or corporation," negotiable bonds issued by such corporations in excess of such limit are invalid without regard to any recitals which they contain. *Nesbit v. Riverside Independent District*, 144 U. S. 610 (1892). Where the power to mortgage does not exist, except it be expressly given by statute, as in the case of railroads, a mortgage in excess of the statutory authorization is void. *Commonwealth v. Smith*, 92 Mass. 448 (1865). An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount. If the bonds are not issued, but the land in payment therefor is deeded to the company, the party has a lien on the land, but must demand the bonds before suing. *Cordova Coal Co. v. Long*, 91 Ala. 538 (1891).

¹ Such bonds are not void. *Smith v. Ferries, etc. Ry.*, 51 Pac. Rep. 710 (Cal. 1897).

² *Farmers' L. & T. Co. v. Toledo, A. A. etc. Ry.*, 67 Fed. Rep. 49 (1895). Even though a corporation cannot give a mortgage for more than one-

half of its capital stock, the validity of the mortgage cannot be questioned on the ground that the capital stock had been irregularly increased. *First National Bank v. Wyoming, etc. Co.*, 136 Fed. Rep. 466 (1905). Where the stockholders formally increase the capital stock and certify that it has been increased and issue mortgage bonds to the full amount of such increased capital stock, under a statute which prohibits the issue of bonds in excess of the capital stock, they will be held to have subscribed *pro rata* to such increased capital stock. *Kreisser v. Ashtabula, etc. Co.*, Ohio Circuits (1903), p. 313. Bonds issued in excess of the charter limit are valid to the extent of the consideration received for them. *Peatman v. Centerville, etc. Co.*, 100 Iowa, 245 (1896).

³ *Shellenberger v. Altoona, etc. R. R.*, 212 Pa. St. 413 (1905).

⁴ In the case of *Flynn v. Coney Island, etc. R. R.*, 26 N. Y. App. Div. 416 (1898), the court in a *dictum* said that in a mortgage, securing bonds, a part of which bonds were to be issued in the future, it is necessary that the mortgage fix a limit on the amount of bonds to be issued, "for otherwise no

possible to tell which are the overissued bonds.¹ As against subsequent mortgages, however, the rule is different.

In England it has been held that where a company had power to borrow, but the power had been already exhausted, and the directors nevertheless raised more money, they were personally liable to repay it.²

bondholder could know the extent or sufficiency of his security." It is of course familiar law that a mortgage running to a single creditor may secure future advances, even though the amount of such future advances is not specified. *Brown v. Kelfer*, 71 N. Y. 610 (1877); *Robinson v. Williams*, 22 N. Y. 380 (1860); *Ackerman v. Hunsicker*, 85 N. Y. 43 (1881). Although the statute requires the articles to state the amount of indebtedness which may be incurred, the articles may fix the amount, with the right to the stockholders to increase it up to the statutory limit. *Thornton v. Balcom*, 85 Iowa, 198 (1892).

¹ Where there are two sets of numbers for two sets of bonds, all secured by the same mortgage, a purchaser is not bound to know of an overissue where the method of numbering is not explained. Hence, where by error \$420,000 of bonds are issued, while the mortgage secures but \$400,000, the extra \$20,000 are secured also by the mortgage as against the company, and also as against income bondholders secured by an unrecorded mortgage; but as against a subsequent recorded third mortgage, the \$20,000 of bonds are unsecured, and the income bondholders take the rights of the third mortgage bondholders to come in ahead of this \$20,000. *Stephens v. Benton*, 1 Duv. (Ky.) 112 (1863). Where a mortgage is given to secure bonds to the amount of \$16,000 per mile of road thereafter built, to be determined on certain certificates to be given by the chief engineer and others, and more than \$16,000 of bonds per mile are issued, all of the bonds share equally in the foreclosure assets, since it is impossible to tell

which are overissued bonds except by the numbers, which are not sufficient proof of the date of issue. *Stanton v. Alabama*, etc. R. R., 2 Woods, 523 (1875); s. c., 22 Fed. Cas. 1070. See also *State v. Cobb*, 64 Ala. 127 (1879), sustaining the validity of the same bonds and enforcing the state's guaranty of them. But neither the court nor the trustees have power to make an overissue of bonds in order to fulfill a corporate contract. *Vose v. Bronson*, 6 Wall. 452 (1867).

² *Weeks v. Property*, L. R. 8 C. P. 427 (1873); *Chapleo v. Brunswick*, etc. Building Soc., L. R. 6 Q. B. D. 696 (1881); *Richardson v. Williamson*, L. R. 6 Q. B. 276 (1871), explained by *Mellish, L. J.*, in *Beattie v. Ebury*, L. R. 7 Ch. 801 (1872). Where a person advanced money to a company on the security of an invalid Lloyd's bond of the company, the directors who issued it were held not to be personally liable to repay the money advanced. *Rashdall v. Ford*, L. R. 2 Eq. 750 (1866). See as to this case, *West London Com. Bank v. Kitson*, L. R. 13 Q. B. D. 363 (1884). Where the directors of a benefit building society had power to borrow if a rule enabling them to do so had been passed, and they borrowed money for the society in the absence of any rule enabling them so to do, it was held that they were personally liable to repay it. *Richardson v. Williamson*, L. R. 6 Q. B. 276 (1871), explained by *Mellish, L. J.*, in *Beattie v. Ebury*, L. R. 7 Ch. App. 801 (1872). See also *West London Commercial Bank v. Kitson*, L. R. 12 Q. B. D. 157 (1883), and L. R. 13 Q. B. D. 360 (1884). Where a company had power to issue debenture stock to a limited extent, and the directors, after

Sometimes the statutes make the directors personally liable for debts of the company contracted in excess of a certain amount.¹

The defense of usury on the part of a corporation is considered elsewhere;² as is also the subject of the power of a corporation to loan money, discount notes, and take a mortgage;³ and the subject of issuing bonds to become due after the charter of the corporation expires.⁴

the power was exhausted, issued more debenture stock, they were held personally liable to the holders of the unauthorized stock. The damages were held to be the value which the stock would have had if it had been authorized. *Firbank v. Humphreys*, L. R. 18 Q. B. D. 54 (1886). Although the directors have agreed to pay for goods in debentures, and although the company is unable to fulfill by reason of all its authorized debentures having already been issued, nevertheless the directors are not personally liable to the vendor to make good the failure to deliver the debentures. *Elkington v. Hürter*, [1892] 2 Ch. 452. Where a person bought new preference stock of a railway company which both he and the directors *bona fide* believed they had power to issue, but which in truth they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law. *Eaglesfield v. Londonderry*, L. R. 4 Ch. D. 693 (1876); *aff'd*, (H. L.) 26 W. R. 540. See also § 682, *supra*.

1 Where the statutes provide that directors are liable for an excess of indebtedness, this liability has been held to be a general one, inuring to the benefit of all creditors upon bill filed and not for the benefit of individual creditors. *Hornor v. Henning*, 93 U. S. 228 (1876). *Cf.* *Rossiter v. Rossiter*, 8 Wend. 494 (1832); *Palmer v. Stephens*, 1 Denio, 471 (1845). See also ch. XII, *supra*, and § 682, *supra*. A statute rendering directors liable for debts in excess of the capital stock does not prohibit the incurring of such debts. In Massachusetts this statutory liability does not apply to past debts which have been reduced to

less than the capital stock at the time suit is commenced. *Flint v. Boston, etc. Co.*, 183 Mass. 114 (1903). The provision making the directors liable for corporate debts in excess of the capital stock does not relieve the corporation from liability for such excess nor invalidate the debt. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892). Under the Illinois statute rendering directors liable for debts in excess of the capital stock, if they assent thereto, directors who do not know of such excess until after it has been contracted are not liable, even though they allow one director to transact all the business. *Lewis v. Montgomery*, 145 Ill. 30 (1893). Where the directors incur debts in excess of the amount allowed by the charter, debts due them are postponed until the other debts are paid, and the directors are legally guilty of fraud as to creditors who did not know of the excessive indebtedness, and hence are personally liable to such creditors. *Guenther v. Basket, etc. Co.*, 107 Ky. 44 (1899). If directors give their personal notes for corporate debts contracted in excess of the charter limit, they cannot sue the stockholders for contribution. *Heald v. Owen*, 79 Iowa, 23 (1890). Where the statute renders the directors liable for money received in excess of a certain limit, they are liable even though by reason of the fraud of the secretary they did not know that the excessive borrowing was being done. *Cross v. Fisher*, L. R. [1892] 1 Q. B. 467.

2 See § 766b, *infra*.

3 See § 690, *supra*.

4 See § 642, *supra*.

§ 761. *Bills, notes, and acceptances may be made and issued by corporations.*—A private corporation may make and issue a promissory note.¹

A note given under the seal of the corporation is not necessarily a sealed instrument, inasmuch as the seal is the old mode of signature to an instrument by a corporation. Such a note is not a sealed instrument in its effect on the negotiability of the instrument, nor on the remedy to enforce it, nor on the statute of limitations.² There are cases, however, to the contrary.³ A corporation

1 Moss v. Averell, 10 N. Y. 449, 457 (1853); Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Clark v. Farmers', etc. Mfg. Co., 15 Wend. 256 (1836); Mead v. Keeler, 24 Barb. 20 (1857); Kent v. Quicksilver Min. Co., 78 N. Y. 159, 177 (1879); Mott v. Hicks, 1 Cow. 513 (1823); Attorney-General v. Life, etc. Ins. Co., 9 Paige, 470 (1842); Moss v. Oakley, 2 Hill, 265 (1842); Smith v. Law, 21 N. Y. 296 (1860); Lucas v. Pitney, 27 N. J. L. 221 (1858); Richmond, etc. R. R. v. Snead, 19 Gratt. (Va.) 354 (1869), a due-bill; Rockwell v. Elkhorn Bank, 13 Wis. 653 (1861); Union Bank v. Jacobs, 6 Humph. (Tenn.) 515 (1845); Straus v. Eagle Ins. Co., 5 Ohio St. 59 (1855); Curtis v. Leavitt, 15 N. Y. 9 (1857); Oxford Iron Co. v. Spradley, 46 Ala. 98 (1871); Smith v. Eureka Flour Mills Co., 6 Cal. 1 (1856); *Ex parte* Estabrook, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794; Barnes v. Ontario Bank, 19 N. Y. 152 (1859); Mumford v. American, etc. Co., 4 N. Y. 463 (1851); McMasters v. Reed, 1 Grant Cas. (Pa.) 36 (1854), holding that they may also issue bonds; Pitman v. Kintner, 5 Blackf. (Ind.) 250 (1839); Commercial Bank v. Newport Mfg. Co., 1 B. Mon. (Ky.) 13 (1840); Leavitt v. Blatchford, 17 N. Y. 521 (1858);

Magee v. Mokelumne Hill, etc. Co., 5 Cal. 258 (1855); Hamilton v. New-castle, etc. R. R., 9 Ind. 359 (1857); Randolph, Com. Paper, §§ 327-335; Millard v. St. Francis, etc. Academy, 8 Bradw. (Ill.) 341 (1880), where an educational institution borrowed money and gave a note therefor. A corporation has an implied authority to issue a note. Reade v. Pacific, etc. Assoc., 40 Or. 60 (1901). A corporation may make a promissory note. Barker v. Mechanics', etc. Ins. Co., 3 Wend. 94 (1829). Corporations may issue notes and bills of exchange "where the nature and character of their business warrants it." *Re* General Estates Co., L. R. 3 Ch. 758 (1868). A corporation organized without business powers and without capital has no inherent power to issue a promissory note. Scott v. Bankers', etc., 73 Kan. 575 (1906).

2 The note of a corporation is negotiable, even though the corporate seal is attached thereto. Chase Nat. Bank v. Faurot, 149 N. Y. 532 (1896); St. James's Parish v. Newburyport, etc. R. R., 141 Mass. 500 (1886). An instrument in the form of a promissory note does not become an instrument under seal by having the corporate seal affixed. The corporate seal is the cor-

3 Clark v. Farmers', etc. Co., 15 Wend. 256 (1836), holding that such a note is not negotiable so as to authorize a suit by an indorsee in his own name. The note may be sued upon as a sealed instrument. St. James's Parish v. Newburyport, etc. R.

R., 141 Mass. 500 (1886). An instrument in form a note, but signed by the corporate seal, must be sued on as a sealed instrument. Benoist v. Carondelet, 8 Mo. 250 (1843). See, also, concerning this subject, §§ 767, 770, *infra*.

may draw or accept a bill of exchange for the purposes of its business.¹

A corporation cannot set up the defense of *ultra vires* to a note where it has received the property for which the note was given.² Even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the note are used to take it up, the

porate mode of signing. *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). The seal of a corporation stamped on its promissory note does not destroy the negotiability of the note. The seal is the proper signature of the corporation. *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). It is not necessary that the corporate seal be attached. *Mott v. Hicks*, 1 Cow. 513 (1823); *Hamilton v. Newcastle*, etc. R. R., 9 Ind. 359 (1857). See also *Buckley v. Briggs*, 30 Mo. 452 (1860); also §§ 721, 722, *supra*. The promissory note of a corporation, signed by its president and treasurer as such, is negotiable, even though the seal of the corporation is attached, there being no evidence that it was the intention that the instrument should be under seal, and no words in the note stating that it was to be under seal, and no evidence that the seal was the seal of the corporation, or that it was affixed by authority. *Weeks v. Esler*, 68 Hun, 518 (1893). In this case on appeal, 143 N. Y. 374 (1894), the court doubted whether a corporate seal upon a promissory note could affect its negotiability, and held that, where there was no evidence that the seal was affixed by authority, the negotiability was certainly not affected. The note of a corporation is a note and not a bond, although the corporate seal is affixed thereto. *Landauer v. Sioux*, etc. Co., 10 S. Dak. 205 (1897). In the case of *St. Joseph's*, etc. Soc. v. *St. Hedwig's Church*, etc. 3 Pen. (Del.) 229 (1901), the court seems to have held that a note was insufficient because it did not contain the seal of the corporation.

Olcott v. Tioga R. R., 40 Barb. 179 (1862); s. c., *aff'd*, 27 N. Y. 546 (1863); *Safford v. Wyckoff*, 4 Hill, 442 (1842), holding that a negotiable bill irregularly issued will bind the corporation in favor of a *bona fide* indorsee. For instances of accepting bills, see *Munn v. Commission Co.*, 15 Johns. 44 (1818); *Partridge v. Badger*, 25 Barb. 146 (1857); *Prairie Lodge v. Smith*, 58 Miss. 301 (1880), where the corporation accepted an order drawn by its contractor; *City Bank of Columbus v. Beach*, 1 Blatchf. 425 (1849); s. c., 5 Fed. Cas. 739. In England it is held that a bill of exchange cannot be accepted by a mining company unless proof is given that it is necessary. *Dickinson v. Valpy*, 10 B. & C. 128 (1829). Nor by a railroad. *Bateman v. Mid-Wales Ry.*, L. R. 1 C. P. 499 (1866). Nor a salt company. *Bult v. Morrell*, 12 Ad. & E. 745 (1840); *Broughton v. Manchester*, etc. Works, 3 B. & Ald. 1 (1819). Nor a salvage company. *Thompson v. Universal*, etc. Co., 1 Exch. 694 (1848) (a promissory note case). Nor a cemetery. *Steele v. Harmer*, 14 M. & W. 831 (1845). But the right may exist if specified in the articles of incorporation. *Re Peruvian Rys.*, L. R. 2 Ch. App. 617 (1867). Directors who had accepted bills on behalf of a company, which had no power under its private acts of parliament to accept bills, were held liable to the holders, who had no notice in fact that the company was not empowered to accept bills. *West London Com. Bank v. Kitson*, L. R. 12 Q. B. D. 157 (1883), and L. R. 13 Q. B. D. 360 (1884).

² *Dewey v. Toledo*, etc. Ry., 91 Mich.

¹ For instances of making bills, see 351 (1892). See also ch. XL, *supra*.

money cannot be recovered back.¹ The indorsers of a corporate note cannot question the power of the corporation to make the note.²

A *bona fide* purchaser of a corporate note is protected as he would be if the maker were an individual,³ excepting where he takes the

¹ McClure v. Trask, 161 N. Y. 82 (1899).

² Glidden v. Chamberlain, 167 Mass. 486 (1897). An indorser of a corporate note cannot set up that such note is *ultra vires*. Donohoe v. Meeker, 35 N. Y. App. Div. 43 (1898).

³ Bissell v. Michigan, etc. R. R. Cos., 22 N. Y. 258, 289 (1860); Daniel, Neg. Inst., §§ 1502-1504; Stoney v. American, etc. Ins. Co., 11 Paige, 635 (1845). See Attorney-General v. Life, etc. Ins. Co., 9 Paige, 470 (1842), holding that the burden of proof is on the holder; Genesee Sav. Bank v. Michigan Barge Co., 52 Mich. 438 (1884). A *bona fide* purchaser of a corporate note is protected, even though its purpose was *ultra vires*. Stouffer v. Smith, etc. Co., 45 S. Rep. 621 (Ala. 1908). A *bona fide* purchaser of a promissory note executed by the officers of a private trading corporation is protected in assuming that the officers have not exceeded their authority in issuing the note. National, etc. Co. v. Rockland Co., 94 Fed. Rep. 335 (1899). Although an agent duly authorized by the corporation to make notes for it issues its notes for accommodation, yet a *bona fide* holder cannot hold the agent liable in tort. He should sue the corporation on the notes. Bird v. Daggett, 97 Mass. 494 (1867). See also Monument Nat. Bank v. Globe Works, 101 Mass. 57 (1869); Lafayette Sav. Bank v. St. Louis Stoneware Co., 2 Mo. App. 299 (1876). In these cases the agent indorsed paper for the accommodation of third parties. Madison, etc. R. R. v. Norwich Sav. Soc., 24 Ind. 457 (1865), where an agent represented a railroad company as being the owner of certain bonds, when in fact it was an accommodation guarantor. It was held liable upon the guaranty.

In Merchants' Bank v. State Bank, 10 Wall. 604, 644 (1870), Mr. Justice Swayne said: "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." This remark was quoted with approval in Gano v. Chicago, etc. Ry., 60 Wis. 12 (1884); Claffin v. Farmers', etc. Bank, 25 N. Y. 293 (1862), where, however, the certification of his personal check by the president of a bank was considered to constitute such a suspicious circumstance as should put a purchaser upon his guard, and render the certification invalid even in the hands of a *bona fide* holder for value. See also § 293, *supra*. Ridgway v. Farmers' Bank, 12 Serg. & R. (Pa.) 256 (1825), where a draft fraudulently drawn by a president was enforced against the corporation; Philadelphia, etc. R. R. v. Lewis, 33 Pa. St. 33 (1859), holding that bonds were not void because secured by a mortgage executed without authority; Rowland v. Apothecaries' Co., 47 Conn. 384 (1879), a note of a corporation given by its treasurer for money for his personal use being held valid against the corporation; Mechanics' Banking Assoc. v. New York, etc. Co., 35 N. Y. 505 (1866), accommodation indorsement by president; *Ex parte* Estabrook, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794, a note given by a man-

note from an officer of the corporation in connection with the officer's personal business matters.¹

A corporation has no power to become an accommodation indorser of a note; but where all the stockholders assent thereto and creditors are not injured, the indorsement is sustained.² A corporation may of course draw checks on its bank account.³

The authority of the president or cashier or other officer to issue a note in the name of the corporation is discussed elsewhere.⁴

ager without authority; *Thompson v. Lambert*, 44 Iowa, 239 (1876), misappropriation by officers of money obtained on mortgage; *White v. How*, 3 McLean, 291 (1843); s. c., 29 Fed. Cas. 1019, where the corporate agent improperly issued notes; *Genesee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438 (1884), where the treasurer was authorized to issue notes and did so, but improperly, it was claimed. The rule was stated to be (p. 446) that "where a corporation has, under any circumstances, power to issue negotiable paper, the *bona fide* holder has the right to presume that it was issued under circumstances which gave the requisite authority; and the negotiable paper of a corporation which appears on its face to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder;" *Western, etc. R. R. v. Franklin Bank*, 60 Md. 36 (1882), where a clerk forged certificates of coupons surrendered for funding. Certificates of deposit issued by a bank cashier for the purpose of raising money for the bank's use, though not based on an actual deposit, have been held binding upon the bank when held by *bona fide* purchasers without notice. See § 718, *supra*. In *The Floyd Acceptances*, 7 Wall. 666 (1868), it was held that acceptances of drafts due in the future for army supplies not delivered were void as not being within the authority of the secretary of war. *Barnes v. Ontario Bank*, 19 N. Y. 152 (1859); *Elsworth v. St. Louis, etc. R. R.*, 33 Hun, 7; *aff'd*,

98 N. Y. 553 (1885), where bonds were issued in violation of the charter; *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). See also *Re Land Credit, etc. Co.*, L. R. 4 Ch. 460 (1869); *Beers v. Phoenix Glass Co.*, 14 Barb. 358 (1852), secretary borrowing money without authority. The *bona fide* purchaser of a note indorsed by a corporation may enforce it against the company. *Central Bank v. Empire, etc. Co.*, 26 Barb. 23 (1857); *Bridgeport City Bank v. Empire, etc. Co.*, 30 Barb. 421 (1859). But a purchaser of a bill of exchange before it is accepted by the company is not such a *bona fide* purchaser. *Farmers', etc. Bank v. Empire, etc. Co.*, 5 Bosw. 275 (1859).

¹ Quoted and approved in *In re Troy, etc. Co.*, 136 Fed. Rep. 420, 433 (1905); *aff'd* 142 Fed. Rep. 1038. See also § 293, *supra*.

² See § 774, *infra*.

³ *Waterlow v. Sharp*, L. R. 8 Eq. 501 (1869); *Re Cefn Cilcen Min. Co.*, L. R. 7 Eq. 88 (1868).

⁴ See §§ 716, etc., *supra*. In New York it is the rule that a business corporation is not liable on commercial paper issued in its name, unless it is shown not only that it was issued by the corporate officers, but that it was authorized by a resolution of the board of directors, or by the by-laws, or by a course of dealing by which the corporation held out that the officers were authorized to issue such paper, or by a ratification of the corporation by accepting and retaining the benefits of the paper. *Miners', etc. Bank v. Ardsley Hall Co.*, 113 N. Y. App. Div. 194 (1906).

Sometimes the charter or a statute forbids a corporation from issuing a note. In such a case the note would be void.¹ The holder, however, may collect from the corporation the money or value advanced for the note.² The power of a corporation to sell and indorse notes received by it in connection with its own business is of course undoubted. It is a part of the every-day business of most corporations.³

§ 762. *Bonds may be issued by corporations—Bonds may be valid although the mortgage securing them is invalid—Bonds to preferred creditors—Re-issues.*—A corporation has inherent power to issue bonds for the payment of money, and no express power is necessary to authorize the issue.⁴ A corporation has no power to

¹ *Leavitt v. Palmer*, 3 N. Y. 19 (1849); *Root v. Wallace*, 4 McLean, C. C. 8 (1845); s. c., 20 Fed. Cas. 1167; *Davis v. River Raisin Bank*, 4 McLean, C. C. 387 (1848); s. c., 7 Fed. Cas. 111; *Attorney-General v. Life, etc. Ins. Co.*, 9 Paige, 470 (1842); *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678 (1824); *Weed v. Snow*, 3 McLean, 265 (1843); s. c., 29 Fed. Cas. 572; *Root v. Godard*, 3 McLean, 102 (1842); s. c., 20 Fed. Cas. 1159; *Hayden v. Davis*, 3 McLean, 276 (1843); s. c., 11 Fed. Cas. 898, where an acceptance and bond given to secure it were held void; *Broughton v. Manchester, etc. Co.*, 3 B. & Ald. 1 (1819), where the bill of exchange contravened the statute giving the Bank of England a monopoly; *Bank of Chillicothe v. Dodge*, 8 Barb. 233 (1850), holding, however, that a foreign corporation innocently holding a draft issued in violation of a statutory provision stands in the same situation as if it had paid money under a mistake of material facts, and may recover the money paid for it. See also *Smead v. Indianapolis, etc. R. R.* 11 Ind. 104 (1858). Certificates of deposit payable to bearer are not within the New York restraining statutes prohibiting the issue of notes for circulation as money. *Mumford v. American, etc. Co.*, 4 N. Y. 463 (1851).

² *Oneida Bank v. Ontario Bank*, 21 N. Y. 490 (1860). *Cf. Attorney-Gen-*

eral v. Life, etc. Ins. Co., 9 Paige, 470 (1842). See also the English cases, *supra*.

³ Quoted and approved in *Fidelity Trust Co. v. Louisville Gas Co.*, 118 Ky. 588 (1904); *Olcott v. Tioga, etc. R. R.*, 27 N. Y. 546 (1863); *Hardy v. Merriweather*, 14 Ind. 203 (1860); *Frye v. Tucker*, 24 Ill. 180 (1860); *Buckley v. Briggs*, 30 Mo. 452 (1860); *Smith v. Johnson*, 3 H. & N. 222 (1858), the last case being that of a bill of exchange.

⁴ *Thatcher v. Consumers', etc. Co.*, 66 Atl. Rep. 934 (N. J. 1907); *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859); *Commonwealth v. Smith*, 92 Mass. 448 (1865). Also many cases *infra*. They may be issued to carry out a reorganization scheme. *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884), and 120 U. S. 287 (1887). A railroad company has inherent power to issue bonds. *Craven County Com'rs v. Atlantic, etc. R. R.*, 77 N. C. 289 (1877); *Miller v. New York, etc. R. R.*, 8 Abb. Pr. 431 (1859); *McMasters v. Reed*, 1 Grant, Cas. (Pa.) 36 (1854). A furnace and chemical company may issue first-mortgage bonds, and may sell them, partial payments to be made from time to time. These payments may be enforced. *Davis v. Montgomery, etc. Co.*, 101 Ala. 127 (1890). A subscription for bonds, the amount being payable on call, may be paid at once

issue perpetual bonds under its charter power to borrow money, because borrowing implies repayment at some time, and the granting of perpetual annuities is not borrowing.¹ Bonds, issued as a part of a lottery scheme, are illegal.² A provision in a charter that prop-

and the bonds demanded. *Watjen v. Green*, 48 N. J. Eq. 322 (1891). A railroad corporation may issue bonds without express authority so to do. *Miller v. New York, etc. R. R.*, 8 Abb. Pr. 431 (1859). "There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter or in some other legislative act. A bond is merely an obligation under seal." *Commonwealth v. Smith*, 92 Mass. 448 (1865), holding, however, that in Massachusetts the statute specifying the purposes for which bonds may be issued and regulating their issue prevents a common-law issue of them. Power to mortgage property gives power to borrow money and issue bonds. *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). Where a corporation has power under the statute to execute bonds and mortgages neither a preferred nor common stockholder can prevent it on the theory that the directors may possibly use the bonds for other purposes than those specified in the statute and mortgage. *Thompson v. Erie Ry.*, 42 How. Pr. 68 (1871); s. c., 11 Abb. Pr. (N. S.) 188. Purchase-money bonds given by a cemetery corporation in New York are legal. *Seymour v. Spring Forest Cem. Assoc.*, 19 N. Y. Supp. 94 (1892); s. c., 157 N. Y. 697. Where a land-improvement company causes a street railway to be built and the two companies, having substantially the same stockholders, join in the execution and issue of bonds secured by a mortgage on both their properties, the bonds and mortgage are legal. *Northside Ry. v. Worthing-*

ton, 88 Tex. 562 (1894). In Kentucky a waterworks company has no power to issue negotiable coupon bonds. *Georgetown Water Co. v. Fidelity, etc. Co.*, 117 Ky. 325 (1904). Where three companies join in the execution of debentures creating a lien on their property, each will be required to pay such part as it received, although such debentures are *ultra vires*. *Re Johnston, etc. Co. Ltd.*, [1904] 2 Ch. 234.

¹ *Re Southern, etc. Ry. Co. Ltd.*, [1905] 2 Ch. 78.

² In the case *Attorney General v. Preferred Mercantile Co.*, 187 Mass. 516 (1905), the charter of a corporation was forfeited because its sole business was to sell for cash its contracts to deliver diamonds to the oldest holders of such contracts, the sole source of revenue being the price received for the contracts. The court held that this was not a lottery, but was in violation of the statute prohibiting obligations redeemable in numerical order or in any arbitrary order. A subscription to the bonds of an investment company cannot be enforced where the company never had any assets excepting such subscriptions, and the only way of paying the bonds is by lapses of some of the subscriptions after being partially paid. *German, etc. v. McCulloch*, 89 S. W. Rep. 5 (Ky. 1905). A bonding scheme by which the bonds were to be paid in consecutive order, and hence the time of payment and value depended on their number, is a lottery and is illegal. *Siver v. Guarantee Inv. Co.*, 183 Mo. 41 (1904). In *McLanahan v. Mott Co.*, 73 Hun, 131 (1893), the court declared illegal a proposed issue of \$100,000,000 of bonds payable in the year 4343, and to draw interest at six per cent. annually, two per cent. to be paid semi-annually, and the remaining

erty should not be mortgaged or pledged except with the consent of the stockholders is for their benefit, and cannot be set up by one creditor as against another creditor.¹

The corporation may issue bonds unsecured by mortgage. Hence, where a mortgage is made to secure the bonds, and the mortgage is illegal and declared void by the courts, the bonds may be valid as unsecured obligations.² The invalidity of some of the bonds cannot affect the validity of the mortgage or of the proceedings for fore-

two per cent. at the maturity of the bonds, two thousand four hundred and fifty years hence. A sinking fund was to be established for gradual redemption. This was to be made up of \$500,000 deposited with the trustee of the mortgage before each interest day, and also a sum equal to the semi-annual interest, two per cent., on all bonds previously redeemed. The bonds to be redeemed were to be designated by the trustees by lot one month before the bonds were redeemed. They were to be redeemed "at their maturity value;" and this language was construed by the directors to mean that each bond was to be redeemed by the payment of \$5,000, such amount being arrived at by taking the principal of the bond, \$100, and adding to it items of the annual interest at two per cent. for two thousand four hundred and fifty years. For another lottery scheme in the issue of bonds, see the indictment in *MacDonald v. U. S.*, 63 Fed. Rep. 426 (1894). In the case of *State v. New Orleans, etc. Co.*, 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if de-

ferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid, and that they were redeemable in numerical order in six years, and that it would be impossible for the company to pay them. The same conclusion was reached in *State v. Louisiana, etc. Co.*, 51 La. Ann. 1795 (1899). A scheme by which shares are sold, each share representing a lot in a tract of land, and upon a sale of all the shares the shareholders elect a board of directors who sell at auction the best lots and distribute the remaining lots by the remaining shareholders drawing the remaining lots "by lot," is not a lottery scheme prohibited by statute. *Elder v. Chapman*, 176 Ill. 142 (1898).

¹ *Alabama, etc. Co. v. McKeever*, 112 Ala. 134 (1896). See also § 808, *infra*. Where the stockholders have not authorized the issue of bonds as required by statute, the statutory liability of the stockholders cannot be enforced to pay such bonds. *Boyd v. Heron*, 125 Cal. 453 (1899).

² The bond may be valid although the mortgage is invalid for want of power to make it. *Illinois T. & S. Bank v. Pacific Ry.*, 117 Cal. 332 (1897); *Union Trust Co. v. New York, etc. R. R.*, 17 Weekly Law Bull. 176 (Ohio, 1887). A note given by a corporation may be enforced against it, where it received and kept the money, even though the mortgage securing the note was void for want of the consent of the stockholders as required by statute. *Curtin v. Salmon River, etc. Co.*, 141 Cal. 308 (1903). Where a stockholder of a vendor cor-

closure.¹ The validity of mortgage bonds given to certain creditors by way of preference is considered elsewhere.² A bond dividend is sometimes made. When made under proper circumstances it is legal.³

It is legal for a corporation to sell its bonds to its directors, provided the sale is a fair one. It is true that directors hold a fiduciary relation towards the stockholders, and sales of corporate property to the directors are voidable at the instance of a stockholder,⁴ but, unless a stockholder objects, the sale is valid. These principles apply to a director's purchase of bonds.⁵ Although the amount of bonds that may be issued is limited by the charter or by statute, yet bonds

poration sets aside the sale of a railroad as *ultra vires*, a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee. *Knoxville v. Knoxville, etc. R. R.*, 22 Fed. Rep. 758 (1884). Where one road has been leased to another, the two roads may subsequently be consolidated and consolidate mortgage bonds issued, of which a part shall go to the former lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor, the court will not disturb it. *Hazard v. Vermont, etc. R. R.*, 17 Fed. Rep. 753 (1883). The bonds of a railroad company are not rendered void in consequence of being secured by a mortgage which is void because the company had no authority to execute it. *Philadelphia, etc. R. R. v. Lewis*, 53 Pa. St. 33 (1859). Bonds may be issued which are not a lien upon any property and are not secured by any mortgage or deed of trust. It is immaterial that they are called "equipment bonds." They may, however, by contract constitute an equitable lien. *Tysen v. Wabash Ry.*, 15 Fed. Rep. 763 (1883). Equipment bonds unsecured by mortgage are subject to future mortgages made by a consolidated company into which the company issuing the bonds has been consolidated. Though the holders might have exchanged their bonds for con-

solidated mortgage bonds, a failure to exercise the right is fatal. *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). *Cf. Compton v. Jesup*, 167 U. S. 1 (1897). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895). Bonds issued under an amendment to a charter with the consent of all the stockholders will be enforced, even though the amendment was invalid. *Johnson v. Mercantile Trust, etc. Co.*, 94 Ga. 324 (1894).

1 *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899). See also § 766, *infra*.

2 See § 691, *supra*.

3 See § 766, *infra*.

4 See § 653, *supra*.

5 See § 692, *supra*.

in excess of that amount may be enforced against the corporation.¹ An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount.² The company may re-issue such of its own bonds as it has purchased.³ A corporation cannot have specific performance of an agreement of a person to purchase its debentures. The remedy is an action for damages.⁴ For breach of an agreement to subscribe to bonds of a corporation the damage is the loss actually sustained, the contract really being a contract to loan money.⁵ An executory contract of a corporation to issue debentures is enforceable, even though the corporation has become insolvent.⁶ Upon a sale of the assets and the winding up of the company bonds not yet due may be paid at par and accrued interest.⁷ Where a corporation deposits securities with a trust company, and the corporation issues and sells interest-bearing certificates against them, the holder of such a certificate is a creditor of the corporation.⁸

§ 763. *Pledge of bonds by a corporation and enforcement thereof.*

—A corporation has power to pledge its bonds as security for a cor-

1 See § 760, *supra*.

2 *Cordova Coal Co. v. Long*, 91 Ala. 538 (1891), holding also that if the bonds are not issued, but the land in payment therefor is deeded to the company, the party has a lien on the land, but must demand the bonds before suing.

3 Outstanding bonds which are purchased by a corporation may be re-issued. *Pruyne v. Adams Furniture, etc. Co.*, 92 Hun. 214 (1895); *aff'd*, 155 N. Y. 629; *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880); *Re Mortgage Bonds*, 15 S. C. 304 (1880); *Ex parte Williams*, 18 S. C. 289 (1881). Such part of the first-mortgage bonds as are re-issued may be issued and deposited as additional security for second-mortgage bonds. *Atwood v. Shenandoah, etc. R. R.*, 85 Va. 966 (1889). Bonds which have been purchased by the corporation and not re-issued cannot participate in the proceeds of a foreclosure sale. An assignment by the company of past-due coupons which it has purchased is not a re-issue of them where they are not actually delivered. *New York Security, etc. Co. v. Equitable Mortgage Co.*, 77 Fed. Rep. 64 (1896). In England

it is held that when a company purchases its own debentures they are thereby canceled and cannot be re-issued by the company. *Re George Routledge & Sons, Ltd.*, [1904] 2 Ch. 474. A re-issue of debentures in the case *Re Perth, etc., Ltd.*, [1906] 2 Ch. 216, was held to be illegal. A debenture that has been pledged by the company itself, and then redeemed and then re-issued, does not stand on equal terms with other debentures of that issue. *Re Tasker & Sons, Lim.*, [1905] 1 Ch. 283; *aff'd*, [1905] 2 Ch. 587. In England where debentures have been pledged by the company and the debt is then paid, the debentures are thereby spent and cannot be re-issued. *Re Russian, etc. Co., Ltd.*, 97 L. T. Rep. 564 (1907).

4 *South, etc. Co. v. Wallington*, [1898] A. C. 309.

5 *South African Territories, Ltd., v. Wallington*, [1897] 1 Q. B. 692.

6 *Pegge v. Neath, etc. Co.*, [1898] 1 Ch. 183.

7 *Re Southern, etc. Ry. Co., Ltd.*, [1905] 2 Ch. 78.

8 *Gallagher v. Asphalt Co. etc.*, 65 N. J. Eq. 258 (1903).

porate debt.¹ A corporation may pledge its unissued bonds as security for the payment of other bonds of the same issue.²

¹ *Lembeck v. Jarvis, etc. Co.*, 70 N. J. Eq. 757 (1906), aff'g 69 N. J. Eq. 450. A corporation may pledge its bonds at less than par. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190 (1881). In this case \$34,000 of bonds were pledged to secure an overdue note for \$5,000 and interest. The court said (p. 202) that the pledgee "had unquestionably the right to take as large a 'margin' for his loan as the borrower was willing to grant. Nor can we discern any valid reason why a railroad corporation may not dispose of its bonds by way of pledge as well as of sale, and in the absence of proof that the proceeds of the loan were, with the knowledge of both parties, to be applied to some purpose not authorized by the statute permitting their issue, we can see no reason, as has already been said, why they might not be used as a pledge to secure an indebtedness already existing." A railroad company having statutory authority to issue bonds to build, operate, and maintain a railroad may pledge its bonds to secure the payment of rent for its business office. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190, 207 (1881). A corporation may pledge its unissued bonds, and such pledge may be made by the board of directors for present and future debts. *Rawlings v. New Memphis, etc. Co.*, 60 S. W. Rep. 206 (Tenn. 1900). See also *Peck v. New Jersey, etc. R. R.*, 22 Hun, 129 (1880); *Peck v. New York, etc. Ry.*, 85 N. Y. 246 (1881). Bonds made to retire and pay other bonds and debts may be issued as collateral security for such other debts. *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880); *County Court v. Baltimore, etc. R. R.*, 35 Fed. Rep. 161 (1888). Where bonds are authorized for extension purposes, and the mortgage and bonds so provide, they cannot, after the company becomes insolvent, be used as a pledge for old debts where the pledgees are really the directors. *Farmers' L. & T. Co. v. San Diego, etc. Ry.*, 45 Fed. Rep. 518 (1891). Bonds may be pledged by the company for past or new debts. *Lehman v. Tallassee, etc. Co.*, 64 Ala. 567 (1879); *Grand Rapids, etc. R. R. v. Sanders*, 54 How. Pr. 214 (1877); rev'd on another point in 17 Hun, 552; *Re Regents', etc. Co.*, L. R. 3 Ch. Div. 43 (1876). A corporation may deposit its bonds as collateral security for notes made for its benefit by its stockholders under a verbal agreement that the bonds shall be held for the protection and security of the makers against liability on the note, their respective interests in the bonds being proportionate with their agreed liability on the note as between themselves. *Reid v. Bank of Mobile*, 70 Ala. 199 (1881); *Rice's Appeal*, 79 Pa. St. 168 (1875), holding that the accommodation indorser for the company may enforce the bonds to the extent of his liability. The company may pledge its unissued bonds to secure its debts. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). A *bona fide* pledgee of bonds from the company is protected in his pledge. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. But not if the pledge was in bad faith in order to buy the property in cheaply. See § 766, *infra*. The issue of bonds as a pledge and security for an antecedent indebtedness of the company has been held to be contrary to the provisions of the constitution of California relative to fictitious bonds. *Farmers' L. & T. Co. v. San Diego, etc. Ry.*, 45 Fed. Rep.

² *Royal Bank, etc. v. Grand Junction R. R.*, 100 Mass. 444 (1868).

The statutes of the state may, however, limit this right, as in Wisconsin, where bonds can be issued at not less than seventy-five cents on the dollar.¹ A constitutional provision against the issue of bonds except for money, labor, or property does not prevent the corporation from pledging its bonds.² Where underwriters have

518 (1891). Where a subscriber to bonds fails to pay, and the corporation then pledges them, it can hold him liable only for the value of the bonds at the time of the pledge, and not the value at a later date. *Cleveland Iron Co. v. Ennor*, 14 N. E. Rep. 673 (Ill. 1888); s. c., *Galena, etc. R. R. v. Ennor*, 116 Ill. 55. Pledgees from the company itself may be *bona fide* holders and will then be protected as such. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. It is legal for a railroad company to pledge its bonds. Power to sell gives power to pledge. *Farmers' L. & T. Co. v. Toledo, etc. Co.*, 54 Fed. Rep. 759 (1893). Where the pledgor is the corporation itself, and by agreement the pledgee is authorized to purchase the bonds at a pledgee's sale upon default, and does so, and the mortgage is foreclosed, an outside creditor cannot question the full title of the pledgee to the bonds, the company itself not objecting. *Farmers', etc. Co. v. Toledo, etc. Co.*, 54 Fed. Rep. 759 (1893). A corporation may pledge its unissued bonds. *Nelson v. Hubbard*, 96 Ala. 238 (1892); *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136 (1895). In *Ex parte Carolina Nat. Bank*, 18 S. C. 289 (1882), the receiver borrowed money to operate the railroad and pledged the unissued bonds of the company. He borrowed \$20,000 and pledged \$134,000 of bonds. The pledgee sold them out for \$13,000, and then applied to have the remaining \$7,000 paid out of the income. The court so ordered, the bondholders having failed to object for six years. That a corporation may pledge its unissued stock, see § 465, *supra*.

¹ Where a statute forbids the issue

of bonds at less than seventy-five cents on the dollar, and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. *National, etc. Works v. Oconto, etc. Co.*, 52 Fed. Rep. 29 (1892). Bonds issued in Wisconsin in pledge for a debt of the company, with a stipulation that they should be accounted for at least seventy-five cents on the dollar, are void by statute, and the pledgees cannot maintain a bill in equity to enforce their lien by reason of the bonds. *Pfister v. Milwaukee Electric Ry.*, 83 Wis. 86 (1892). Where a person pledges his stock as additional security to a corporate creditor who has bonds of the company in pledge for the same debt, such pledge of bonds, however, being illegal, the pledgor of the stock cannot compel the creditor to resort to the bonds first; nor, although a fictitious sale of the stock is alleged, can he compel the transferee of the stock to return the stock so that the pledgor may vote it, unless the pledgor pays the amount due. *Hinckley v. Pfister*, 83 Wis. 64 (1892). This case holds also that although bonds are issued illegally, being given in pledge for less than seventy-five cents on the dollar, yet neither the company, nor an officer, nor a stockholder, can maintain an action for the surrender and cancellation of such bonds, unless they tender the amount for which the bonds were pledged, the company and its officers being in equal wrong with the pledgee.

² *Illinois T. & S. Bank v. Pacific Ry.*, 117 Cal. 332 (1897). A corporation may pledge its unissued bonds even though the statute prohibits the issue of bonds except for labor, money or property actually received. *Wil-*

agreed to purchase the bonds of the corporation at a certain price with a bonus of seventy-five per cent. in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the seventy-five per cent. in stock for that purpose.¹ A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president.² A pledgee is not entitled to past-due coupons which were detached from the bonds before they were pledged, even though such coupons are entitled to payment in priority to the bonds themselves.³ A *bona fide* pledgee of bonds is protected to the same extent that *bona fide* purchasers are protected.⁴ The power of a corporate agent to sell bonds

liam Firth Co. v. South Carolina, etc. Co., 122 Fed. Rep. 569 (1903). The New York statute requiring bonds to be issued at their fair valuation does not prevent their being pledged by the corporation. *In re Waterloo*, etc. Co., 134 Fed. Rep. 345 (1904). The constitutional provision that bonds shall be issued only for money paid does not prevent the bonds being pledged, and such pledgee on foreclosure may prove up the par value thereof, the amount to be paid him, however, not to exceed the debt. *Western, etc. Co. v. United States, etc. Co.*, 92 S. W. Rep. 986 (Tex. 1906). Although a corporation pledges \$150,000 unissued bonds to secure a corporate debt of \$85,000, yet there is no fictitious issue of bonds. *Dexter v. McClellan*, 116 Ala. 37 (1897). The corporation may pledge its own bonds, even under the constitution of South Carolina, which prohibits the issue of bonds except for labor, money, or property. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569. See also § 766, *infra*.

¹ *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 146 (1904); *aff'd*, 137 Fed. Rep. 387.

² *Hook v. Ayers*, 63 Fed. Rep. 347 (1894); s. c., 64 Fed. Rep. 660.

³ *Rhawn v. Edge Hill, etc. Co.*, 201 Pa. St. 637 (1902).

⁴ The pledgee of negotiable bonds before maturity, and without notice to him of any defect of title, as collateral security for the loan of money, is entitled to hold such paper, to the extent of his loan, with the same immunities as an ordinary holder of commercial paper taken by purchase in good faith, for value, and before maturity; and it is not material whether the evidence of the principal debt be in negotiable form or not. *Thomson-Houston Elec. Co. v. Capitol Elec. Co.*, 65 Fed. Rep. 341 (1894). Where the cashier of a bank abstracts bonds held in pledge by the bank, and pledges them for his own purposes, and his administrator pays the debt in order to redeem the bonds, the bank may claim the bonds without repaying what the administrator has paid out. *Rinaker v. Dollar, etc. T. Co.*, 69 Atl. Rep. 43 (Penn. 1908). Where a trust company has orally agreed to hold certain bonds for delivery in accordance with certificates issued by another company, and subsequently the trust company loans money to such other company and takes such bonds as security, the holders of the certificates may hold the trust company liable for not protecting the certificates. *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898). Where the trustee of a mort-

does not give him power to pledge them even to secure corporate debts, and holders not *bona fide* are not protected.¹ A pledgee of bonds and coupons may collect the same and apply the proceeds on the debt.² A pledgee of bonds has a right to have them registered in his own name.³ Even though a corporation when it mortgages its mortgage bonds gives an option to the mortgagee to purchase the bonds, such option cannot be enforced, because a mortgagee is not allowed at the time of making a loan to contract for the purchase of mortgaged property. The rule is different where a day or more intervenes between the two contracts.⁴

Where the company pledges its own bonds they may be sold upon notice to pay the debt, the same as shares of stock, even though the bonds are promises to pay and the sale has been enjoined in another state.⁵ A holder of collateral may enforce his claim in the ordinary way by judgment and execution against the debtor without any deduction for his collateral.⁶ He cannot be enjoined from selling the same, although dissolution proceedings are pending.⁷ Parties holding bonds as collateral to corporate debts cannot be enjoined from selling them out during a voluntary dissolution.⁸ The ap-

gage, the day after the mortgage is executed, accepts some of the mortgage bonds from the secretary as collateral security for a personal loan to the secretary, and it transpires that such pledge was in breach of trust by the secretary, the trustee is not protected as a pledgee. *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). A pledge of bonds to secure an antecedent debt does not make the pledgee a *bona fide* holder under the New York decisions. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190, 204 (1881). Pledgees of bonds from the corporation are not *bona fide* holders where their debts were past due at the time of the pledge. *Moore v. Ensley*, 112 Ala. 228 (1896). This decision is in accordance with the New York decisions, but is not the general law of the land. The right of a corporation mortgagor to pay off its mortgage cannot be defeated by the fact that it has pledged some of the bonds and given to the pledgee an option to purchase all of the bonds, full payment by the pledgee of the amount borrowed with interest being

tendered. Any other construction would be an illegal clog on the equity of redemption. *Jarrah, etc. Corp. v. Samuel*, 87 L. T. Rep. 44 (1902); *aff'd*, 88 L. T. Rep. 106.

¹ *Shaw v. Saranac Horse Nail Co.*, 144 N. Y. 220 (1894). See also § 474, *supra*.

² *Ritchie v. McMullen*, 79 Fed. Rep. 522, 551 (1897).

³ *Ritchie v. Burke*, 109 Fed. Rep. 16 (1901).

⁴ *Samuel v. Jarrah, etc. Corp. Ltd.*, [1904] A. C. 323.

⁵ *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492 (1889), holding, however, that a sale by a pledgee after insolvency proceedings are commenced gives the purchaser none except equitable rights. *Cf. Jerome v. McCarter*, 94 U. S. 734, 739 (1876).

⁶ *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372 (1893); *Lewis v. United States*, 92 U. S. 618 (1875). See also § 476, *supra*.

⁷ *Matter of Binghamton Gen. El. Co.*, 143 N. Y. 261 (1894).

⁸ *Re Binghamton Gen. Elec. Co.*, 143 N. Y. 261 (1894). A corporate cred-

pointment of a receiver does not affect the rights of a pledgee from the corporation prior to such appointment. The pledgee may sell.¹ Where an Oregon corporation pledges its bonds in California to secure notes payable in California, the law of California applies as to the mode of selling such bonds on default of the pledgor.² A pledgee of bonds who buys them in at his own sale as pledgee still holds them in pledge.³ Where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage.⁴

itor who takes negotiable corporate bonds as collateral security, and then sells the bonds to himself for a nominal consideration, cannot, under the Connecticut statutes, file a claim for the par value of the bonds and also for his claim, less the amount realized at the sale, the bonds not being secured by mortgage. *Re Waddell-Entz Co.*, 67 Conn. 324 (1896).

1 *Guaranty Trust Co. v. Galveston City R. R.*, 87 Fed. Rep. 813 (1898); *National, etc. Bank v. Benbrook, etc. Co.*, 27 S. W. Rep. 297 (Tex. 1894). A trust company as pledgee of second-mortgage bonds may sell them on notice, even though it is the trustee of the first mortgage and even though a receiver is in charge. *Guaranty Trust Co. v. Galveston City R. R.*, 87 Fed. Rep. 813 (1898).

2 *Morris, etc. v. East Side Ry.*, 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13.

3 *Duncomb v. N. Y., etc. R. R.*, 84 N. Y. 190, 204 (1881). Where the trustee of a mortgage loans money to the mortgagor and takes part of the bonds as security, and then at the request of the mortgagor sells the bonds at public sale and buys them in, it cannot enforce the bonds for their full amount, but only to the extent of the debt secured, and upon

payment must deliver up the bonds for cancellation. *Knickerbocker, etc. Co. v. Penacook, etc. Co.*, 100 Fed. Rep. 814 (1900). See also § 479, *supra*.

4 *Bracken v. Atlantic T. Co.*, 167 N. Y. 510 (1901). Where trustees hold stock as security for various debts of various parties, the stock to be sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustees to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price for the benefit of himself and the other trustees. The sale will be set aside. *Jenkins v. Hammerschlag*, 38 N. Y. App. Div. 209 (1899). Where a corporation owns all of its bonds excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet if that settlement was caused by misrepresentations as to

A creditor of a corporation who holds collateral security for his debt cannot be compelled to exhaust such security before resorting to the general assets of the corporation for payment.¹ Where a corporate creditor has collateral security he may participate in the corporate assets as though he had no security, and afterwards realize what he can from the security, except that any surplus over and above his claim must, of course, be paid over to the representative of the insolvent corporation.²

the value of the securities, he is not bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be allowed to participate the same as the bondholder who did not turn in his bonds. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). Where bonds are deposited with the trust company to secure a loan from the latter under an agreement by which the pledgor might sell the bonds and apply the proceeds on the loan, a misrepresentation by a clerk of the trust company to a purchaser that the bonds were first-mortgage bonds may render the trust company liable. *Polhemus v. Holland T. Co.*, 61 N. J. Eq. 654 (1900). See also § 317, *supra*.

1 *Doe v. Northwestern Coal, etc. Co.*, 78 Fed. Rep. 62 (1896). See also § 476, *supra*. If there are two pledgees of bonds from the corporation, and after one is paid in full from the purchase price on foreclosure sale there remains a surplus, such surplus may be applied to the debt of the other pledgee. *Georgetown Water Co. v. Fidelity, etc. Co.*, 117 Ky. 325 (1904).

2 A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full.

Merrill v. National Bank, etc., 173 U. S. 131 (1899). The pledgee may participate in the general fund as though he had no security. *Harrigan v. Gilchrist*, 121 Wis. 127 (1904). A pledgee of bonds in participating in the distribution of the proceeds realized at foreclosure sale is not limited to an amount of bonds equal to the debt secured, but is entitled to "prove all the bonds and receive a dividend thereon to an amount not exceeding the amount of the debts for which they were held as collateral." *Duncomb v. N. Y. etc. R. R.*, 84 N. Y. 190, 206 (1881); *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893); *rev'd on another point in Marbury v. Kentucky, etc. Co.*, 62 Fed. Rep. 335 (1894). See also § 476, *supra*. A creditor of an insolvent national bank is entitled to prove the whole amount of the claims against it held by him, without reference to the collateral held to secure such claims. *Merrill v. First Nat. Bank*, 75 Fed. Rep. 148 (1896). Although a creditor of a corporation holds collateral security, nevertheless, upon the insolvency of the corporation, he may participate in the assets as though he did not have the collateral security, and may realize and apply the collateral security in addition to his proportionate part of the assets, to the extent, however, only of the full amount of his debt. *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372 (1893). A pledgee of bonds from the corporation is entitled to full dividends upon the foreclosure of the mortgage until the amount due on the pledge has been

A mechanic's lien on the plant of a gas company may be waived by taking bonds of the company as collateral security, where the

fully paid. *Cochran v. Anglo-American, etc. Co.*, 69 Hun, 168 (1893). The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral, since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied. *New York Security, etc. Co. v. Lombard Inv. Co.*, 73 Fed. Rep. 537 (1896). Mortgage bondholders may file their claims as general creditors, in addition to realizing what they can from their mortgage. A pledgee of mortgage bonds from the corporation itself, after realizing what he can from the bonds, may file a claim as a general creditor, not as a bondholder, but on his original claim. *Pattberg v. Lewis, etc. Bros.*, 55 N. J. Eq. 604 (1897). Where a corporation has given bonds as collateral security for certain debts, the assets of the corporation upon insolvency should be marshaled, the bonds being estimated at their true value, and the creditor allowed to pro-rate with unsecured creditors upon at least the balance of his claim. *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624 (1893). In Nebraska, the court, after reviewing the conflicting rules in different states, held that, where a creditor held collateral, he must deduct from his claim all that he realizes from the collateral before he can get a dividend, and must also deliver up his collateral to the receiver. *State v. Nebraska Sav. Bank*, 40 Neb. 342 (1894). Under the Connecticut statutes an insolvent corporation is placed in a receiver's hands for the benefit of all creditors, and a person holding security must stand on his security or else come in only for the excess of his claim above the value

of the security. *Re Waddell-Entz Co.*, 67 Conn. 324 (1896). Under the statutes of Connecticut a pledgee is limited to a dividend on the unpaid portion of his claim unless he waives his security altogether. *In re Greeley & Co.*, 70 Conn. 494 (1898). Where a corporation assumes a mortgage and then becomes insolvent, the mortgagor is entitled to a dividend from its assets on the whole mortgage debt existing at the time of such assumption, even though the mortgagor has foreclosed and realized a part of the debt. *Matter of Simpson*, 36 N. Y. App. Div. 562 (1899); *aff'd*, 158 N. Y. 720. A pledgee of bonds from the corporation itself is entitled to full dividends from the general funds of the corporation upon its insolvency in addition to the special dividend upon the bonds so pledged. *Matter of Snyder*, 29 N. Y. Misc. Rep. 1 (1899).

It has been held that where the company pledges its bonds, the pledgee can prove up against general assets his debt only and not the par value of the bonds. *Re Blakely, etc. Co.*, L. R. 8 Eq. 244 (1869); *Newport, etc. Co. v. Douglass*, 12 Bush (Ky.), 673 (1877). The bonds of a corporation not secured by mortgage, when given as collateral security for the debt of the company, do not entitle the creditor to any greater dividend in the assets of the company, upon its insolvency and winding up, than he would have if he did not hold such collateral security. *International Trust Co. v. Union Cattle Co.*, 3 Wyo. 803 (1892). The weight of authority holds, however, that mortgage bonds issued as collateral security have the right to participate in the benefits of the foreclosure to the extent of their par value. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190 (1881); *Peck v. New York, etc. Ry.*, 85 N. Y. 246 (1881); *Re Regents', etc. Co.*, L. R.

bonds recite that they are a first mortgage.¹ The fact that the bonds pledged by the corporation sell for very little at a pledgee's sale does not invalidate the sale.² But any fraud whereby the bonds are purposely sacrificed will invalidate the sale.³ Purchasers of bonds at a pledgee's sale, though the pledge was by the company itself, and the price at such sale very low, may enforce such bonds at their par value.⁴ Where bonds are issued by a corporation to a director or officer for a certain purpose, he cannot retain them on the ground that the company owes him money;⁵ and where a corporation delivers bonds to a creditor to sell and apply on his debt, the bonds are good though he fraudulently disposes of them.⁶ Where bonds are deposited as collateral security to notes, and before the notes are due the bonds are stamped on their face as subordinate to a junior lien, the indorsers of the notes are released.⁷ A pledge of bonds by one person to another is similar to a pledge of stock, a subject which is fully considered elsewhere.⁸ A sale of bonds as collateral security, in violation of an agreement as to the notice to be given, does not release a surety on the note secured by the bonds, but discharges him only to the extent of the actual value of the

3 Ch. D. 411 (1875); *Jerome v. McCarter*, 94 U. S. 734, 740 (1876); *Third Nat. Bank v. Eastern R. R.*, 122 Mass. 240 (1877); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885). In foreclosure the pledgee of bonds from the corporation is the owner to the extent of his loan. *Hayden v. Lincoln City Elect. Ry.*, 43 Neb. 680 (1895). See also § 476, *supra*, and 70 Atl. Rep. 319.

1 *Bristol, etc. Co. v. Bristol Gas, etc. Co.*, 99 Tenn. 371 (1897).

2 *Wheelwright v. St. Louis, etc. Transp. Co.*, 56 Fed. Rep. 164 (1893). See also § 850, *infra*.

3 *James v. Railroad Co.*, 6 Wall. 752 (1867). See *Minneapolis T. Co. v. Menage*, 73 Minn. 441 (1898); also § 766, *infra*.

4 *Jerome v. McCarter*, 94 U. S. 734 (1876). The purchaser of bonds at a pledgee's sale may enforce such bonds for their full par value. *Wade v. Chicago, etc. R. R.*, 149 U. S. 327 (1893). Where the pledgee sells bonds held as collateral and buys them in, he may enforce them for their full par value instead of to the extent of only his claim. *Atlantic Trust Co.*

v. Woodbridge, etc. Co., 86 Fed. Rep. 975 (1897).

5 *Greenville Gas Co. v. Reis*, 54 Ohio St. 549 (1896).

6 *Persse v. Atlantic, etc. Tunnel Co.*, 5 Colo. App. 117 (1894).

7 *Nassau Bank v. Campbell*, 74 Hun, 616 (1893); reversed on a question of evidence in 147 N. Y. 694.

8 See ch. XXVI, *supra*. *Bona fide* pledgees have the same rights as a *bona fide* purchaser to the extent of their pledge. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. Where a bank receives a pledge of bonds in good faith its title is good, although it advanced money on the bonds by certifying checks, contrary to the national banking act. *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240 (1892). A pledgee of bonds from an individual pledgor may prove the entire amount of the collaterals, but can recover no surplus over and above the amount of his debt or advances with proper costs of suit. The pledgor takes the remainder. *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885).

bonds.¹ Where a pledgee's debt has really been paid and yet he retains the stock, and by reason thereof the pledgor is unable to enter a reorganization, the pledgor may recover the actual damages sustained by him, but such value must be shown by him; otherwise it will be inferred that it had little or no value.² A pledgee of bonds is bound to exercise due diligence in collecting the same and is entitled to be reimbursed for his expense, including attorney's fees.³ A pledgee of bonds may agree that upon a reorganization their proportionate part of the expense shall be a lien on such bonds.⁴ The question of the ownership of bonds as between a pledgor and pledgee and subsequent holders cannot be contested in the foreclosure of the mortgage securing the same prior to the decree, but on the distribution of the proceeds of the foreclosure sale that question can then be litigated.⁵

§ 764. *Forged bonds—Priorities among bonds—Incomplete bonds—References to the mortgage—Variance between bond and mortgage—Purposes of the issue—Certification and registration of bonds.*—If any material part of a bond is forged the bond is void.⁶ An alteration of the number, however, is immaterial and does not affect the bond itself.⁷ The bonds may be incomplete, in

¹ Vose v. Florida R. R., 50 N. Y. 369 (1872).

² Griggs v. Day, 158 N. Y. 1 (1899). The preceding case arose out of a controversy between a contractor and the chief stockholder and promoter who advanced money. As to the rights and duties of a pledgee on a reorganization, see also Griggs v. Day, 21 N. Y. App. Div. 442 (1897), reversed in 158 N. Y. 1 (1899); s. c., 136 N. Y. 152, 162 (1892). A pledgor of bonds may take part in the purchase at the reorganization without any obligations towards the pledgee as to such purchase. Brown v. Anderson, 104 Ga. 30 (1898). See also Field v. Sibley, 74 N. Y. App. Div. 81 (1902); aff'd, 174 N. Y. 514.

³ Hanover, etc. Bank v. Brown, 53 S. W. Rep. 206 (Tenn. 1899).

⁴ Field v. Sibley, 74 N. Y. App. Div. 81 (1902); aff'd, 174 N. Y. 514.

⁵ Sioux City, etc. Ry. v. Manhattan T. Co., 92 Fed. Rep. 428 (1899).

⁶ Bonds containing a forged seal of the corporation and a forged certifi-

cate by the trustee are invalid and void, and not enforceable. A consolidated road is not liable therefor. Maas v. Missouri, etc. Ry., 83 N. Y. 223 (1880). See also §§ 365-370, *supra*. But it is no defense to an action on coupons that certain forged bonds are out. Wood v. Consolidated, etc. Co., 36 Fed. Rep. 538 (1888).

⁷ In State v. Cobb, 64 Ala. 127, 158 (1879), the court said: "The change or mutilation of the number would be a mere change or mutilation of a mark, placed upon the bond, it may be, by the maker, or the indorser, or it may be by any holder, for the convenience and protection of the one or the other." The alteration of the number on a bond does not destroy its negotiability, and a *bona fide* purchaser of it from a thief is protected. The number is merely for convenience in identifying the bond, the same as the private mark of the owner upon it would be. Commonwealth v. Emigrant, etc. Bank, 98 Mass. 12 (1867), citing Smith v. Ill. etc. R. R. (N. Y.

that the payee or place of payment may be omitted. In such cases the validity and enforceability of the bond depend on the extent of the omission and the facts connected with the case.¹

Where the treasurer of a charitable corporation forges a resolution of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable it has recourse against the broker by reason of the stock exchange rules which renders liable a broker who witnessed signatures to transfers of stock or bonds.²

A registered municipal bond with coupons attached is negotiable, where the name of the payee is left blank on the face of the bond, even though in books kept for that purpose the name of the registered owner is entered; hence a purchaser in good faith of such a

Super. Ct.). To same effect, *Elizabeth v. Force*, 29 N. J. Eq. 587 (1878); *Birdsall v. Russell*, 29 N. Y. 220 (1864). Even though the thief of negotiable railroad bonds changes the numbers on the bonds, yet the *bona fide* purchaser is protected. Such an alteration is an immaterial one. *Wylie v. Missouri Pac. Ry.*, 41 Fed. Rep. 623 (1890).

1 Railroad bonds may be negotiable though payable to a blank person. *White v. Vermont, etc. R. R.*, 21 How. 575 (1858). Although the name of the payee is left blank in a debenture, yet if there is a corporate contract to deliver debentures to the holder of them, they are enforceable. *Davis v. Martin*, [1894] 3 Ch. 181. A bond incomplete in that the payee is left blank may be filled in by any holder and sued upon by him, where the proceeds from the sale thereof went to the company and the legislature has ratified the bond. *Chapin v. Vermont, etc. R. R.*, 74 Mass. 575 (1857); *Hubbard v. New York, etc. R. R.*, 36 Barb. 286 (1862). Where in a railroad bond the place of payment is

left blank, with power to the president to fill it in, until so filled in the bond is not negotiable, and a thief can give no title to a purchaser. *Ledwich v. McKim*, 53 N. Y. 307 (1873). Where the place of payment is left blank, with authority to the president to fill it in, but he does not fill it in, and the bonds are stolen from the company, they are not negotiable. *Jackson v. Vicksburg, etc. R. R.*, 2 Woods, 141 (1876); s. c., 13 Fed. Cas. 257. Where the bonds state that the president is authorized to fix the place of payment, and the bonds are stolen from the company before he does so, they are not negotiable nor collectible. *Parsons v. Jackson*, 99 U. S. 434 (1878). In the case of a note by a firm the date may be filled in by any holder. *Michigan Bank v. Eldred*, 9 Wall. 544 (1869). Municipal bonds payable "to —, his executors, administrators, and assigns," are negotiable. *Dutchess County Ins. Co. v. Hachfield*, 1 Hun, 675 (1874).

2 *Clarkson Home v. Missouri, etc. R. R.*, 182 N. Y. 47 (1905).

bond is protected, although the bond was stolen. A *bona fide* pledgee is likewise protected.¹

Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no *bona fide* purchaser of them.² This question, however, as well as that of registration of bonds, is considered elsewhere.³ Where bonds must be approved by a state commissioner before being issued, notes convertible into such bonds upon such approval are not a lien as they would be if the bonds themselves had been issued.⁴ The holders of mortgage bonds cannot claim the right to exchange the same for new bonds, even though the mortgage securing the new bonds provides for such exchange.⁵ Coupons detached from the bond before the bond is certified by the trustee as required by its terms are not entitled to the benefit of the mortgage.⁶

The vendor of bonds does not impliedly warrant that they were legally issued,⁷ nor does he guarantee payment.⁸ The numbers on the bonds do not give one bond any priority as against other bonds.⁹ Even though a mortgage is partly a purchase money mortgage in that some of the bonds are issued in payment for a railroad which comes under the mortgage, yet the holders of such bonds are not en-

¹ *Manhattan Sav. Inst. v. N. Y., etc. Bank*, 170 N. Y. 58 (1902). See also §§ 815, 816, *infra*.

² *Maas v. Missouri, etc. Ry.*, 83 N. Y. 223 (1880). Where a certificate of stock provides on its face that it must be signed by a transfer agent the corporation is not liable on a certificate to which the transfer agent's name had been forged by an employee of the corporation. *Dollar, etc. Co. v. Pittsburgh, etc. Co.*, 213 Pa. St. 307 (1906). Municipal bonds stolen and negotiated before they were legally issued by the municipality are void, and even a *bona fide* purchaser cannot enforce them. *Germania Savings Bank v. Suspension Bridge*, 73 Hun, 590 (1893).

³ §§ 814, 815, *infra*.

⁴ *Augusta T. Co. v. Federal T. Co.*, 153 Fed. Rep. 157 (1907).

⁵ *Morse v. Chicago, etc. R. R.*, 84 N. Y. App. Div. 406 (1903).

⁶ *Holland T. Co. v. Thomson-Hous-*

ton El. Co., 170 N. Y. 68 (1902), *aff'g* 62 App. Div. 299.

⁷ *Otis v. Cullum*, 92 U. S. 447 (1875). See also § 366, *supra*.

⁸ *Ketchum v. Duncan*, 96 U. S. 659 (1877).

⁹ "The bonds all bear the same date, and fall due on the same day. Bond number one has therefore no advantage over any other bond, and no presumptions are to be indulged in its favor." *Stanton v. Alabama, etc. R. R.*, 2 Woods, 523 (1875); s. c., 22 Fed. Cas. 1070. The fact that bonds are numbered does not give priority in payment to one bondholder as against another. *Commonwealth v. Susquehanna, etc. R. R.*, 122 Pa. St. 306, 321 (1888). As to the numbers of the shares in England, the court said, in *Inds case*, L. R. 7 Ch. 485, "the numbers of the shares are simply directory for the purposes of enabling the title of particular persons to be traced."

titled to priority over the other bonds.¹ Nor does the fact that they were issued at different times give any prior right to payment of those first issued.² All the bonds are conclusively presumed to have been issued at their date.³ A mortgage deed of trust is a lien from the date of its record, even though the bonds are not issued until after other liens have attached.⁴ All outstanding bonds in *bona fide* hands are conclusively presumed to have been issued on the date of the recording of the mortgage.⁵ The bonds should be of the same

¹ *Murray v. Farmville, etc. R. R.*, 101 Va. 262 (1903).

² There is no priority of one bond over another by reason of some being issued later than others. The lien of the bond dates from the recording of the mortgage. *City of Lincoln v. Lincoln St. Ry.*, 67 Neb. 469 (1903); *Reed's Appeal*, 122 Pa. St. 565 (1888). Each bond shares *pro rata* in the distribution. *Hodge's Appeal*, 84 Pa. St. 359 (1877). See also § 881, *infra*, on the subject of distribution. In Cape Colony, bonds secured by mortgage have a preference only from the date when they are issued, and not from the date of the mortgage. *Standard, etc. v. Heydenrych*, 97 L. T. Rep. 148 (1907).

³ The purchasers of bonds bearing the same date as the mortgage may rely on the fact that they were made and issued simultaneously, and that there was no intervening time for the liens of material-men to attach. *Nelson v. Iowa, etc. R. R.*, 8 Am. Ry. Rep. 82 (Iowa, 1875). In *Reynolds v. Manhattan T. Co.*, 83 Fed. Rep. 593 (1897), the court held that where the mortgage has been delivered to the trustee, but no bonds have yet been issued, a mechanic's lien may be obtained at any time prior to the issue of the bonds. Engraved bonds issued in lieu of temporary lithographed bonds are legal. *Illinois T. & S. Bank v. Pacific Ry.*, 117 Cal. 332 (1897). In the case of *International, etc. Co. v. Davis, etc. Co.*, 70 N. H. 118 (1900), it was held that an attachment subsequent to a mortgage, but before all the mortgage bonds had been issued, takes preced-

ence as regards bonds issued after such attachment. Engraved bonds substituted for temporary printed bonds are good. *McKee v. Vernon County*, 3 Dill. 210 (1874); s. c., 16 Fed. Cas. 188.

⁴ *Central Trust Co. v. Bartlett*, 57 N. J. L. 206 (1894). A mechanic's lien may have priority over mortgage bonds previously authorized, but subsequently issued to persons knowing of such mechanics' lien. *Porch v. Agnew Co.*, 70 N. J. 328 (1905).

⁵ *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); *aff'd, sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). A mortgage deed of trust is a lien from the date of its record, even though the bonds are not issued until after other liens have attached. *Central Trust Co. v. Bartlett*, 57 N. J. L. 206 (1894). A mortgage operates from the time of recording, even though the bonds are issued thereafter, and during the intermediate time other incumbrances are made. This applies to chattels as well as real estate covered by the mortgage. *Camden, etc. Co. v. Burlington, etc. Co.*, 33 Atl. Rep. 479 (N. J. 1895). "It is the rule, as between bondholders and persons acquiring liens on the mortgaged property subsequent to the recording of the mortgage, that the rights of the *bona fide* holders of the bonds are to be determined as if they had been acquired at the date of the recording of the mortgage securing them." *Belden v. Burke*, 72 Hun, 51, 75 (1893), reversed on another point in 147 N. Y. 542.

date as the mortgage, but a variance in their dates may be explained by parol evidence.¹ Even though the entire amount of bonds provided for by the mortgage is never issued, yet the holders of the bonds which are issued are entitled to payment in full before anything is paid to judgment creditors and other creditors.² The bond and mortgage may provide for the priority of one of the bonds over another part. Such priorities are matters of contract and are legal.³

¹ Although the bonds are dated October 1, 1871, yet parol evidence may show that these are the bonds which are secured by the mortgage. *Butler v. Rahm*, 46 Md. 541 (1877). The date of the mortgage is presumed to be the date when it was acknowledged and not the date of the mortgage itself. *Guaranty, etc. Co. v. Galveston, etc. R. R.*, 107 Fed. Rep. 311 (1901). A mortgage is a first lien ahead of a lease, even though they were executed at the same time, it being shown that the mortgage became due ten years before the lease was to expire and that the lease provided for the execution of the mortgage. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899).

² *East Tennessee, etc. Co. v. London, etc. Co.*, 106 Tenn. 41 (1900). In enforcing a liability of directors for debts in excess of the capital stock, mortgage bonds, signed but not actually issued, are not counted. *Webster v. Whitworth*, 63 S. W. Rep. 290 (Tenn. 1901). In the distribution of the assets the unissued bonds of the corporation are not considered. *Badger v. Sutton*, 30 N. Y. App. Div. 294 (1898).

³ There may be a preference to certain bonds as against others of the same issue, all secured by the same mortgage. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885); *McMurray v. Moran*, 134 U. S. 150 (1890). Although part of the bondholders purchased by reason of fraudulent representations of brokers to whom the other bondholders had sold part of their holdings, this does not give any priority to the former over the latter. *Coe v. East, etc. R. R.*, 52 Fed. Rep.

531 (1892). In *Commonwealth v. Chesapeake, etc. Canal Co.*, 32 Md. 501 (1870), various complicated questions as to the priority of different classes of bonds were passed upon. In Massachusetts a statutory provision forbids the issue of bonds redeemable in their numerical order. See L. 1891, ch. 382. A final decree in a foreclosure suit not appealed from may, so far as it awards priority to some of the bonds as against others, be subsequently modified to conform to a decision of the supreme court of the United States in another case, and holding differently as to such priority. The second case was for the sole purpose of determining what bonds were legal. *Moran v. Hagerman*, 64 Fed. Rep. 499 (1894). Where by the charter the stockholders are liable for all debts and they buy some of the company's bonds, the remaining bonds will be paid first out of the proceeds of foreclosure. *Shaw v. Saranac Horse Nail Co.*, 78 Hun, 7 (1894); *aff'd* on another point in 144 N. Y. 220. In general, all the bonds share equally in the proceeds of a foreclosure sale; but where the corporation agreed with the first purchasers to issue only \$10,000 per mile, although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers of bonds have been paid. *McMurray v. Moran*, 134 U. S. 150 (1890). The fact that coupons are payable in the order of their numbers and only from money as it comes in, does not render the bonds or coupons illegal, and the

First-mortgage bonds have priority over second-mortgage bonds, although issued after the latter.¹

Where the bonds refer to a mortgage securing them, the mortgage becomes thereby a part of the bond and is construed with it.²

officers are not personally liable therefor. *Vokes v. Eaton*, 119 Ky. 913 (1905). Even though the owner of a majority of the bonds agrees that a certain debt shall come in ahead of the mortgage, the person entitled to the benefit of such agreement cannot intervene in a foreclosure suit by minority bonds, inasmuch as they are not bound. *First Nat. Bank v. Wyman*, 16 Colo. App. 468 (1901). See § 766c, *infra*.

¹ *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880). First debentures have priority over second debentures, although some of the first are issued after the second are out. *Lister v. Lister & Son*, 68 L. T. Rep. 826 (1893). A mortgage by a purchasing company takes precedence over an order of the selling company to pay a certain amount of money out of the sale of the bonds of the selling company. *Roberts v. Central T. Co.*, 128 Fed. Rep. 882 (1904).

² Bondholders are bound to take notice of what is indorsed and "of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage." *Stanton v. Alabama, etc. R. R.*, 2 Woods, 523 (1875); s. c., 22 Fed. Cas. 1070; *Morton v. New Orleans, etc. R. R.*, 79 Ala. 590 (1885). The mode of distribution prescribed by the mortgage binds the bondholders. *Low v. Blackford*, 87 Fed. Rep. 392 (1898). A provision in a mortgage for the principal sum becoming due on non-payment of interest applies to the bonds, even though such provision is not contained in the bonds themselves. The two instruments are construed as one. *New Jersey, etc. Co. v. Security, etc. Co.*, 42 Atl. Rep. 746 (N. J. 1899). The bond is in fact a part of the mortgage and they constitute one trans-

action, and hence if the bond recites that the trustee has retained certain of the bonds to meet a prior lien, the mortgagor cannot compel the trustee to deliver those bonds to a purchaser from the mortgagor. *Moses v. Philadelphia, etc. Co.*, 127 Ala. 433 (1900). Individual stockholders may intervene in a trustee's foreclosure suit and attack the validity of certain bonds on the ground that such bonds had been issued for construction work which had not been finished, and had subsequently been issued in payment for services by officers, the mortgage providing that bonds should be issued only for construction work, and the bonds not being in *bona fide* hands. *Central T. Co. v. California, etc. R. R.*, 110 Fed. Rep. 70 (1901); *aff'd*, 128 Fed. Rep. 882. Bondholders are chargeable with notice of the terms of the mortgage securing the bonds. *Grant v. Winona, etc. Ry.*, 85 Minn. 422 (1902). A bondholder need not take notice of a provision in the mortgage that he cannot sue at law on his bond unless one-fourth of the bondholders assent. *Guilford v. Minneapolis, etc. Ry.*, 48 Minn. 560 (1891). Bondholders are bound by recitations in the deed of trust recognizing unrecorded prior liens. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 356 (1879); s. c., 22 Fed. Cas. 274. A statute referred to in the bond becomes thereby a part of the bond. *Gilman v. New Orleans, etc. R. R.*, 72 Ala. 566 (1882); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885); *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501 (1870). Purchasers are bound to know the contents of the mortgage which secures the bond. *Caylus v. New York, etc. R. R.*, 10 Hun, 295 (1877); *affirmed*, 76 N. Y. 609. The holders of consolidated

After a coupon has been detached it is no longer subject to conditions contained in the bond or mortgage.¹ Statements and representations in the bonds are controlled by explanations contained in the mortgage, but if the terms conflict the bond controls, excepting that the mortgage controls as to the amount of property which is covered by the mortgage.²

The purchasers of railroad bonds cannot rescind on the ground that the railroad has used the proceeds for purposes other than those stated in its prospectus.³

bonds are, it has been held, chargeable with notice of the prior bonds and mortgages and of the terms upon which their own bonds were issued. Hence, they cannot impeach the validity of the bonds which were retired. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892).

¹ *Haskins v. Albany, etc. Co.*, 74 N. Y. App. Div. 31 (1902).

² If the wording of the bond is different from the wording of the mortgage, the bond controls. *Railway Co. v. Sprague*, 103 U. S. 756 (1880). Although a bond purports to be secured by more than the mortgage specifies, yet, if the mortgage does not cover the lands in controversy, the bondholder cannot subject such lands to the mortgage that actually is given. *New Orleans, etc. Ry. v. Parker*, 143 U. S. 42 (1892). In *Van Weel v. Winston*, 115 U. S. 228, 242 (1885), the court said that if the mortgage differed from the circulars of the company, the mortgage "must be looked to as the security on which the bondholders alone had a right to rely." *Cf. O'Beirne v. Bullis*, 158 N. Y. 466 (1899). Even though the bonds recite that the mortgage covers all after-acquired property, yet if the mortgage itself covers only such after-acquired property as is connected with the railroad, the mortgage does not cover a hotel property not connected with the operation of the railroad, but does cover stock in another railroad subsequently purchased by the mortgagor, a lease of the railroad itself being taken at the same time. Guar-

anty T. Co. *v. Atlantic, etc. R. R.*, 132 Fed. Rep. 68 (1904); modified in 138 Fed. Rep. 517. Where a bond on its face recites that it is secured by all the assets of the company, while in fact it is not secured at all, the purchaser thereof may hold the president personally liable, the latter having taken part in the issue of the bonds. *Stickel v. Atwood*, 25 R. I. 456 (1903). See also § 765, *infra*.

³ *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162, 196 (1888); *Van Weel v. Winston*, 115 U. S. 228 (1885). Although bonds and a mortgage are authorized to pay debts, but are partially used to carry on the business, *bona fide* purchasers of the bonds are protected. *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). After the purpose of the issue is fulfilled, the remaining bonds may be issued for other purposes. *Clafin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880). A mortgage reciting that it is made for the purpose of borrowing money to carry on the operations of the company is valid, although the bonds are issued in payment for the plant. *Davidson v. Westchester, etc. Co.*, 99 N. Y. 558 (1885). Although bonds are issued expressly according to their terms to take up outstanding bonds; yet a *bona fide* purchaser is not bound to ascertain whether the bonds were used for that purpose. *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870). But where by statute new mortgage bonds are issued to take up old bonds, purchasers of such new bonds must see to it that

Although the statute restricts the mortgage to certain purposes, yet if the bonds are used for other purposes, *bona fide* purchasers are protected.¹ A bondholder cannot attack other bonds on the ground that the money received therefor was not used for the purposes authorized by the mortgage.² When part of the bonds are issued the corporation may agree not to issue the others except on certain conditions.³ Bonds are sometimes issued convertible into

the old bonds are taken up, even though the new bonds are stated to be first-mortgage bonds. *Spence v. Mobile, etc. Ry.*, 79 Ala. 576 (1885). Even though a mortgage provides that the trustee shall certify and deliver the bonds or the proceeds thereof, only upon a written statement by the mortgagor declaring the purposes for which said bonds or proceeds are to be used, the trustee is not liable for failure to require such written statement, where the trustee has not expressly agreed to carry out that provision. Moreover, a suit by a bondholder against the trustee for failure to carry out that provision must be commenced within ten years from the time of the breach thereof. *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), *aff'g Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App. Div. 473; s. c., *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169. The lower federal court held that a bondholder may hold the trustee liable for certifying to bonds and delivering them to the mortgagor, where the mortgage restricted the purposes for which the mortgagor was to use such bonds, and the trustee knew that the mortgagor had not complied with this provision in regard to a part of the bonds already issued; also that the general provision exempting the trust company from liability and also releasing it from any obligation to inquire into the application of the bonds is no defense, inasmuch as the mortgage provided that the trustee should issue the bonds only on orders declaring the purposes for which the mortgagor proposed to use them; also that the trustee must use such care

as a mortgagee would use in making such advances; also that a mortgagee is not a necessary party to such a suit, but the suit must be brought by a bondholder, not for himself alone, but in behalf of all bondholders; also that the statute of limitations was a bar. *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5 (1899). The understanding of a bondholder as to the use of the funds does not bind the corporation. *Ives v. Smith*, 3 N. Y. Supp. 645 (1888). An action to rescind the purchase of stock lies where the money paid therefor was to be applied to a certain purpose, but was not applied, but the receiver will not be directed to give up the money. *Moore v. Robertson*, 25 Abb. N. C. 173 (1890). See also *Belden v. Burke* in § 766, *infra*, and see §§ 830, 831, *infra*.

1 Where bonds and a mortgage are prohibited except to pay debts, but instead of that are partially used to carry on the business, *bona fide* purchasers of the latter are protected. *Carpenter v. Black Hawk, etc. Min. Co.*, 65 N. Y. 43 (1875); *Lord v. Yonkers, etc. Co.*, 99 N. Y. 547 (1885). Where a company has power to mortgage, but not to give bills of exchange, a mortgage securing bills of exchange is good as security for the money represented by the bills of exchange. *Scott v. Colburn*, 26 Beav. 276 (1858).

2 *Camden, etc. Co. v. Citizens', etc. Co.*, 69 N. J. Eq. 718 (1905).

3 In general, all the bonds share equally in the proceeds of a foreclosure sale; but where the corporation agreed with the first purchasers to issue only \$10,000 per mile, although the mortgage provided for a much

stock, and sometimes stock is issued convertible into bonds. The questions connected with such issues are considered elsewhere.¹

§ 765. *Attachments levied on bonds—Form of bonds—Gold clause—Seal—Cancellation and subrogation—Consolidated bonds.*—The unissued bonds of a corporation cannot be attached for corporate debts.² But bonds after issue may be taxed,³ and an attachment may be levied on them at the place where they actually are, although not at the place where the corporation is and they are not.⁴ There can be no attachment of bonds which are issued to a trustee to pay a certain debt.⁵

A suit at law will lie for the conversion of bonds,⁶ or a suit in equity by their equitable owner for their value;⁷ but an equitable suit does not lie to rescind a sale of worthless bonds. A suit at law for damages is the proper remedy.⁸

There is no particular form in which the bonds of a corporation must be drawn. In order to be negotiable they of course must contain the essential features of negotiable paper.⁹

larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers' bonds have been paid. *McMurray v. Moran*, 134 U. S. 150 (1890),—the court stating also that the mortgage might have provided for priority among the bonds if it had been so drawn.

¹ See § 283, *supra*.

² An attachment of unissued bonds is not good. *Richardson v. Green*, 133 U. S. 30, 47 (1890); *Coddington v. Gilbert*, 17 N. Y. 489 (1858); *Barnes v. Mobile, etc. R. R.*, 12 Hun, 126 (1877); *Sickles v. Richardson*, 23 Hun, 559 (1881). Unissued bonds are not personal property subject to a statutory lien for supplies. *Millhiser, etc. Co. v. Gallego, etc. Co.*, 101 Va. 579 (1903).

³ See § 572a, *supra*.

⁴ Negotiable bonds held outside of the jurisdiction of the court cannot be attached by serving the attachment on the corporation which issued the bonds. *Von Hesse v. Mackaye*, 55 Hun, 365 (1890); *aff'd*, 121 N. Y. 694. Garnishee process does not lie against a non-resident company on bonds, since the debtor may have sold them.

Junction R. R. v. Cleneay, 13 Ind. 161 (1859).

⁵ *Alabama, etc. Co. v. Chattanooga, etc. Co.*, 37 S. W. Rep. 1004 (Tenn. 1896).

⁶ For the allegations in an action for the conversion of a bond, see *Saratoga, etc. Co. v. Hazard*, 55 Hun, 251 (1889); *aff'd*, 121 N. Y. 677. Where bonds are loaned to use temporarily, upon an agreement to return them when called for, and the member of the firm to whom they are delivered uses them for his own purposes, he converts them. *Birdsall v. Davenport*, 43 Hun, 552 (1887).

⁷ A suit by an equitable owner of bonds to recover the bonds, or their value, is properly brought in equity. *Phelps v. Elliott*, 29 Fed. Rep. 53 (1886).

⁸ *U. S. Bank v. Lyon County*, 46 Fed. Rep. 514 (1891). See also §§ 155, 156, 356, *infra*. Concerning fraud inducing the purchase of bonds, see §§ 140, 157, *supra*. A bill in equity is proper to rescind when third parties with notice are to be reached. *Banque, etc. v. Brown*, 34 Fed. Rep. 162 (1888).

⁹ See § 411, *supra*, concerning these requisites; also § 767, *infra*, concern-

Where a bond provides that it may be registered and the coupons surrendered, and that thereafter the interest will be paid by check,

ing the various decisions on the negotiability of corporate bonds.

The following are forms:

[*Form of Coupon Bond.*]
UNITED STATES OF AMERICA,
STATE OF NEW YORK.

No. \$1,000.
THE COMMERCIAL CABLE COMPANY, NEW
YORK.

FIRST MORTGAGE FIVE-HUNDRED-YEAR FOUR
PER CENT. GOLD BOND.

On the first day of January, A. D. 2397,
for value received, The Commercial Cable
Company promises to pay the bearer the
sum of

ONE THOUSAND DOLLARS

in gold coin of the United States of America of or equal to the present standard of weight and fineness, at the office of The Farmers' Loan and Trust Company in New York City, and to pay interest thereon at the rate of four per cent. per annum, payable quarterly on the first days of January, April, July, and October, in the gold coin aforesaid, at the said office of the said The Farmers' Loan and Trust Company, upon the presentation and surrender of the coupons annexed and to be annexed hereto, as they severally become due.

This bond is one of an issue of bonds, coupon and registered, of like tenor, to an amount not exceeding in the aggregate twenty million dollars, all of which are equally secured by a mortgage deed of trust bearing date January 1, 1897, made by the said The Commercial Cable Company to said The Farmers' Loan and Trust Company as Trustee, of and upon the property and franchises of The Commercial Cable Company.

In case of default for six months after due demand in the payment of interest on any of said bonds, the principal of all thereof may be declared due in the manner and with the effect provided in said mortgage deed of trust.

All payments upon this bond of both principal and interest are to be made without deduction for any tax or taxes which said Cable Company may be required to pay or to retain therefrom, by any present or future laws of the United States of America, or any of the states thereof, said Cable Company hereby covenanting and agreeing to pay any and all such tax or taxes.

The holder of this bond may at any time at his option surrender the same, with the undue coupons attached, to the Registrar

of said bonds, to be canceled, and receive in lieu thereof a registered bond in the form provided in the mortgage deed of trust.

This bond shall not be valid or obligatory until the certificate indorsed hereon shall be signed by the Trustee under said mortgage deed of trust.

IN WITNESS WHEREOF, The Commercial Cable Company has on this first day of January, 1897, caused its corporate seal to be affixed hereto, and this bond to be signed by its Vice-President and Treasurer, and has also caused a fac-simile signature of its Treasurer to be engraved on each of the coupons hereto annexed.

THE COMMERCIAL CABLE COMPANY,
By

Vice-President.
Treasurer.

Attest:

Secretary.

[*Form of Coupon.*]

\$10

\$10

On the first day of 19
THE COMMERCIAL CABLE COMPANY
will pay to the bearer at the office of The
Farmers' Loan and Trust Company, Ten
Dollars in gold coin, being three months'
interest due on its first mortgage bond for
one thousand dollars.

No.

Treasurer.

And said bonds are to bear the following
certificate indorsed upon them, to be signed
by said trustee:

[*Trustee's Certificate.*]

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, hereby certifies that this bond is one of the issue referred to within.
THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By

Vice-President.

[*Form of Registered Bond.*]

(In denominations of \$100, \$500, \$1,000,
\$5,000, and \$10,000.)

UNITED STATES OF AMERICA,
No. —.

THE COMMERCIAL CABLE COMPANY, NEW
YORK.

FIRST MORTGAGE FOUR PER CENT. GOLD
BOND.

Principal due Jan. 1, A. D. 2397.

Interest payable quarterly on the first days
of January, April, July, and October,
at the rate of four per cent.
per annum.

FOR VALUE received The Commercial Ca-

a bondholder may, by an action for specific performance, compel the carrying out of this contract on the part of the corporation issuing the bonds.¹

The bonds may be payable to the bearer.² If the payee of the

ble Company promises to pay to or assigns dollars in gold coin of the United States of America of or equal to the present standard of weight and fineness at the office of The Commercial Cable Company, in the city of New York, on the first day of January, A. D. two thousand three hundred and ninety-seven, and to pay interest thereon, in like gold coin, at the rate of four per centum per annum, from the first day of 18, until such principal sum shall be paid, such interest being payable at said office on the first days of January, April, July, and October in each year.

This bond is one of an issue of bonds, coupon and registered, of like tenor, to an amount not exceeding in the aggregate twenty million dollars, all of which are equally secured by a mortgage deed of trust bearing date January 1, 1897, made by the said The Commercial Cable Company to said The Farmers' Loan and Trust Company, as Trustee, of and upon the property and franchises of The Commercial Cable Company (including the franchises, stock, and property of the Postal Telegraph-Cable Company, heretofore acquired by said The Commercial Cable Company).

In case of default for six months after due demand in the payment of interest on any of said bonds, the principal of all thereof may be declared due in the manner and with the effect provided in said mortgage deed of trust.

All payments upon this bond of both principal and interest are to be made without deduction for any tax or taxes which said Cable Company may be required to pay or to retain therefrom, by any present or future laws of the United States of America, or any of the states thereof, said Cable Company hereby covenanting and agreeing to pay any and all such tax or taxes.

This bond is transferable only at the office of said The Commercial Cable Company on the books of said The Commercial Cable Company by the registered owner in person or by attorney upon the surrender hereof, and may be transferred into similar bonds of smaller denominations or be merged with other bonds of this issue into a similar bond of larger denomination, except that the only denominations shall be \$100, \$500, \$1,000, \$5,000, and \$10,000.

Instalments of interest on this bond shall

be paid by cheques or warrants mailed to proprietors at their addresses, registered in the books of said Cable Company, and such payments shall be in full in the order of their maturity and in accordance with the provisions of said mortgage deed of trust.

This bond may be exchanged for the debenture stock of said The Commercial Cable Company on the terms set forth in the mortgage deed of trust securing this bond.

This bond shall not be valid or obligatory until the certificate indorsed hereon shall have been signed by the Trustee under the said mortgage deed of trust.

IN WITNESS WHEREOF The Commercial Cable Company has on this day of caused its corporate seal to be affixed hereto, and this bond to be signed by its vice-president and treasurer.

THE COMMERCIAL CABLE COMPANY,

By

Vice President.
Treasurer.

Attest:

Secretary.

The above class of bonds usually contain a registration clause as follows:

This bond shall pass by delivery, or by transfer upon the transfer books of the company in the city of New York. After registration of ownership certified hereon by the transfer agent of the company, no transfer, except on the books of the company, shall be valid, unless the last transfer is to bearer, which shall restore transferability by delivery; and it shall continue subject to successive registrations, and transfers to bearer, as aforesaid, at the option of each holder.

1 Benwell v. Mayor, 55 N. J. Eq. 260 (1897). On this subject of registration, see also § 815, *infra*.

2 Kneeland v. Lawrence, 140 U. S. 209 (1891); Mercer County v. Hackett, 1 Wall. 83 (1863); Savannah, etc. R. R. v. Lancaster, 62 Ala. 555 (1878). Railway bonds may be payable to the trustees in the mortgage or bearer, or may be payable to bearer alone. Ide v. Passumpsic, etc. R. R., 32 Vt. 297 (1859). The bearer may sue on

bond is left blank, the holder may fill in his name;¹ but if it is payable only to a specified person, a written assignment is necessary.² If payable to a certain person, he may indorse them in blank and then they pass by delivery.³ A bondholder is a payee and not an assignee.⁴ The bonds should not be described as first-mortgage bonds if there are underlying mortgages on divisions of the property.⁵ A purchaser of bonds and stock may rescind on the ground that the vendor falsely represented that there was but one mortgage on the property. It is immaterial that the vendor paid off the other mortgage after suit was brought.⁶ Where a corporation issues bonds having the words printed on their face "first-mortgage bonds," when, as a matter of fact, there was an underlying mortgage which the party to whom the bonds were sold agreed to pay, but did not pay except in part, the officers and the directors who took part in the issue of the bonds are liable to an innocent purchaser who relied on the statement contained on the face of the bonds. His measure of damages is the difference between the value of the bonds as first-mortgage bonds and second-mortgage bonds.⁷ The usual endorsement of a trust company on the back of bonds that "This bond is one of a series of bonds mentioned and described in the mortgage within referred to" does not render the trust company liable on account of

them in his own name. *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). Bonds are often drawn payable to the trustee or bearer.

¹ See § 764, *supra*.

² The assignee of a bond payable to a certain person or assigns cannot sue thereon where the assignment to him is not in writing. *Bunting v. Camden, etc. R. R.*, 81 Pa. St. 254 (1876).

³ *Brainerd v. New York, etc. R. R.*, 10 Bosw. 332 (1863).

⁴ *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883).

⁵ It is fraudulent to deliver as first-mortgage bonds, bonds which are denominated "first-mortgage consolidated bonds" which are not secured by a first mortgage, but are second to underlying mortgages on divisions of the property. *Williamson v. New Jersey Southern R. R.*, 29 N. J. Eq. 311, 318 (1878), affirming on this point 28 N. J. Eq. 277. Although the bonds bear upon their face the words "consolidated first-mortgage bonds," yet, if

they refer to a mortgage, and the mortgage shows that there were underlying first-mortgage bonds which were to be exchanged or taken up if possible by the consolidated bonds, the directors and the trustee are not liable for fraud in issuing the consolidated bonds, a part of the bonds having been used for new construction. *Caylus v. New York, etc. R. R.*, 10 Hun, 295 (1877); *aff'd*, 76 N. Y. 609.

⁶ *Stevenson v. Marble*, 84 Fed. Rep. 23 (1897). The contract of a corporation to sell first-mortgage bonds on a certain date cannot be rescinded by the vendee on the ground that the previous first mortgage had not been released, it appearing that all but a few of the bonds secured by the previous mortgage had been paid and that these few could not be traced, but a fund had been set apart for that payment. *Nes v. Union Trust Co.*, 104 Md. 15 (1906).

⁷ *Bank v. Byers*, 139 Mo. 627 (1897). *Cf.* § 764, *supra*, and § 814, *infra*.

the mortgage securing the bond not being a first mortgage, even though the bond itself stated that it was secured by a first mortgage.¹ A person having a prior lien may waive it by taking from the corporation, as security, bonds which purport to be first mortgage bonds.² The seal of the corporation is attached to the bond.³ This seal may be considered as merely the signature of the company, thereby rendering the "bond" merely a promissory note and subject to the short statute of limitations,⁴ or it may be considered a seal the same as an individual's seal, making the instrument a sealed instrument.⁵

The execution of the bonds should be regularly and formally authorized by the proper corporate authorities.⁶

A mortgage and bonds secured thereby may be authorized by the board of directors, and no action or authorization by the stockholders is necessary.⁷

Bonds and mortgages may be executed outside of the state incorporating the company.⁸

If no date of payment of the principal is specified it may be collected at any time.⁹

The various questions arising concerning the interest on and coupons of bonds are considered elsewhere.¹⁰

A bond by its terms may be made payable in gold coin of or equal to the present standard of weight and fineness.¹¹ But the court

1 *Tschetinian v. City Trust Co.*, 186 N. Y. 432 (1906).

2 *Bristol, etc. Co. v. Bristol Gas, etc. Co.*, 99 Tenn. 371 (1897).

3 An official may, while out of the state, cause a new seal to be made and attach it to the bonds of the corporation out of the state. *Lynde v. Winnebago County*, 16 Wall. 6 (1872). See also § 722, *supra*.

4 See §§ 770, 772, *infra*.

5 See §§ 770, 772, *infra*.

6 Where the stockholders build the road with their own money and take the mortgage bonds of the company as security without formal action of the corporation authorizing it, the bonds are not goods in their hands and an execution sale of the property comes in ahead of the mortgage. *McKee v. Grand Rapids, etc. Ry.*, 41 Mich. 274 (1879). See §§ 721-725, *supra*. As to notice of a meeting to authorize bonds, see § 599, *supra*. As to ratifica-

tion of an unauthorized mortgage, see § 809, *infra*.

7 *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). See also § 808, *infra*.

8 *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884).

9 *Hopkins v. Worcester, etc. Canal*, L. R. 6 Eq. 437 (1868).

10 See §§ 771, 772, *infra*.

11 For various decisions on the gold clause in obligations, see 7 Wait, Act. & Def., p. 586; 2 Dan. Neg. Inst., 4th ed., § 1247; *Bronson v. Rodes*, 7 Wall. 229 (1868). Where the contract calls for gold coin, the judgment for damages for failure to pay should be for coin for the amount specified in the contract. *Butler v. Horwitz*, 7 Wall. 258 (1868); *Trebilcock v. Wilson*, 12 Wall. 687 (1871). An agreement to pay in gold may be implied, but the implication must be found in the language of the contract. Maryland

cannot change the payments of interest from currency to gold.¹ A railroad has no right to pay off bonds before they are due, nor to pay the money to the trustee and have the mortgage canceled.² Upon a sale of the assets and the winding up of the company bonds not yet due may be paid at par and accrued interest.³

Where the owner of bonds delivers them up to the company in exchange for other bonds or securities, the courts are inclined to hold that he does not thereby waive the security of the mortgage that secured the bonds, but that the new bonds are subrogated to such security.⁴ Thus where a reorganized company issues its bonds

v. Railroad Co., 22 Wall. 105 (1874). Coupons may by their terms be made payable in gold coin. *Pollard v. Pleasant Hill*, 3 Dill. 195; s. c., 19 Fed. Cas. 944 (1873). Where a statute authorizes the governor to sign bonds bearing eight per cent. interest, he may sign bonds bearing eight per cent. payable in gold. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606; s. c., 30 Fed. Cas. 850 (1875). Where bonds are payable in gold and silver coin the government has no right to pay them in legal-tender currency. *State v. Hays*, 50 Mo. 34 (1872). As to a gold clause, see also *Blanck v. Sadlier*, 153 N. Y. 551 (1897); *Dennis v. Moses*, 18 Wash. 537 (1898); *Carpentier v. Atherton*, 25 Cal. 564 (1864).

¹ *Taylor v. Atlantic, etc. Ry.*, 55 How. Pr. 275 (1877).

² *Missouri, etc. Ry. v. Union Trust Co.*, 156 N. Y. 592 (1898), aff'g 87 Hun, 377 (1895). See also §§ 811, 816, *infra*.

³ *Re Southern, etc. Ry. Co., Ltd.*, [1905] 2 Ch. 78. See also § 642, *supra*.

⁴ Although bonds are taken in payment of past-due coupons, yet those who take such bonds are subrogated to and may enforce the coupons. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586, 596 (1880). But in *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 86 Va. 1 (1889), the same court held that where coupons are exchanged for income bonds at sixty cents on the dollar, and the clear intent was to satisfy, discharge, and cancel the coupons, there is no subroga-

tion. Second-mortgage bonds taken in exchange for coupons on first-mortgage bonds share in the proceeds as though they were such coupons. *Farmers' L. & T. Co. v. Green Bay, etc. R. R.*, 6 Fed. Rep. 100 (1881). Interest released by first-mortgage security-holders may be expressly made payable to holders of other securities, and yet the latter are not subrogated to the mortgage to that extent. *Sullivan v. Portland, etc. R. R.*, 94 U. S. 806 (1876). Bondholders taking certificates of indebtedness do not thereby waive their mortgage security. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 357 (1879); s. c., 22 Fed. Cas. 274. See also *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887), where a trustee for the second-mortgage bondholders bought for them the property at a foreclosure sale under the first mortgage. *Cf. Railroad v. Souter*, 13 Wall. 517 (1871), where the sale was fraudulent. See also, in general, *Gibbes v. Greenville, etc. R. R.*, 13 S. C. 228 (1879); *Newbold v. Peoria, etc. R. R.*, 5 Ill. App. 367 (1879); *Blair v. St. Louis, etc. R. R.*, 23 Fed. Rep. 524 (1885); *Ames v. New Orleans, etc. R. R.*, 2 Woods, 206 (1876); s. c., 1 Fed. Cas. 760. But a person advancing interest is not entitled to be equitably subrogated. *Newport, etc. Co. v. Douglass*, 12 Bush (Ky.), 673 (1877). See also §§ 772, 860, *infra*; *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889); *Ex parte White*, 2 S. C. 469 (1871). Where the mortgage bondholders agree to waive their

in exchange for bonds of the old company, such bonds of the old company are not thereby canceled so as to give a junior mortgage of the old company priority over the bonds so received in exchange.¹ Where a part of mortgage bonds which are in default, are, under a reorganization agreement, returned to the corporation and placed under a new mortgage, securing bonds which are issued to the persons who so turned in the first-mentioned bonds, the holders of the remaining old bonds cannot claim that the bonds so turned in have been canceled, thereby reducing the first-mortgage issue by that amount.² Yet, where consolidated mortgage bonds are issued in exchange for bonds secured by prior lien, but all of the prior bonds are not so turned in, and a foreclosure takes place; such of the prior bonds as were not turned in must be paid in full.³ Where a holder of bonds exchanges them for new bonds, the agreement being that the old bonds should be canceled when all of them have been changed,

lien and take new second-mortgage bonds, and the trustee does discharge the mortgage, a failure of the company to issue the new second-mortgage bonds in accordance with the contract does not entitle the old bondholders to be restored to their position as first-mortgage bondholders. They may, however, have their bonds allowed as second-mortgage bonds upon foreclosure. *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 33 W. Va. 761 (1890). In the case of *Maxwell, etc. Co. v. Henderson*, 12 Colo. App. 425 (1899), where the lessee of land had issued bonds based on such lease and most of the holders thereof had transferred their bonds to a mortgagee of the lessor in exchange for bonds of the lessor, the court held that these bonds of the lessee which had been so exchanged could not participate in the proceeds from the foreclosure of the mortgage given by the lessee.

¹ *United States Rubber Co. v. American, etc. Co.*, 181 U. S. 434 (1901). Where in a consolidation new bonds are issued in exchange for old bonds, and some of the old bonds are not sent in, and those which are sent in are not canceled, it is a question of intent as to whether they

are to be considered canceled. *Burlington, etc. Co. v. Princeton, etc. Co.*, 67 Atl. Rep. 1019 (N. J. 1907). Where a new mortgage is executed to secure bonds to be issued in exchange for old mortgage bonds, and an attachment is levied on the property before the recording of the new mortgage, the court will preserve the lien of the pre-existing mortgage as against such attachment. *Griffin v. International T. Co.*, 161 Fed. Rep. 48 (1908).

² *Mowry v. Farmers' L. & T. Co.*, 76 Fed. Rep. 38 (1886).

³ *Bound v. South Carolina R. R.*, 78 Fed. Rep. 49 (1897). Where the outstanding bondholders join in a request for a foreclosure of the mortgage bonds of the reorganized company, they are deemed to have waived their rights in the old bonds. *First Nat. Bank v. Radford Trust Co.*, 80 Fed. Rep. 569 (1897). Where a consolidated mortgage provides for the issue of its bonds in exchange for prior bonds and some of the prior bonds are so exchanged, the bonds so turned in are considered as surrendered and paid, especially where the company subsequently represented that they were paid. *New York, etc. T. Co. v. Louisville, etc. R. R.*, 102 Fed. Rep. 382 (1900).

such owner cannot rescind even though all of the bondholders do not come in and consequently the cancellation does not take place.¹

Where without foreclosure the bondholders purchase the property at an assignee's sale subject to the mortgage, and pay the price by turning in bonds, the bonds cannot be enforced against the stockholders of the mortgagor company.² Where mortgage bonds are deposited with the trustee to be issued in exchange for outstanding bonds, the right of a holder of outstanding bonds to make the exchange cannot be defeated by the mortgagor after such holder has actually deposited his bonds and asked for the new bonds.³ The holder of bonds, issued by a corporation, which is afterwards consolidated with another corporation, cannot claim the right to exchange his bonds for bonds of the consolidated company, even though the mortgage of the consolidated company provides for such exchange, especially where the party has delayed for nine years in claiming the right.⁴

The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a party defendant and resides in the same state as the complaining corporation. The trustee in such a suit is merely a formal party.⁵ Where a corporation buys its unmatured bonds and causes the mortgage securing them to be canceled, but neglects to cancel the bonds, a *bona fide* pledgee of such bonds from the treasurer, who fraudulently abstracted them, is protected.⁶ Even though a railroad mortgage is being foreclosed in the federal court on the supposition that a prior mortgage had been fully paid, yet a *bona fide* purchaser of bonds secured by such prior mortgage may bring a foreclosure suit thereon in the state court after the foreclosure suit in the federal court has been completed, even though such purchaser purchased during the foreclosure of the subsequent mort-

1 Central Trust Co. v. Marietta, etc. Ry., 73 Fed. Rep. 589 (1896).

2 Cock v. Bailey, 146 Pa. St. 328 (1892).

3 Wakefield, etc. Co. v. New England T. Co., 175 Mass. 478 (1900).

4 New York, etc. Trust Co. v. Louisville, etc. R. R., 97 Fed. Rep. 226 (1899). Even though on the consolidation of several railroads provision is made for issuing consolidated bonds to take up existing bonds of the constituent companies, yet after seven years' delay a holder of the

latter bonds cannot compel the consolidated company to make the exchange, there being no definite contract on the part of the consolidated company so to do, and there being a provision as to the consolidated bonds in case the bondholders in the constituent companies refused or neglected to exchange. Mott v. N. Y., etc. Co., 29 N. Y. Misc. Rep. 39 (1899).

5 Lake, etc. R. R. v. Ziegler, 99 Fed. Rep. 115 (1900).

6 Rockville, etc. Bank v. Citizens', etc. Co., 72 Conn. 576 (1900).

gage and was aware of the default on such second mortgage.¹ In construing a provision in a bond for a sinking fund, the prospectus is not admissible in evidence. The term "sinking fund" does not necessarily imply accumulation.² A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of a *bona fide* mortgagee without notice of such debentures and such contract.³

The question of whether a provision that bonds may be issued by vote of the stockholders only, and whether a statutory notice may be waived, is considered elsewhere.⁴

§ 766. *Bonds issued below par for cash, property, or construction work—Dividend of bonds—Bonds, notes, or mortgages given without consideration—Statutory and constitutional prohibitions relative to issues of bonds—Fraudulent issues of bonds—Bona fide purchasers of bonds issued at less than their par value are protected—Fraudulent issues of bonds to the directors, or through directors who are "dummies," or to construction companies in which the directors are interested.*—It is clear that at common law a corporation may issue its bonds at less than their par value.⁵

1 Pittsburgh, etc. Ry. v. Lynde, 55 Ohio St. 23 (1896); same case aff'd, *sub nom.* Pittsburgh, etc. Ry. v. Long Island L. & T. Co., 172 U. S. 493 (1899).

2 Morrison v. Chicago, etc. Co., 77 L. T. Rep. 677 (1897).

3 Re Castell, etc. Co., [1898] 1 Ch. 315.

4 § 725, *supra*, and § 808, *infra*.

5 Gamble v. Queens County Water Co., 123 N. Y. 91 (1890), where the court, after speaking with reference to the stock of the company, proceeded to say: "A different rule, however, prevails in regard to the bonds of a corporation. An extended discussion of the question is not needful. We think a corporation has the power to issue its bonds at less than par. So far as this point is concerned, it is not restricted to an issue only upon payment to the company of the par value of the bonds, either in money or property for its use." To same effect, Lyceum v. Ellis, 57 N. Y. Super. Ct. 532 (1890); Farmers' L. & T. Co. v. Rockaway, etc. R. R., 69 Fed. Rep. 9 (1895). The holder of a majority

of the stock of a railroad company may legally cause its bonds to be issued to himself at ninety cents on the dollar in payment of a debt due him. Gloninger v. Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891). A corporation may issue bonds at eighty cents on the dollar. The Vigilancia, 68 Fed. Rep. 781 (1895). In the case of Duncomb v. N. Y. etc. R. R., 84 N. Y. 190 (1881), bonds were sold by the corporation at fifty-one cents on the dollar, and the court sustained the sale. It is no defense to a foreclosure suit that the bonds were issued at two-thirds of their par value. Central Trust Co. v. Washington, etc. R. R., 124 Fed. Rep. 813 (1903). Bonds sold by the corporation at eighty cents on the dollar were sustained in Lembeck v. Jarvis, etc. Co., 70 N. J. Eq. 757 (1906), aff'g 69 N. J. Eq. 450. Where mortgage bonds are issued without any consideration the burden of proof is shifted on to the holders of the bonds to prove that they are *bona fide* holders. McVicar, etc. Co. v. Union Ry. etc. Co., 136 Fed. Rep. 678 (1905). A New York corporation cannot under

A person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par by the corporation to the person taking the bonus.¹ A person who buys mortgage bonds with stock as a bonus, from a party to whom the stock and bonds were originally issued, cannot be held liable on the stock at the instance of other stockholders, who did not object at the time of the issue, but who come into the foreclosure suit and attempt to defeat the bonds on the ground that the amount due thereon is not more than the unpaid par value of the stock, the bonds and stock having originally been issued in payment for property.² Where

the New York statute receive a note in payment for its bonds, especially where it was a note of the president, unless such note is actually collected. *In re Waterloo, etc. Co.*, 134 Fed. Rep. 341 (1904). A corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of twenty-five per cent. *Bank of Toronto v. Cobourg, etc. Ry.*, 10 Ont. (Can.) 376 (1885). Debentures may be issued at a discount, even sixty per cent. discount being upheld in *Webb v. Shropshire Ry.*, [1893] 3 Ch. 307. See also *Handley v. Stutz*, 139 U. S. 417 (1891); *Christensen v. Illinois, etc. Co.*, 52 Hun, 478 (1889). But an agreement of a corporation to issue bonds to a subscriber as a "bonus" was held to be void, and the subscription was enforced, in *Morrow v. Nashville, etc. Co.*, 87 Tenn. 262 (1889). In *Clafin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880), bonds were issued at the rate of eighty cents on the dollar, and no question was raised as to the validity of the issue. In England debentures may be issued at a discount in cash. *Campbell's Case*, L. R. 4 Ch. D. 470 (1876), where the issue was to a director; *Re Regents', etc. Co.*, L. R. 3 Ch. D. 43 (1876), where pledgees of debentures shared equally with purchasers, on winding up, to the extent of the pledge; *Re Anglo-Danubian, etc. Co.*, L. R. 20 Eq. 339 (1875); *Re Inns, etc. Co.*, L. R. 6 Eq. 82 (1868). Where railroad bonds are issued and paid for in Confederate currency, they can

be enforced only to the extent of the purchasing value of the currency thus paid, at the time of the purchase, with interest upon that value. *Spence v. Mobile, etc. Ry.*, 79 Ala. 576 (1885). See also, on the subject of issuing stock and bonds at less than their par value, ch. III, *supra*. It is illegal to issue municipal bonds at a discount. See § 98, *supra*. In *Sherlock v. Winnetka*, 68 Ill. 530 (1873), the court held a sale of municipal bonds below par to be unlawful. A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of stock which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899).

¹ *Davis v. Montgomery, etc. Co.*, 101 Ala. 127 (1890). See also § 42, *supra*.

² *Northern, etc. Co. v. Columbia, etc. Co.*, 75 Fed. Rep. 936 (1896); *Dickerman v. Northern T. Co.*, 80 Fed. Rep. 450 (1897); *aff'd*, 176 U. S. 181. But see §§ 46, 47, *supra*. Even though a corporation sells \$161,500 of bonds and \$130,000 of its stock for \$145,350, yet the remaining bondholders cannot complain on the foreclosure, and even if there was any liability on the

underwriters have agreed to purchase the bonds of the corporation at a certain price with a bonus of seventy-five per cent. in stock, the corporation may pledge the bonds and assign the underwriting agreement to the pledgee, and the pledgee in order to enforce the underwriting agreement may compel the corporation to furnish the seventy-five per cent. in stock for that purpose.¹ The bonds of a failing corporation and the mortgage securing them are valid although when the bonds were issued a large amount of increased capital stock was given by the corporation as a bonus with the bonds. The giving of the bonus is no defense to a foreclosure of the mortgage, it being shown that the corporation was nearly insolvent at the time such increased capital stock was issued.² But bond purchasers who receive an equal amount of stock, the entire price being the par value of the bonds only, are liable on the stock if they had notice of the fact that it had been issued for worthless property, and it is immaterial that some of them after signing the contract accepted the bonds without taking the certificate of stock.³ In New York it has been held that unissued shares of stock may be issued gratuitously to stockholders; also bonds of the company; and they are not liable for the par value or any part thereof to the corporation or corporate creditors, unless they agreed to pay therefor or the statute requires payment. Even though the stockholder has sold such stock and bonds, he is not liable to corporate creditors for the amount received from

stock as an unpaid subscription the statute of limitations may be a bar, and the same is true as to any forfeiture for usury. *Weed v. Gainesville, etc. R. R.*, 119 Ga. 576 (1904).

¹ *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 146 (1904); *aff'd*, 137 Fed. Rep. 387. In the case *Hudson, etc. Ry. v. O'Connor*, 95 N. Y. App. Div. 6 (1904), an underwriting syndicate agreement was construed where bonds were sold at eighty cents on the dollar with a stock bonus, and it was held that coupons attached to the bonds belonged to the underwriters, even though the bonds were not delivered for some time after the coupons became due.

² *Dummer v. Smedley*, 110 Mich. 466 (1896), the court relying on the authority of *Handley v. Stutz*, 139 U. S. 417 (1891). See also § 42, *supra*. Where a corporation cannot find a purchaser for its bonds at sixty cents on the dollar it may sell them together

with a bonus of stock equal to fifty per cent. of the par value of the bonds for eighty-five cents on the dollar for the bonds, and such transaction is legal, even though one-half of the stock was contributed by the stockholders who were reimbursed by a stock dividend to that amount. Neither the corporation nor its receiver can complain of the transaction, and creditors who were not deceived and fraudulently induced to purchase the stock or bonds cannot complain. *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561.

³ *Gillett v. Chicago Title & T. Co.*, 82 N. E. Rep. 891 (Ill. 1907), holding also that where bonds were sold with a bonus of stock, and the purchasers were held liable on the stock, they were entitled to participate as bondholders in the fund which the court compelled them to pay in on their stock.

the sale.¹ Even though bonds are issued as a bonus to stockholders, yet a *bona fide* holder of such bonds may enforce them.²

Generally a large amount of stock is issued together with a quantity of bonds in payment for property or construction work. Upon the insolvency of the company, the bonds having passed into the hands of *bona fide* holders, an attempt is made to hold the contractors liable for the par value of the stock on the theory that it has never been paid for. The great weight of authority, however, holds that the contractors are not liable on the stock, whether they have disposed of it or not.³

1 Christensen v. Eno, 106 N. Y. 97 (1887), the court refusing to follow Skrainka v. Allen, 7 Mo. App. 434 (1879); s. c., 76 Mo. 384. "Stock issued as a bonus with the sale of bonds, or stock issued through the means of overvaluation of property, cannot properly be regarded as necessarily issued fraudulently. In the absence of intervening rights of creditors, such transactions appear to have been generally supported by the courts, unless positive fraud has been clearly established, notwithstanding the constitutional and statutory provisions of many of the states designed to secure a proper relationship between the capital stock and the assets of corporations." Arnold v. Searing, 67 Atl. Rep. 831 (N. J. 1907). See also ch. III, § 42, *supra*.

2 Thomson-Houston Elec. Co. v. Capitol Elec. Co., 65 Fed. Rep. 341 (1894), holding also that where an agent received the bonds with notice, but tried to cheat his principal, the latter is not chargeable with notice.

3 Where all the stock and a large quantity of bonds are issued by a railroad corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value. "If, when disposed of by the railroad company, it was without value, no wrong was

done to creditors." Even the Missouri constitution and statutes do not change this rule. Fogg v. Blair, 139 U. S. 118 (1891); Van Cott v. Van Brunt, 82 N. Y. 535 (1880). The doctrine laid down in Van Cott v. Van Brunt was approved in Coe v. East, etc. R. R., 52 Fed. Rep. 531 (1892). It is legal for a railroad company to issue bonds and stock in payment for the construction of its road. If all the parties assent no one can complain. "As the stock was issued as a part of the consideration for construction, it cannot be said that it was taken without value given." The par value is immaterial. "The fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all." Barr v. New York, etc. R. R., 125 N. Y. 263 (1891). A railroad construction contract by which the work is paid for by stock and bonds is not a stock subscription nor a sale of the stock, but is merely a contract, and the receiver of the railroad cannot hold a contractor liable for the alleged value of the stock and bonds, he being estopped the same as the corporation itself, there being no promise to pay the par value of the stock. Bostwick v. Young, 118 N. Y. App. Div. 490 (1907). Where a corporation fails in its suit to have bonds canceled on the ground that they were not issued for value, it cannot afterwards defend against such bonds on the ground of payment and estoppel. Ruckman v.

The issue of the bonds of a corporation in payment for property or construction work is the favorite mode of issuing bonds at less

Union Ry., 45 Ore. 578 (1904). At common law, even though a railroad corporation issues to its president nearly \$1,400,000 of mortgage bonds and \$700,000 of stock for construction work which costs only about \$700,000, nevertheless the purchasers of such stock and bonds cannot cause suit to be brought by the corporation, after the foreclosure of its property, and hold him liable. The court held that inasmuch as the stock had no market value no harm was done. The court said: "Nor is it true that those who took the stock and bonds and paid money for them were cheated by Kase, in any real sense of the word. Is any man of ordinary judgment cheated when he pays seventy-five or eighty cents on the dollar for a seven or eight per cent. railroad bond, receiving with the bond a gift of the stock in many cases almost equaling the face value of the bond? Such a purchaser knew, just as Kase knew, that the value of the paper was speculative. If Kase lived, if he expended the money in construction, if he completed the road, if the event then proved it to be a meritorious enterprise (that is, if it received and developed traffic sufficient to pay operating expenses, fixed charges, and reasonable dividends), the speculative buyer would probably more than double his money. If any one of the contingencies did not happen, the buyer lost; but he was not cheated, except in the sense that all who bet on the happening of an uncertain event, and lose, are cheated." *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa. 1898). In this case stock and bonds had been issued by the corporation for land, but the stock had no market value, and an effort was made to hold the vendor of the land liable for the par value of the stock and the actual value of the bonds less the actual value of the land. The court refused, and said: "We do not concur with the master in his conclusion that Kase should refund to the company a large sum of money in excess of the profit, because of the stock received by him in the transaction. He finds as a fact that the stock was then, and is now, worthless. A court of equity does not perform the duties of a court of quarter sessions; does not order restitution of that which is valuable, and also impose a heavy fine on the guilty. The company has the land, Kase has a profit of \$111,000 bonds, and no profit in the worthless stock. He should account for the bonds alone." Inasmuch, however, as the president secretly owned land in the name of another person and caused the corporation to purchase it and issue stock and bonds in payment, without disclosing his interest in the land, he was held liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land. *Danville, etc. R. R. v. Kase*, 39 Atl. Rep. 301 (Pa. 1898). Although \$1,500,000 of stock, issued as fully paid, and \$1,500,000 in bonds, are issued for the construction of a work which costs less than \$1,500,000, yet an attorney who took part in the transaction cannot, as a creditor of the corporation, claim that the stock was not fully paid. *Ten Eyck v. Pontiac, etc. R. R.*, 114 Mich. 494 (1897). In *Northwestern, etc. Ins. Co., v. Cotton, etc. Co.*, 46 Fed. Rep. 22 (1891), however, the court held that where property worth \$157,000 is turned in to a corporation for \$200,000, payable in \$125,000 of stock and \$75,000 of bonds, the creditors of the company might hold the parties liable on the stock as though it were unpaid stock, and the cred-

than their par value. The real value of the property or construction work being uncertain, it is difficult to detect the real price at which the bonds are issued; and when it is borne in mind that bonds may be issued below par, even when issued for cash, the safety of issuing bonds at a price greatly below par in payment for property or construction work becomes apparent. The courts sustain such issues of bonds, even though the value of the property or construction work is far less than the par value of the bonds.¹ Thus,

itor is presumed not to have known of the transaction when he contracted the debt. Where a railroad worth \$112,000 is sold to a new corporation for \$1,120,000 of bonds and all its capital stock, the transaction is fraudulent. The bondholders may obtain judgment against the company on their bonds, and then compel the stockholders to pay the full par value of their stock. *Preston v. Cincinnati, etc. R. R.*, 36 Fed. Rep. 54 (1888). This decision was affirmed in *Lloyd v. Preston*, 146 U. S. 630 (1892), where the court held that where the owner of a railroad sold it to a newly organized corporation for stock and bonds, the par value of which was fifty times the real value of the railroad, the bondholders and other creditors who had obtained judgment against the corporation, the execution being returned unsatisfied, may hold the party receiving the stock liable thereon, on the ground that the subscription price of such stock has never been paid. The court said: "The entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature." The court also said: "It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce actual pay-

ment by the subscribers, it only remains to consider the effect of the defenses set up."

¹ In *Stewart v. St. Louis, etc. R. R.*, 41 Fed. Rep. 736 (1887), where a railroad road-bed worth \$2,000 was turned in to a corporation for \$200,000 of its notes and \$3,600,000 of its stock, the court held that the notes were good and could be collected. In passing upon the validity of a railroad construction contract whereby bonds and preferred stock and common stock were issued for construction work, the court in figuring the actual value received by the railroad for these securities figured the common stock at fifteen cents on the dollar and the bonds at seventy-six cents on the dollar, and held that this was legal, even under the Ohio statutes. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). In a suit by the receiver of an insolvent street railway company to hold a construction company liable on stock which, together with bonds, was issued for the construction of a street railway, the claim being that there was no consideration received for the stock, the bill in equity must allege that the construction company had power to acquire such stock. If such stock was issued and received as full-paid stock the construction company is not liable thereon, even though \$63,750 of stock and \$95,000 in notes secured by bonds were issued for construction work costing but \$95,000, there being no proof that the stock ever had any value. *Doak v. Stahl-*

a purchaser of bonds, who purchases with notice that an alleged covenant in the mortgage securing the bonds, to devote the proceeds

man, 58 S. W. Rep. 741 (Tenn. 1899). The statute of New York prohibiting the issue of stock at less than par and of bonds at less than their fair market value does not prohibit the issue of stock and bonds by a gas company in payment for the stock and bonds of a competing gas company, even though a high value is placed upon the franchise of such competing company as a part of the purchase price. Such a transaction is not illegal on the ground of creating a monopoly, nor is it *ultra vires*, provided the charter of the first company allowed it to purchase stock and bonds, as provided in the New York statutes. *Rafferty v. Buffalo, etc. Co.*, 37 N. Y. App. Div. 618 (1899). The New York statute against the issue of stock below par and the issue of bonds below their fair market value does not prevent the issue of stock and bonds by a railroad company for construction work, and such stock and bonds may be delivered in advance of the work being done. *Hudson River, etc. R. R. v. Hanfield*, 36 N. Y. App. Div. 605 (1899). Mortgage bonds issued in exchange for notes held by a former company must be clearly and fully explained in a foreclosure suit based thereon. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 90 Fed. Rep. 584 (1898). In *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858), the court held that bonds issued in payment for the completion of a canal were legal, although the sum for which they were issued was largely greater than the estimated cost of the work. In that case the bonds were issued at about fifty cents on the dollar. Railroad bonds issued to pay for the construction of the road are not rendered invalid by proof that the road could have been, or was, constructed for less than the amount of such bonds, if the contract for its construction was fairly made and carried out, and called for the amount of bonds actually issued, and no fraud is charged in the inception or execution of such contract. Such a question, however, may be raised before the master upon the distribution of the fund realized upon foreclosure. *Farmers' L. & T. Co. v. Rockaway Valley R. R.*, 69 Fed. Rep. 9 (1895). Even though a party acquires all the stock of a corporation, amounting to \$1,500,000, and then through dummy directors issues \$3,500,000 additional stock and \$4,000,000 of mortgage bonds to himself, and then proceeds to sell the stock and bonds to the public, yet a person who purchases some of the stock cannot file a bill in equity against the corporation to set aside the transaction and to ascertain what part of his stock is legal. His remedy is at law for damages, or he may repudiate and recover back his money. "It is elementary that the court is possessed of no power to make a new contract between parties entirely distinct and different from the contract that they have entered into." *Church v. Citizens' Street Ry.*, 78 Fed. Rep. 526 (1897). A delivery of bonds as payment in advance for services to be rendered in selling other bonds cannot be rescinded, where by subsequent agreement a loan with the bonds as collateral was negotiated, the bonds to be subsequently sold. *American L. & T. Co. v. Toledo, etc. Ry.*, 47 Fed. Rep. 343 (1890); *aff'd*, *Burke v. American L. & T. Co.*, 155 U. S. 534 (1895). The plan of issuing large quantities of stock and bonds of a railroad company to a contractor, the bonds being all "water," is declared illegal in *Central Trust Co. v. New York, etc. R. R.*, 18 Abb. N. Cas. 381, 395 (1887), holding also that the full amount of the bonds can be claimed

of the bonds to the improvement of the property, has been broken, cannot complain of such breach of covenant, even though the entire proceeds of the bonds were, through the medium of sales of property, diverted to the personal benefit of stockholders.¹ Even though bonds

only by *bona fide* holders without notice, and that the other bonds will be paid only in proportion to the actual value of the property given to the company for them. The celebrated Burke litigation is in point here. It appears that in July, 1881, Burke purchased the entire capital stock (except seven shares which seem to have been lost) of three coal-carrying railroad companies in Ohio and consolidated them. He owned also the stock of another coal and railroad company. Accordingly he caused the consolidated company to issue \$8,000,000 of its mortgage bonds in purchase of and payment for the stock of the coal and railroad company, which was worth less than \$1,500,000. He then sold the bonds and kept the proceeds. The bonds recited on their face that they were for double tracking, equipment, and improvement purposes. The bonds passed into *bona fide* hands. The consolidated company also passed into other hands. In 1887, or thereabouts, the company commenced suit against Burke and others to compel an accounting and to reach the stock of the company which Burke had paid for out of the proceeds of the \$8,000,000 of bonds. A preliminary injunction against his transferring the stock was obtained, and his motion to dissolve this injunction was denied. *Columbus, etc. Ry. v. Burke*, 19 Week. L. Bull. 27 (Ohio, 1887). Subsequently the case was withdrawn from the courts and submitted to three arbitrators. These arbitrators decided in 1888 that the company had no remedy. *Columbus, etc. Ry. v. Burke*, 20 Week. L. Bull. 287. Then a *bona fide* holder of some of the bonds brought a suit in equity in the New York courts to compel Burke to account to the corporation

for the value of the bonds so taken by him. A demurrer to the bill was overruled. *Belden v. Burke*, N. Y. L. J., Nov. 3, 1890. Upon the trial of this case, however, the suit was dismissed, chiefly on the ground that the plaintiff bondholder was estopped by the fact that the chain of title of his bonds ran through the guilty parties themselves. *Belden v. Burke*, 20 N. Y. Supp. 320 (1892). This decision was reversed by the General Term, 72 Hun, 51 (1893). The case then went to the New York court of appeals (147 N. Y. 542—1895), and the case was dismissed on the ground that the plaintiff had not proved any injury and had purchased with notice. In a suit at law by the company to compel the associates of Burke—the parties to whom he sold the bonds—to pay over the proceeds of the bonds, the court directed a verdict for the defendants chiefly on the ground that all the stockholders had assented to the transaction. *Columbus, etc. Ry. v. Lanier*, N. Y. L. J., Feb. 4, 1893. In 1898 the mortgage mentioned above was foreclosed and an attack upon it by the second mortgagee failed. *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898).

¹ *Belden v. Burke*, 147 N. Y. 542 (1895). The court said (p. 551), as to the action of the stockholders: "They had raised a vast sum of money by placing a mortgage upon their own property, and had expended and disbursed the money as they thought would best promote their own interests. There is no one who, in this action, has any right to complain of this, unless the bondholders, from whom they borrowed the money, were intentionally deceived to their loss or injury, for which they have no adequate redress at law." The court

are issued by a company in payment for property at an excessive overvaluation, yet subsequent creditors of the corporation cannot attack the bonds on that ground.¹ But actual fraud changes this rule. Thus where a corporation issues several million dollars of bonds, secured by a mortgage that represents that it covers many thousand acres of land, although, in fact, the company owned but a few hundred acres of land, a purchaser of such bonds may maintain a bill in equity in behalf of himself and other bondholders to hold the directors liable for false representations, and the corporation itself is not a necessary party defendant, a request to the trustee of the mortgage having first been made to bring suit.² Bonds issued to promoters in payment for options on the property of competing companies of small and uncertain prospective value are void under the Pennsylvania constitution, and cannot be turned in to apply on the purchase price at a bankrupt sale.³ A corporation will not be allowed to repudiate its consent to an issue of stock for property and to charge a single stockholder therefor, when thirteen-fifteenths of its stock were parties receiving the benefit of the transaction, especially where any such reputation would be for the guilty and innocent alike.⁴

Parties owning real estate may convey it to a corporation formed for that purpose and take bonds in payment. The New York court of appeals says: "No just criticism is possible either upon the legality or morality of the transaction. Evidence was given to show that the land conveyed was not worth the sum secured, but that is

also said that neither on the ground of a breach of covenant—the covenant being a covenant of the corporation only—nor on the ground of fraud could the action be maintained. The court referred to the fact that the plaintiff had not paid more for his bonds than they were actually worth, the interest having been promptly paid and the bonds having appreciated in market value.

1 *Central T. Co. v. Worcester, etc. Co.*, 110 Fed. Rep. 491 (1901). "A subsequent creditor of the corporation has no right to complain of a fraud upon his debtor which the debtor has waived or refuses to litigate," and hence creditors of an insolvent railroad corporation cannot attack the validity of an alleged issue of stock and bonds for less than their par value in payment for construction work. *Toledo etc. R. R. v. Conti-*

mental Trust Co., 95 Fed. Rep. 497 (1899). See also § 46, *supra*, and § 848*k*, *infra*.

2 A provision in the mortgage against individual bondholders maintaining a suit before offering indemnity to the trustee is no bar to such a suit, that provision being applicable to remedies under the mortgage only. The suit may be maintained in the United States circuit court in New York, even though the corporation was organized in Missouri, it appearing that the directors reside in New York. *Slater T. Co. v. Randolph, etc. Co.* (U. S. C. C. 1908), N. Y. L. J. June 27, 1908. See also §§ 830, 831, *infra*.

3 *Wiegand v. Lewis, etc. Co.*, 158 Fed. Rep. 608 (1908), *aff'g In re Wyoming, etc. Co.*, 153 Fed. Rep. 787.

4 *Old Dominion, etc. Co. v. Lewishohn*, 210 U. S. 206 (1908).

a totally immaterial fact. Whatever the price, it wronged no one, and could wrong no one.”¹

Where a corporation has used its surplus earnings to improve its property, it may issue bonds to its stockholders as a dividend in lieu of a cash dividend.² The law goes still further and holds that where all the stockholders assent and corporate creditors are not injured, a private corporation may issue its bonds, notes, and mortgage for the personal benefit of any stockholder, officer, or even outsider,³ unless, of course, there is some statute to the contrary,

¹ *Seymour v. Spring Forest Cem. Assoc.*, 144 N. Y. 333 (1895); s. c., 157 N. Y. 697.

² In *Wood v. Lary*, 124 N. Y. 83 (1891), the court sustained the court below in refusing to cancel a mortgage and bonds, the bonds having been issued as a bond dividend to preferred stockholders. s. c., 47 Hun, 550; *State v. Baltimore, etc. Co.*, 6 Gill (Md.), 363 (1847); *Frank v. Edison, etc. Co.*, N. Y. L. J., Jan. 12, and Jan. 16, 1892. Where a joint-stock association, having \$12,000,000 surplus invested in securities, issues its bonds to the amount of \$12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. *D'Ooge v. Leeds*, 176 Mass. 558 (1900). A division of corporate property among the stockholders is not good as against existing creditors. *Singer, etc. Co. v. Barnard, etc. Co.*, 113 Iowa, 664 (1900). A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained what seemed to be sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were

not sufficient to pay all liabilities, no bad faith being involved. *Lawrence v. Greenup*, 97 Fed. Rep. 906 (1899). See also §§ 535, 546, *supra*.

A stock dividend is not in itself injurious to the corporation or its creditors, and the creditors cannot complain of it and hold the stockholders liable thereon. Hence an issue of stock to stockholders, a part of which they then contribute to go with a sale of bonds by the corporation, a portion of the price therefor to be paid to the stockholders, may be legal. *Great Western, etc. Co. v. Harris' Estate*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561. In *Merz v. Interior Conduit, etc. Co.*, 87 Hun, 430 (1895), the issue of bonds to pay scrip which had been issued as a dividend was enjoined. The dissenting opinion in this case seems the better view. See s. c., 46 N. Y. Supp. 243 (1897). Where scrip dividends convertible into bonds run to the holder, the holder may sue upon them in his own name. *Chaffee v. Rutland R. R.*, 55 Vt. 110, 139 (1882). A railroad corporation may issue certificates of indebtedness, which the company agrees to redeem in money or bonds. Where the president causes the board to order a gratuitous distribution of bonds among the stockholders, though they hold five-sixths of the stock, there being dissenting stockholders, the company may enjoin foreclosure. *Virginia, etc. Co. v. Mercantile Trust Co.*, 12 N. Y. Supp. 529 (1890).

³ Where three persons own all the

as there generally is. Where bonds are issued to the stockholders for their stock, such bonds will be paid only after other creditors

stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. *Schilling, etc. Co. v. Schneider*, 110 Mo. 83 (1892). A corporation cannot have its mortgage and bonds declared void on the ground that they were issued to its stockholders, and were mostly "water," in violation of a constitutional provision. *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887); s. c., to same effect, 19 Fed. Rep. 388. Persons sued at law by a corporation for accepting its money from its president and using it to pay the president's debt, may file a bill in equity to enjoin the suit at law on the ground that the president owned or controlled all the stock and used the corporation for his private purposes, and that the money was so paid with the consent of all the stockholders and officers. *Leigh v. Kewanee, etc. Co.*, 127 Fed. Rep. 990 (1904). Where there are but two stockholders in a corporation one may contract with the other that certain profits of the corporation shall belong to the latter. *Giveen v. Gans*, 91 N. Y. App. Div. 37 (1904); aff'd, 181 N. Y. 538. A creditor of a corporation may object to a mortgage given to secure the individual debts of its stockholders incurred in purchasing stock in the corporation, even though the creditor became such after the transaction. *In re Haas Co.*, 131 Fed. Rep. 232 (1904). A mortgage given by a corporation to secure the debts of its principal stockholder and manager is void as against corporate creditors. *American, etc.*

Co. v. Norment, 157 Fed. Rep. 801 (1907). As to stock dividends see §§ 51a, 535, 536, *supra*. See also § 3, *supra*, showing to what length the courts have gone in this direction.

Where all the stockholders assent, and corporate creditors existing at the time of the transaction are protected, a corporation may legally issue its bonds, notes, or mortgage for the personal benefit of an individual stockholder. The case of *Swift v. Smith*, 65 Md. 428 (1886), is in point. In that case a person had purchased all the stock of a corporation and paid for it by notes secured by a mortgage of the corporation on all of its property. The corporation became insolvent. A general creditor of the corporation attacked the mortgage, but the court held that it was legal and could be enforced by the person to whom the notes were given. The court said: "A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby." In the case of *First Nat. Bank, etc. v. Winchester*, 119 Ala. 168 (1898), where a private corporation had but four stockholders and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation, and secured by mortgage on the corporate property, the court held that the note was not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving *Swift v. Smith*, 65 Md. 428 (1886). So long as a corporation is solvent it may, with the consent of its stockholders, dispose of property at such price as it sees fit, and may even

have been paid.¹ But under the reserved right to amend charters, the legislature may authorize a corporation to reduce its capital stock

make a gift of property, and, present creditors being protected, future creditors cannot complain. *Hamilton v. Menominee, etc. Co.*, 106 Wis. 352 (1900). Where an individual, who owes a debt transfers property to a corporation, and later the corporation, with the consent of all the stockholders and creditors, gives a bill of sale of certain property to pay such debt, the corporation itself cannot subsequently complain. *Quee Drug Co. v. Plaut*, 55 N. Y. App. Div. 87 (1900). Where the president owns all or nearly all of the stock and mingles his business with that of the company, and causes a debtor of the company to make a payment on his individual debt to the bank, the payment is legal. *Brunswick, etc. Co. v. National Bank, etc.*, 99 Fed. Rep. 635 (1900). The assent of a few minor stockholders whose stock was given to them may be presumed, in case they have not objected to an agreement whereby some of the stockholders sell their stock to the others and take their pay from the corporation itself and resign their offices and substitute new parties as directors. *Raymond v. Colton*, 104 Fed. Rep. 219 (1900). The fact that a corporation by unanimous consent pays the premium on life insurance of one of its directors does not enable subsequent corporate creditors to claim the insurance. *Little v. Garabrant*, 90 Hun, 404 (1895); *aff'd*, 153 N. Y. 661. An improvement corporation may legally give a mortgage to secure the personal debt of its president, if none of the stockholders or their existing creditors object. *Osborn v. Montelac Park*, 89 Hun, 167 (1895); *aff'd*, 153 N. Y. 672. Even though an officer pledges corporate bonds for his own debt, yet if he owns the whole capital

stock of the corporation, the company cannot for that reason defeat the mortgage given to secure the bonds. *Buffalo Loan, etc. Co. v. Medina Gas, etc. Co.*, 12 N. Y. App. Div. 199 (1896); *aff'd*, 162 N. Y. 67. Where the sole owner of the stock of a corporation executes the note of the corporation for his individual indebtedness, no one but the creditors of the corporation can complain. *Millsaps v. Merchants', etc. Bank*, 71 Miss. 361 (1893). Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. *Solomon Co. v. Barber*, 58 Kan. 419 (1897). See also *Pusey v. New Jersey R. R.*, 14 Abb. Pr. (N. S.) 434 (1873). A *bona fide* purchaser of negotiable railroad bonds may enforce them, even though the president issued them for his own use. *Long Island L. & T. Co. v. Columbus, etc. Ry.*, 65 Fed. Rep. 455 (1895). See also s. c., 55 Ohio St. 23 (1896); *aff'd sub nom.* *Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). In *Farmers' L. & T. Co. v. Forest Park, etc. R. R.*, 65 Fed. Rep. 882 (1895), a mortgagee who had not been made a party defendant in the foreclosure of mechanics' liens attempted to foreclose its mortgage and claim that the mechanics' lien foreclosure sale was subject to the mortgage. The mortgage was illegal when issued because it exceeded the amount of the capital stock, in violation of the statute. Resolutions to increase the capital stock had been passed, but the papers had not been filed, nor the statutory fees to the state paid, until after the foreclosure of the mechanics' liens. The company had received

¹ *In re Estate, etc.*, 202 Pa. St. 589 (1902).

and issue bonds in exchange for such part of the capital stock as is retired, especially where the original charter authorized the corporation to decrease its capital stock by purchasing its own stock.¹

nothing from the bonds. The purchasers at the first foreclosure sale had expended large sums of money. Speculators who long afterwards bought the bonds with knowledge of the facts bought the bonds for a small sum in order to bring this suit. The suit failed. In *Germania, etc. Co. v. Boynton*, 71 Fed. Rep. 797 (1896), it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them. Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself which he and other stockholders had purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re Brockway Mfg. Co.*, 89 Me. 121 (1896). A mortgage given by a corporation to secure a debt due to a third person by one of its stockholders is illegal as against corporate creditors. *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165 (1898). See § 774, *infra*. Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. *Saranac, etc. R. R. v. Arnold*, 167 N. Y. 368 (1901). Even though a person owns all but two shares of the capital stock, yet a transfer of corporate property by him is ineffective to convey title. *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). See also § 709, *supra*. Where the chief

stockholder has paid a corporate debt by giving his own notes therefor, and subsequently the corporation again assumes the debt, the transaction is legal as against subsequent creditors of the corporation. *Fernald v. Highland Hall Co.*, 59 Kan. 534 (1898). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. *Chattanooga, etc. R. R. v. Evans*, 66 Fed. Rep. 809 (1895). When one telegraph company agrees to extend the lines of another telegraph company and to take pay therefor in advance in bonds of the latter company, and then exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and the mortgage on the property of the second corporation. *Boston, etc. Co. v. Bankers', etc. Co.*, 36 Fed. Rep. 288 (1888). This case was affirmed *sub nom.* *United Lines Tel. Co. v. Boston, etc. Co.*, 147 U. S. 431 (1893). The court said in regard to the method of issuing the stocks and bonds: "It violated no principle of law and no rule of good morals." In *Home, etc. Co. v. Barber*, 67 Neb. 644 (1903), the purchaser of stock sued to hold former stockholders liable for corporate assets appropriated by them. The court found that such use of assets had been taken into consideration in fixing the price at which the stock had been sold, and hence refused to hold the parties liable. See 69 Atl. Rep. 1090.

¹ *C. H. Venner Co. v. United States, etc. Corp.*, 116 Fed. Rep. 1012 (1902). By its certificate of incorporation a New Jersey corporation may have

It has been held in England that although none of the stockholders and creditors of a company, which is in difficulties, object to a new issue of bonds and stock for contract work, a part of the bonds and stock being given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company, the scheme is illegal and the directors are liable.¹ Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* purpose, yet he may enforce the same.² A bondholder cannot cause to be canceled bonds issued to stockholders on the ground of no consideration, where the bonds are not yet due, and there has

power to purchase and retire part or all of its preferred stock, and to issue in payment therefor its bonds, or to sell its bonds and use the proceeds to retire such preferred stock, or it may purchase and hold such stock for re-issue. The offer to purchase must be made *pro rata* to all the preferred stockholders. Under the reserved rights to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interest; but while it is true that the charter constitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on the corporation. *Berger v. United States Steel Corp.*, 63 N. J. Eq. 809 (1902).

¹ *London Trust Co. v. Mackenzie*, 68 L. T. Rep. 380 (1893). Even though the vendors of property to a newly formed corporation receive an excessive price therefor in fully paid stock, yet if it is a closed transaction the corporation cannot thereafter hold

them liable for the overvaluation, notwithstanding the corporation thereafter sells other stock to the public at par for cash without disclosing the transaction. *Old Dominion Copper, etc. Co. v. Lewisohn*, 210 U. S. 206 (1908), the court saying: "At the time of the sale to the plaintiff, then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land." The court said also that under the decisions a purchaser of stock from the vendors would have no claim excepting, of course, for actual fraud, and that the theory that the corporation is not bound until an independent board of directors passes upon the transaction has no basis in the decisions, and the court distinguished *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, aff'g 5 Ch. D. 73, on the ground that in the latter case the purchase was not completed until the stock had been taken by the public in ignorance of the facts.

² *Wright v. Hughes*, 119 Ind. 324 (1889). See also § 760, *supra*. It is no defense to foreclosure that the mortgagor misapplied the proceeds from the bonds. *Farmers' L. & T. Co. v. New York, etc. R. R.*, 78 Hun, 213 (1894), reversed on another point in 150 N. Y. 410.

been no default, and the plaintiff has no control over the management or the earnings or the money of the corporation.¹ The issue of bonds for cash at less than their par value is sometimes allowed by statute or by charter.²

In several of the states there are constitutional and statutory provisions to the effect that fictitious bonds and stock shall be void. The purpose of these provisions was to prevent the issue of bonds and stock at a price far below par. The courts, however, have practically construed such provisions as not invalidating bonds and stock issued for property or construction work.³ They are so disastrous in

1 *Bibb v. Montgomery Iron Works*, 101 Ala. 301 (1893). See also § 735, *supra*.

2 See § 47, *supra*. Under a charter power to sell bonds at such a rate as the directors think best, the bonds may be issued below par and may be issued to pay for iron at less than par value. *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372 (1859). Where the charter allows the directors to borrow money on such terms as they deem best, they may issue and sell mortgage bonds at sixty-six and two-thirds cents on the dollar. *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298 (1887). In *Junction Railroad v. Bank of Ashland*, 12 Wall. 226 (1870), the court held a sale of bonds below par to be valid because the statute expressly authorized it. In *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858), the court held a sale of bonds below par to be valid because the legislature had expressly approved the particular transaction. Under a power to borrow at such rate of interest and upon such terms as the directors should think fit, the directors may sell £250 debentures for £95 each. *Re Regents', etc Co., L. R.* 3 Ch. D. 43 (1876). The power to make the issue in this case was given by the "articles of association," *i. e.*, the by-laws.

3 See ch. III, § 47, *supra*; also cases in note 3, p. 2607, giving the common-law decisions on this subject. Thus, although the constitution of Arkansas prohibits the issue of stock and bonds

except for value, and declares void all fictitious stock and bonds, the supreme court of the United States held that although property worth only \$1,300,000 was turned in to a corporation for \$1,300,000 of stock and \$2,600,000 of bonds, yet that the bonds were valid. *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887). The court said: "Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the state constitution. The beneficial

their effect on innocent holders, the courts have construed them away.

owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders." The Illinois constitutional provision does not render invalid the issue of \$9,000,000 of bonds and \$18,000,000 of stock for property purchased at foreclosure sale for \$1,500,000, there having been added to the property \$6,000,000 worth of improvements. The court pointed out that the issue of the stock did not interfere with creditors collecting their claims, inasmuch as their claims were ahead of the stock, and the bonds by themselves were not in excess of the value of the property itself. *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897); also 86 Fed. Rep. 929; *aff'd in Toledo, etc. R. R. v. Continental T. Co.*, 95 Fed. Rep. 497 (1899). Stockholders have a right to intervene in a foreclosure suit and set up defenses against an illegal claim where by a fraud and collusion the directors fail to do so; but a mere allegation by the stockholders that the bonds were issued at a large discount is no defense, unless it is shown that the bonds were sold for less than their value, and are still held by original holders or purchasers with notice. *Gunderson v. Illinois, etc. Bank*, 199 Ill. 422 (1902). See also the important case of *Peoria, etc. R. R. v. Thompson*, 103 Ill. 187 (1882), where a very large amount of bonds and cash was given to a contractor for construction work, and the bonds were upheld by the court, although prohibited by a constitutional provision, similar to that in Arkansas, passed upon in the case cited *supra*.

In *Coleman v. Howe*, 154 Ill. 458 (1895), the court held that, where property of known value, and worth but \$75,000, is sold to a corporation for \$150,000 capital stock and a mortgage for \$70,000, fraud is presumed,

and the stockholders are liable for the par value of the stock less the \$5,000. The court said: "Some of the cases hold that overvaluation will not render the stockholder liable for the difference between the actual and accepted values unless there is an affirmative proof of fraud *aliunde*. But other cases hold, what we regard as the better view, namely, that where property whose value is well known, or can be easily learned, is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith, and is made for a fraudulent purpose. This presumption will be conclusive unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as matter of law."

Even though bonds and stock are issued for the construction of a road, the face value of which is twice the cost of the road, yet if all the stockholders consented and none of the creditors then existing are injured, transferees of such stock cannot complain on the foreclosure of the mortgage securing the bonds. *Wells v. Northern T. Co.*, 195 Ill. 288 (1902). A stockholder's liability on stock may be offset against bonds held by the stockholder, even though he has transferred them to another who had knowledge of the facts. *Hynes v. Illinois, etc. Bank*, 226 Ill. 95 (1907). In the case of *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900), where an Illinois corporation issued \$6,500,000 of stock and \$5,150,000 in bonds for the construction of an elevated road of about seven miles in length, the cost of which was about \$3,500,000, the court held that the constitution of Illinois did not invalidate such issue, and furthermore, that the corporation itself could not hold liable the con-

The supreme courts of Alabama and Missouri have zealously

tractor to whom the issue was made, inasmuch as the stock and bonds if invalid were void. The court said (p. 128): "It must not be forgotten that men will not invest large capital in speculative and hazardous enterprises without being assured that, in case of success, they shall receive a profit corresponding relatively to the risk assumed. Whatever may be the correct solution of the problem, the law does not require payment of subscription of stock to be in cash. It may be paid for in work, labor, material, or service rendered. We sit to declare, not to make, the law, and are unable to condemn the transaction in question as within the ban of the constitutional provision. But if this were otherwise, and the constitutional provision denounces this issue of stock, the act was *ultra vires* the corporation, and the stock was void, not merely voidable. It had no validity in the hands of a *bona fide* purchaser for value without notice. The complainant has not suffered pecuniary injury by its issue, and cannot call upon Ziegler to account for what he received upon its sale, for that would be to affirm a void transaction; to both reprobate and approve."

The Texas prohibition is not applicable to a contract of a land improvement company to issue bonds to aid in building a bridge. *Fort Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294 (1894). In *New Castle, etc. Ry. v. Simpson*, 21 Fed. Rep. 533 (1884), the court, in passing on the provision in the Pennsylvania constitution, held that a contract giving a construction company \$300,000 of stock and \$300,000 of bonds for work worth but \$180,000 would be set aside, although \$40,000 of work had been done; but that the construction company should be repaid the \$40,000 in cash. See s. c., 23 Fed. Rep. 214 (1885), holding that the contractor

may recover back not only this, but also a reasonable compensation and interest. The constitutional provision that bonds shall be issued only for money paid does not prevent the bonds being pledged, and such pledgee on foreclosure may prove up the par value thereof, the amount to be paid in, however, not to exceed the debt. *Western, etc. Co. v. United States, etc. Co.*, 92 S. W. Rep. 986 (Tex. 1906). A corporation may pledge its unissued bonds, even though the statute prohibits the issue of bonds except for labor, money or property actually received. *William Firth Co. v. South Carolina, etc. Co.*, 122 Fed. Rep. 569 (1903). Where a promoter purchases all the stock of a corporation for \$75,000, and then purchases and transfers to it options on the business and property of other companies at a cost to him of about \$17,500 and receives therefor \$90,000 of bonds, and \$200,000 of stock in the first named company, which then becomes insolvent, the bonds are illegal under the Pennsylvania statute that mortgage bonds shall not exceed one-half the capital stock, the issue of the stock itself being illegal, the court refusing to allow anything for a prospective and problematical removal of competition, the basis of the decision being that the value of the property was so slight compared with the par value of the stock and bonds, that the bonds and stocks were void, under the constitution of Pennsylvania. Creditors may object to such bonds in the hands of original holders, except to the extent that the money was actually advanced thereon, and hence such bonds cannot be turned in in part payment of the purchase price on the foreclosure sale. *In re Wyoming, etc. Co.*, 153 Fed. Rep. 787 (1907); *aff'd*, 158 *Id.* 608.

Where a railroad purchases another railroad subject to a mortgage which it agrees to pay, it cannot afterwards

endeavored to carry out the purpose of these laws and have attack that mortgage on the ground that it was fictitious and fraudulent. Old Colony, etc. Co. v. Allentown, etc. Co., 192 Pa. St. 596 (1899). A contractor who receives bonds in payment for construction work, and sells them, cannot claim that they are void as contrary to the statute prohibiting "watered" bonds. Reed's Appeal, 122 Pa. St. 565 (1888). Where a consolidated company of New York and Pennsylvania issues bonds in New York, fictitiously, such bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void so far as the Pennsylvania part of the property was concerned. Pittsburgh, etc. R. R. v. Rothschild, 4 Cent. Rep. 107, decided by the supreme court of Pennsylvania in 1886. Although watered stock and bonds are issued in Pennsylvania, yet a *bona fide* purchaser of the bonds may foreclose the mortgage securing them in order to obtain payment. Woodbury v. Allegheny, etc. R. R., 72 Fed. Rep. 371 (1895). Even though a person who has a contract with a street railway company that the latter will lease its street railway on certain terms, turns over such contract to a new corporation for \$900,000 of stock of the latter, and the latter then assumes the lease, and even though such stock is illegal under the constitution and statutes of Pennsylvania, yet where the state delays three years in filing a bill to declare it void, and meanwhile the stock has passed into *bona fide* hands, and not until five years thereafter are the real owners of the stock made parties defendant, the bill will be dismissed. Commonwealth v. Reading, etc. Co., 204 Pa. St. 151 (1902).

A water-works company's charter will not be forfeited because another company has purchased a majority of its stock and illegally placed a mort-

gage upon its property. Commonwealth v. Punxsutawney, etc. Co., 197 Pa. St. 569 (1901). A party who has invested \$15,000 in obtaining a bridge franchise and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former \$15,000 out of \$80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue \$95,000 in bonds, \$80,000 in preferred stock, and \$60,000 in common stock for building the bridge at a cost of \$71,000, but if the former takes his \$15,000 preferred stock and keeps it for six years, he cannot then complain. Jutte v. Hutchinson, 189 Pa. St. 218 (1899). Where \$100,000 of bonds and \$125,000 of stock are issued in payment of construction work of the value of \$121,000, the bonds are valid and may be enforced by *bona fide* purchasers. Wood v. Corry, etc. Co., 44 Fed. Rep. 146 (1890). This last case held, also, that only the state could object to an issue of "watered" stock and bonds as being in violation of this constitutional provision. A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state—Pennsylvania. See also, to same effect, §§ 735, *supra*, 848, *infra*. It is legal for a company to issue \$67,000 of bonds and \$67,000 of full-paid stock, even to one of its directors, for \$67,000 in cash, if this was all that the whole \$134,000 of securities were worth, and if all the directors and stockholders knew of it and agreed to it. Union, etc. Co. v. Southern, etc. Co., 51 Fed. Rep. 840 (1892).

In *Coe v. East*, etc. R. R., 52 Fed. Rep. 531 (1892), the court held that the provision in Alabama against watered stock and bonds did not in-

sought to enforce these constitutional provisions in those states.

validate bonds, although \$10,000 of bonds and \$10,000 of stock were issued for every mile of road constructed, even though it cost much less than \$20,000 cash per mile.

The constitutional provision in Alabama forbidding the issue of stock or bonds except for value, and the statutory provision requiring subscriptions to railroad stock to be paid in money, labor or property at their money value, does not prevent one railroad company selling its property to another railroad company for bonds and stock of the latter, and the value placed upon the property may be its net earning power and the cost of rebuilding it. It is immaterial that the original cost was much less. *Grant v. East, etc. R. R.*, 54 Fed. Rep. 569 (1893).

Where bonds have been given to the stockholders for nothing, the issue being in payment for construction work, which, however, at the time of the contract, had already been completed and delivered, the corporation may enjoin against the foreclosure of a mortgage securing such bonds, the bonds being still in the stockholders' hands, and may cause the bonds themselves to be canceled under the Colorado constitutional prohibition against such an issue. *Gunnison, etc. Co. v. Whitaker*, 91 Fed. Rep. 191 (1898). Where for six years an issue of stock for services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto, and the party receiving the stock used a large portion of it to interest other persons in the company, and even though the stock so issued to him was \$125,000, being one-half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the

company. *Calivada, etc. Co. v. Hays*, 119 Fed. Rep. 202 (1902). The Nebraska prohibition does not render void an issue of \$5,940,000 stock and bonds for a railroad purchased at a foreclosure sale, where the old corporation had over \$5,000,000 stock and bonds outstanding, even though it is claimed that the property did not cost over \$2,000,000. The court held that the transaction was valid although "the cash value of the physical property and franchises which were acquired by the reorganized company was not fully equal to the par value of its securities." *Sioux City, etc. Ry. v. Manhattan T. Co.*, 92 Fed. Rep. 428 (1899). In *Brown v. Duluth, etc. Ry.*, 53 Fed. Rep. 889 (1893), the court refused to enjoin an issue of stock, and refused to cancel stock already issued, although \$900,000 of bonds and \$945,000 of stock were issued for construction work which cost \$580,000. The court so held, although the statute required the stock to be fully paid, and prohibited issues except for property actually received. The plaintiff, however, was a holder who purchased with full knowledge of the facts. The court said: "This statute was not intended to prevent or interfere with the usual method of raising money to build railroads, or for any legitimate corporate purpose. It is not to be construed as obstructive to the extent of restricting and hampering corporations in their internal management, and embarrass them in procuring means to carry out the legitimate purposes of the corporation; and unless it appears that, under the guise of building its road, bonds and stock of the defendant company are to be issued and put upon the market fraudulently, that do not and are not intended to represent money and property, this corporation is not prohibited from entering into a real transaction, based upon a present consideration, and having reference to

In doing so they upheld the bonds, but held the stockholders

legitimate corporate purposes." The court also said that "such a provision does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued." The California constitutional prohibition against the issue of fictitious bonds or stock does not prevent the company pledging its bonds for a debt less than the par value of such bonds. *Atlantic Trust Co. v. Woodbridge Canal, etc. Co.*, 79 Fed. Rep. 842 (1897). The provision in the California constitution relative to fictitious stock and bonds does not invalidate them. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). A sale of bonds at ninety-five is legal, even under the Texas constitution. *Northside Ry. v. Worthington*, 88 Tex. 562 (1895). Where railroad constructors pay themselves in stock and then issue bonds without any consideration whatsoever, and pledge them to a bank, which knows all the facts, the bank is not protected. *Farmers', etc. Bank v. Waco, etc. Ry.*, 36 S. W. Rep. 131 (Tex. 1896). In *Manhattan Trust Co. v. Seattle Coal, etc. Co.*, 16 Wash. 499 (1897), a person bought coal mines for \$70,000 and then organized a corporation and sold them to the corporation for \$5,000,000 full-paid stock and \$320,000 mortgage bonds. The company did not pay the interest on the bonds and incurred a floating debt of \$135,000. The bonds were still held by the original parties, and the trustee of the mortgage took possession under the mortgage and filed a bill in equity to protect the possession and to obtain a receiver. The court held that the transaction was fraudulent, but subsequently, in the same case, the court practically overruled this decision and held that the

bonds were legal. *Manhattan Trust Co. v. Seattle, etc. Co.*, 19 Wash. 493 (1898), holding that although coal land which is purchased for \$100,000 is immediately turned in to a corporation for \$5,000,000 of stock and \$320,000 of mortgage bonds, yet the transaction is not fraudulent *per se*, and the stockholders are not liable to corporate creditors; also that the issue of stock and bonds for property is not necessarily fraudulent, even though \$2,000,000 of the \$5,000,000 of stock is turned back into the treasury to be sold for the benefit of the corporation, also that where a suit is brought by creditors to invalidate mortgage bonds and such suit fails, but an appeal is taken by a part of such creditors and the decision reversed, only those creditors who appealed are entitled to have their claims paid in priority to the bonds, also that a decree adjudging a mortgage and bonds to be fraudulent and allowing certain general creditors to obtain payment in priority to such bonds is binding on the bondholders where the trustee was a party to the suit.

Under the statutes of Washington prohibiting stockholders from withdrawing any of the capital stock, a note signed by the corporation, but really given in payment for the stock of the corporation which the former stockholders had transferred to new parties, is not enforceable, the transaction being really one where the owner of all the stock sold the same to another person, and the note being practically an accommodation note, and it being shown that the parties who signed the company name to the note were not even officers of the company. *Gilbert v. Seatco, etc. Co.*, 98 Fed. Rep. 208 (1899). See *Coler v. Tacoma, etc. Co.*, 65 N. J. Eq. 347.

A provision in a charter of an Illinois and Indiana railroad company that its bonds shall not be sold at less

liable on the stock.¹ In Ohio the issue of bonds at less than par

than par does not invalidate the bonds of the company issued and sold in New York at ninety cents on the dollar. *Elsworth v. St. Louis, etc. R. R.*, 33 Hun, 7 (1884); *aff'd*, 98 N. Y. 553. A stockholder cannot, after ten years' delay, maintain a suit to cancel stock issued for patents, and to compel the holder of such stock to refund dividends thereon, the transaction having been spread on the records of the company and open to the stockholders. An allegation that the patents were of no value is insufficient, even though the constitution of the state (Missouri) required that stock be issued only for "money paid, labor done, or money or property actually received," there being no allegation that the patents were known to be valueless at the time. *Kimbell v. Chicago, etc. Co.*, 119 Fed. Rep. 102 (1902).

¹ See § 47, *supra*, giving the Alabama and Missouri decisions on this subject. A stockholder may enjoin the company from issuing \$50,000 of bonds to the stockholders as a bonus, the same being in violation of the constitution, there being no proof of undivided profits to that amount. *American, etc. Co. v. Crane*, 142 Ala. 620 (1905). In regard to the constitutional provision against the issue of fictitious bonds and stock, the supreme court of Alabama has said: "The constitutional provision, standing by itself, does not require that the amount of money, or the value of the labor or property, for which stock or bonds are issued, shall correspond with the face value of the stock or bonds for which it is issued." Hence the court held that bonds might be issued at less than their par value, provided that some substantial value was paid for them, such value to be fair and reasonable and "not a mere trick or device to evade the law." *Nelson v. Hubbard*, 96 Ala. 238 (1892). In the case of *Coe v. East,*

etc. R. R., 52 Fed. Rep. 531 (1892), the court held that the above provision in Alabama against watered stock and bonds did not invalidate bonds, although \$10,000 of bonds and \$10,000 of stock were issued for every mile of road constructed, even though it cost much less than \$20,000 cash per mile.

Although \$50,000 of stock, issued as full-paid, and \$25,000 of mortgage bonds are issued for \$2,500 worth of property, yet the parties receiving the same are not liable to corporate creditors for the value of the bonds, the bonds still being in the possession of the parties receiving the same. The parties receiving the stock, however, are liable to corporate creditors on the stock as being unpaid. *Roman v. Dimmick*, 115 Ala. 233 (1896). In *McCaleb v. Goodwin*, 114 Ala. 615 (1897), one street railway purchased all the stock of another street railway, and paid the stockholders therefor by issuing the mortgage bonds of the latter street railway company. The former then placed the stock under its own mortgage, and, this mortgage having been foreclosed, the purchaser attacked the validity of the first mentioned mortgage. The court sustained the mortgage, however, on the ground that all the stock had voted therefor. The fact that a corporation issued \$18,000 of bonds to its president for \$16,500 does not render such bonds illegal, and a subsequent creditor cannot attack them. *Anderson v. Bullock, etc. Bank*, 122 Ala. 275 (1899). Where persons buy a property for \$50,000 and make some improvements, and then convey it to a corporation for \$50,000 of stock and \$25,000 of bonds, the stock is full paid, and a creditor cannot reach the bonds by garnishee process, inasmuch as there was no promise to pay for the bonds, and if they are invalid they cannot be enforced. *Roman v. Dimmick*, 123 Ala. 366 (1899). A minority stockholder in a street rail-

to a director is made illegal.¹ The statutes of Ohio regulating the price at which bonds may be issued do not affect bonds issued to a contractor for construction work, unless it is shown that the price was palpably in violation of the statute and that the parties knew it so to be.²

way cannot cause to be set aside a sale of its property to another company for stock of the latter, where such sale is authorized by statute, even though the statute was passed subsequently to the incorporation of the street railway, and even though the purchasing company had issued bonds and stocks to the amount of \$90,000,000 in payment for street railways, the capital stock and bonded indebtedness of which was only \$33,255,000, and even though in making the sale the majority stockholders voted that the stock was worth \$170 a share, and that that price should be paid to minority stockholders, and the vendee company thereupon agreed to pay the same. The remedy of the dissenting stockholder, if any, is at law for the market value of the stock or a proportionate share of the proceeds. *Tanner v. Lindell Ry.*, 180 Mo. 1 (1904).

1 Section 3313 of the Revised Statutes of Ohio sets forth that "all capital stocks, bonds, notes, or other securities of a company purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." In *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859), this provision was held not to affect the liability of a guarantor of such bonds. But in *Union Trust Co. v. New York, etc. R. R.*, 17 Weekly Law Bull. 176 (Ohio 1887), the court applied the statute and held that where \$50,000,000 of paid-up stock and \$15,000,000 of bonds were issued to a syndicate, of which a director was a member, for \$18,000,000, the stocks, bonds, and mortgages were void. The bondholders became unsecured creditors, the *bona fide* holders being unsecured

creditors to the amount of the par value of their bonds and interest, and the other holders being unsecured creditors to the amount actually invested by them. The statute of Ohio rendering void bonds which are issued to a director at less than par affects only the bonds issued to him. *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897). The Ohio statute against a director purchasing bonds at less than par does not apply to bonds purchased by the directors from *bona fide* holders. *Continental T. Co. v. Toledo, etc. R. R.* 86 Fed. Rep. 929 (1898), holding also that where the president by secret agreement is to participate in a construction contract, he cannot enforce such contract; and hence bonds issued to the contractor are not affected by the Ohio statute prohibiting the sale, directly or indirectly, of bonds to an officer at less than par. *Continental T. Co. v. Toledo, etc. R. R.*, 86 Fed. Rep. 929 (1898). The Ohio statute prohibiting a director being interested in the purchase of bonds from his corporation at less than par does not apply to an issue of bonds to an outsider who subsequently admits a director as a partner in the transaction. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). Creditors of an insolvent railroad corporation who become creditors after the mortgage bonds have been issued cannot attack such bonds as having been issued in violation of the statute prohibiting the issue of bonds to directors at less than the par value thereof. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899).

2 *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897). The

In Wisconsin bonds issued by a corporation as a pledge will not be ordered to be canceled, because issued in violation of a state statute, requiring payment in money or property of a certain per cent. of their face value, unless the money received by the company upon the pledge of the bonds has been repaid or otherwise secured.¹

Under the New Jersey statutes it is dangerous to issue bonds and stock for property and construction work at a large overvaluation, inasmuch as the courts of that state hold that the bonds are illegal, and that the stockholders are liable on the stock.² In Indi-

Ohio statute prohibiting the issue of bonds at less than seventy-five cents on the dollar does not render invalid \$9,000,000 of bonds issued to a contractor, even though he received also \$12,250,000 of stock, all for construction and work which cost him, including ten per cent. profit, \$10,300,000, the proof showing, however, that the \$12,250,000 of stock was worth not more than \$3,400,000. *Continental T. Co. v. Toledo, etc. R. R.*, 86 Fed. Rep. 929 (1898). In this case on appeal, *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899), the court in sustaining the validity of a large issue of bonds and stock by a reorganized railroad corporation, the common stock being issued at fifteen and the preferred about thirty, said that the Ohio statute does not forbid the sale or exchange of stock at its market value, the court holding also that in passing upon the validity of a railroad construction contract whereby bonds and preferred stock and common stock were issued for construction work, the *actual* value only of the bonds and stock would be considered. The court, in ascertaining the actual value received by the railroad for these securities, figured the common stock at fifteen cents on the dollar and the preferred stock at thirty cents on the dollar, and the bonds at seventy-six cents on the dollar, and held that this was legal, even under the Ohio statutes. It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock,

contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. *Farmers' L. & T. Co. v. Toledo, etc. Ry.*, 67 Fed. Rep. 49 (1895).

¹ *Andrews v. National, etc. Works*, 76 Fed. Rep. 166 (1896). The Wisconsin statute that bonds should not be issued for less than seventy-five per cent. of their par value does not apply to a transaction where old bonds are placed under a new mortgage, and the holders of the old bonds receive new bonds in lieu thereof. *Mowry v. Farmers' L. & T. Co.*, 76 Fed. Rep. 38 (1896). Where a statute forbids the issue of bonds at less than seventy-five cents on the dollar, and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. *National, etc. Works v. Oconto Water Co.*, 52 Fed. Rep. 29 (1892). See also, as to pledges, § 763, *supra*.

² Bonds issued by a street railway before the capital stock is paid in are illegal under the New Jersey statute, except those which are in *bona fide* hands, and these latter are entitled to the amount actually received therefor by the corporation. *Vanderveer v. Asbury Park, etc. Ry.*, 82 Fed. Rep. 355 (1897). A dissenting stockholder may enjoin a New Jersey street railway company from selling its property to another street railway company in exchange for stock of the latter, unless such sale

ana, also, there is a statute on this subject.¹ The invalidity of some of the bonds does not render invalid the mortgage securing the

is made in connection with dissolution proceedings. He may enjoin a sale of the property to a Washington street railway company for twenty thousand shares of the full-paid stock of the latter, where dissenting stockholders of the former are to be paid only \$35 cash in lieu of each share of the Washington corporation which he would be entitled to. On its face this is an issue of the Washington stock at \$35 per share, and is in violation of the Washington statutes. The court said: "To the extent of sixty-five per cent. of the issue the increase of capital stock will be, therefore, 'fictitious,' and, according to the constitution, 'void.' Such a scheme ought not to be forced upon an unwilling stockholder of the New Jersey company." Moreover, it being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. *Coler v. Tacoma Ry. etc.*, 65 N. J. Eq. 347 (1903), rev'g 64 N. J. Eq. 117. A railroad mortgage in New Jersey is not valid if it exceeds the amount of cash paid in on its capital stock. The mortgage, however, may be made in advance of construction. Where \$900,000 of bonds and \$900,000 of stock are issued to a contractor for work costing only \$900,000, the bonds are invalid, except in *bona fide* hands. On a bill filed by the receiver to cancel the mortgage, the court so decreed, upon condition, however, that

bona fide holders were first paid the amounts they paid for their bonds. Various parties' rights were passed on by the court. Directors and other participating parties do not participate in the mortgage. *Baker v. Guarantee, etc. Co.*, 31 Atl. Rep. 174 (N. J. 1895). On appeal the court held that where the statutes prohibit debts in excess of the capital stock actually paid in, the excessive bonds in the hands of a director cannot be enforced. *Steelman v. Baker*, 53 N. J. Eq. 672 (1896). But where one issue of bonds was legal and a second issue was illegal, a director holding bonds of the first issue may enforce them. *Physick v. Baker*, 53 N. J. Eq. 673 (1896). Even though it is clear that property was transferred to a corporation for stock and bonds, the par value of which is much greater than the actual value of the property, yet a dividend on the stock cannot be enjoined by a stockholder on the ground that the profits should be used to add to the actual value of the assets sufficient to make them equal to the par value of the stock and bonds so issued, even though the amount of "water" is \$11,000,000, it appearing that there were no floating debts and it not appearing that any one was defrauded. *Goodnow v. American, etc. Co.*, 66 Atl. Rep. 607 (N. J. 1907). A state may obtain an injunction against a gas company issuing stock for property at an overvaluation of the latter, but if the transaction has been completed fraud in the over-

1 Where a water-works company issues \$197,000 of stock as full paid and \$150,000 of mortgage bonds to a contractor for construction work, the work actually costing less than \$150,000, and the contractor pays to one of the directors \$6,000 in cash, and gives to the two others \$20,000 each

of the stock, such directors are liable to corporate creditors for the debts due to the latter, under the Indiana statute rendering the directors liable where the provisions of the statute have been violated. *Clow v. Brown*, 150 Ind. 185 (1898).

bonds.¹ Thus, even though a large number of owners of paper mills are induced to turn their property in to a single corporation in exchange for bonds and stock of the latter, and the promoters secretly receive a large quantity of additional profit, and even though the

valuation must be proved before the issue will be set aside, and the fact that \$300,000 in bonds and stock were issued for property worth but \$75,000 at the time of the suit is insufficient, as is also the fact that the officers were personally interested in the transaction. A foreign trustee of the mortgage securing the bonds may be made a party by publication. *McCarter v. Pitman, etc. Gas Co.*, 69 Atl. Rep. 211 (N. J. 1908). A bill in equity is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock, and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See *v. Heppenheimer*, 55 N. J. Eq. 240 (1897); *aff'd*, 56 N. J. Eq. 453. This same transaction was involved

in the case *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900), and the court there held that the mortgage was legal and could be enforced, yet the court intimated that the promoters could be held personally liable. A decision on the merits was rendered in 1905 in *See v. Heppenheimer*, 69 N. J. Eq. 36 (1905). "Stock issued as a bonus with the sale of bonds, or stock issued through the means of overvaluation of property, cannot properly be regarded as necessarily issued fraudulently. In the absence of intervening rights of creditors, such transactions appear to have been generally supported by the courts, unless positive fraud has been clearly established, notwithstanding the constitutional and statutory provisions of many of the states designed to secure a proper relationship between the capital stock and the assets of corporations." *Arnold v. Searing*, 67 Atl. Rep. 831 (N. J. 1907). Where a corporation which has no profits on hand issues its bonds in payment for its stock, the party so receiving the bonds cannot enforce them, but on the contrary remains liable for the unpaid subscription price of the stock, it not having been properly issued as paid-up stock, and he not being a *bona fide* holder. *Hebberd v. Southwestern, etc. Co.*, 55 N. J. Eq. 18 (1896). In this case it was held that *bona fide* holders of bonds illegally

¹ *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886). Even though only \$2,788,000 is paid for thirty-nine paper mills, and the purchaser then turned the property over to a corporation for \$5,000,000, payable partly in bonds and partly in stock, yet this does not affect the validity of the mortgage securing the bonds, and

even though the purchasers of the bonds received therewith a bonus of stock, yet their claims based on the bonds cannot be decreased by the par value of the stock so received by them, they being innocent purchasers. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). See also § 762, *supra*.

total amount of bonds and stock issued is about twice the price actually paid to the owners for the properties, yet this does not invalidate the mortgage securing the bonds, and the remedy of the parties who so turned in their properties is against the promoters and not in defense of a suit to foreclose the mortgage.¹

Where bonds have been illegally or fraudulently issued, the court will allow those which are in the hands of the guilty parties, or per-

issued could enforce them only for the amount paid therefor by such *bona fide* holders; and where bonds with a bonus of stock had been issued, that, as against the parties receiving the bonds, the liability on the stock could be offset against the amount due on the bonds, the company having become insolvent. Even though property is purchased at sheriff's sale for \$17,000, and is then resold to the reorganized corporation for \$38,000 in mortgage bonds, this is no proof of fraud. *Pomeroy v. New York, etc. Co.*, 48 Atl. Rep. 395 (N. J. 1901).

Where property mortgaged to secure bonds is of doubtful value and there is a financial stringency in the market, a corporation may sell \$40,000 of its mortgage bonds and \$5,000 of its stock for \$33,000, and a subsequent purchaser of stock of the company with notice of the facts cannot attack the validity of the mortgage. The defense of usury is not good where the issue was made in New York state, although the corporation was organized in New Jersey. *Franklin T. Co. v. Rutherford, etc. Co.*, 57 N. J. Eq. 42 (1898). In the case of *Short v. Post*, 58 N. J. Eq. 130 (1899), where two mortgages and a large amount of stock were issued by a corporation for property worth no more than the first mortgage, and the receiver of the corporation defended against such first mortgage on the ground that the mortgage was usurious because some of the stock had been given to the mortgagee without consideration, the court held the defense not good under the facts in that case.

A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of stock which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899). The New York courts will, at the instance of a New York stockholder in a New Jersey corporation, enjoin the latter from issuing stock as a bonus with bonds in violation of the New Jersey statute requiring stock to be issued for money or property, even though the actual value of the stock and bonds so issued does not exceed the par value of the bonds and the amount received by the corporation is the par value of the bonds. The fact that the company is in a failing condition does not change the effect of the statute. *Kraft v. Griffin Co.*, 82 N. Y. App. Div. 29 (1903). See 69 Atl. Rep. 1090; *Hess v. Reick*, (N. J. 1908), involving a mortgage given without consideration.

¹ *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). In the foreclosure of a mortgage the corporation cannot set up that the value of the property received by it for bonds and stock was grossly overvalued. *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904).

sons taking with notice, to be collected only for such amounts as were actually received therefrom by the corporation.¹

The courts go very far in protecting *bona fide* holders of corporation bonds, and will uphold and enforce such bonds under nearly all circumstances. The defense that bonds were issued below par does not avail as against *bona fide* holders. They may collect the full face value of their bonds.² The question of what constitutes

¹ Thomas v. Brownville, etc. R. R., 109 U. S. 522 (1883); Central Trust Co. v. New York, etc. R. R., 18 Abb. N. Cas. 381, 403 (1886). See also § 770, *infra*, and § 762, *supra*, and Union Trust Co. v. New York, etc. R. R., 17 Weekly L. Bull. 176 (Ohio, 1887). The courts will require substantial equity to be done to the persons receiving "watered" bonds before requiring them to account for the bonds. Thus, although bonds are irregularly issued to a contractor, yet his contract is not held invalid unless he is repaid the sums actually expended in good faith by him under the contract. Porter v. Pittsburg, etc. Co., 120 U. S. 649, 672 (1887). See also § 744, and ch. XXXIX, *supra*; Kappner v. St. Louis, etc. R. R., 3 Dill. 228 (1875); s. c., 14 Fed. Cas. 132. Where the holder is not a *bona fide* purchaser, he stands in the shoes of his vendor, and where the officers use the corporate bonds to pay the debts of other corporations illegally, the court will order the bonds and mortgage canceled, there being no *bona fide* holders of the bonds. Chicago v. Cameron, 120 Ill. 447 (1887).

² Graham v. Boston, etc. R. R., 118 U. S. 161 (1886); Cromwell v. County of Sac, 96 U. S. 51 (1877). A *bona fide* purchaser of railroad bonds may enforce them at their par value, irrespective of what he paid for them. Wade v. Chicago, etc. R. R., 149 U. S. 327 (1893). In the case of Railroad Companies v. Schutte, 103 U. S. 118, 144 (1880), the court said: "It is next contended that as the bonds were fraudulently put out by the officers of the companies, and are unconstitutional, the recovery must be confined

to the amount actually paid for the bonds to the agents of the companies. . . . In commerce, commercial paper means what on its face it represents, regardless of what its maker or promoter may have got for it. The bonds of the state in the open market purported to be what they called for. The companies put them out, and in legal effect, as we think, indorsed them. A *bona fide* holder can now require the indorser to respond to his indorsement commercially; that is to say, by paying what he in effect agreed the maker must pay."

Where the foreclosure of a mortgage is contested on the ground that bonds and stock were issued largely in excess of the value of the property, and on the ground that the parties who turned in their property for stock were defrauded by the promoters, the court said in regard to the bonds: "We are clearly of opinion that so far as they were purchased for a valuable consideration by innocent holders they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, where the bonds must be treated as an entirety, but is a defense applicable to each individual bondholder." Dickerman v. Northern T. Co., 176 U. S. 181, 206 (1900). In this last case parties receiving stock and bonds from the corporation in payment for property sold the bonds with a bonus of stock. The court held that the purchasers were not necessarily purchasers with notice.

In Dickerman v. Northern T. Co.,

bona fide holdership is largely a question of fact in cases where bonds have been fraudulently issued, and each case is determined

176 U. S. 181, 202 (1900), the court said: "It is true that these parties in disposing of the bonds allowed to each purchaser of a one thousand dollar bond two hundred dollars of preferred and four hundred of common stock, but they did not seem to have profited by this themselves. And if it were necessary to the negotiation of the bonds to give a bonus in stock, it cannot be considered in the light of a mere donation. Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders. Certainly, if this bonus were received in ignorance of the fraud practiced upon the original mill-owners, and simply as an inducement to take the bonds, the dissenting stockholders could not compel the bondholders to submit to a deduction from their bonds of the par value of the stock received as a bonus, particularly in view of the fact that the stock might turn out to be worthless." Where mortgage bonds are issued without any consideration the burden of proof is shifted on to the holders of the bonds to prove that they are *bona fide* holders. *McVicar, etc. Co. v. Union Ry. etc. Co.*, 136 Fed. Rep. 678 (1905). Where a New Jersey corporation having power to purchase its own stock and issue its bonds in payment therefor has made such an issue, the bonds may be enforced in *bona fide* hands, even though the stock so purchased was worthless. *Hoskins v. Seaside, etc. Co.*, 68 N. J. Eq. 476 (1905).

In a foreclosure suit the holders of bonds are presumed to be *bona fide* holders, and, if the corporation claims that the bonds were issued without consideration, it must prove that the holders are not *bona fide* holders. *Atlantic T. Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539 (1902), holding also that where the trustee of a mort-

gage in foreclosing proves the issue of the bonds and that it is the holder thereof, this raises a presumption that the owners of the bonds are *bona fide* holders for value, and, if the corporation claims that the bonds were issued without consideration, it must prove that the holders are not *bona fide* holders. Coupon bonds of a railroad company "payable to bearer pass by delivery; and a *bona fide* purchaser of them before maturity takes them freed from any equities that might have been set up against the original holders of them. The burden of proof is on him who assails the *bona fides* of such purchase." *Kneeland v. Lawrence*, 140 U. S. 209 (1891); *Elsworth v. St. Louis, etc. R. R.*, 33 Hun, 7; aff'd, 98 N. Y. 553 (1885), where the issue below par was even prohibited by statute. Though the directors fraudulently issue bonds to another railroad to build the latter, and the latter uses the proceeds to purchase control of the former, the *bona fide* holders of the bonds are protected. *State v. Brown*, 64 Md. 199 (1885). Bonds issued below par or without consideration are nevertheless valid in *bona fide* hands. *Ex parte Chorley*, L. R. 11 Eq. 157 (1870); *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859)—two cases in which the corporation received nothing for the bonds; *Woods v. Lawrence County*, 1 Black, 386 (1861); *Mercer County v. Hackett*, 1 Wall. 83 (1863); *Whitney v. Peay*, 24 Ark. 22 (1862), a case of pledge of bonds. A bond like a note purchased by a *bona fide* party may be enforced at its par value although purchased at less than the par value. *Cromwell v. Sac County*, 96 U. S. 51 (1877); *Bronson v. La Crosse, etc. R. R.*, 2 Wall. 283 (1863); *Alexander v. Atlantic, etc. R. R.*, 67 N. C. 198 (1872); *Railway Co. v. Sprague*, 103 U. S. 756 (1880),

on its own peculiar circumstances.¹ Moreover, the *bona fide* holder-ship may be destroyed by the fact that the bond itself may not be drawn in negotiable form.²

If the holder of the bonds purchased them from an officer of the

where nothing was received by the corporation for the bonds; *Grand Rapids, etc. R. R. v. Sanders*, 17 Hun, 552 (1879), rev'g 54 How. Pr. 214. *Bona fide* purchasers of bonds from a contractor are not affected by the fact that he did not complete the work according to contract, for which he received the bonds in payment. *McElrath v. Pittsburg, etc. R. R.*, 55 Pa. St. 189 (1867). The fact that the proceeds received from the sale of the bonds are misappropriated by the stockholders does not affect the validity of the bonds in *bona fide* hands. *Western, etc. R. R. v. Drew*, 3 Woods, 692 (1879); s. c., 29 Fed. Cas. 747. The *bona fide* purchaser is not affected by the fact that the president sold the bonds and used all the proceeds for his individual purposes. *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859). The *bona fide* purchaser of municipal bonds may enforce them, although the railroad to which they were issued sold them at a discount of twenty-five per cent., contrary to the charter. *Woods v. Lawrence County*, 1 Black. 386 (1861).

¹ After many years' delay in foreclosing the mortgage, the court will scrutinize closely the validity of the bonds. A purchaser of the bonds at from three to twenty cents on the dollar, after an ineffectual foreclosure, and after the unpaid accrued interest nearly equals the principal, is not a *bona fide* purchaser, and if the original issue was for no consideration he cannot enforce them. But a *bona fide* purchaser from him, and any subsequent purchaser from such *bona fide* purchaser, may enforce the bonds. *Bona fides* must be proved in such a case. *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889); rev'd on other

points, *sub nom. Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895). A purchaser may be *bona fide* although he took the bonds in exchange for other bonds worth only ten cents on the dollar. *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885). *Bona fides* is not presumed where the fraudulent issue has been proved. *Gilman v. New Orleans, etc. R. R.*, 72 Ala. 566 (1882). Where overdue railroad mortgage bonds, which belong to the railroad company, are bought at forty cents on the dollar from the vice-president of the company after suit to foreclose has been begun, and a receiver has taken possession of the mortgaged property, the purchasers of such bonds are not *bona fide* holders where inquiry on their part would have shown that the vice-president had no authority to sell the bonds. *American, etc. Co. v. St. Louis, etc. Co.*, 42 Fed. Rep. 819 (1890). A person who purchases four bonds of \$1,000 each for \$150 is bound to inquire into the legality of the issue. *Riggs v. Pennsylvania, etc. R. R.*, 16 Fed. Rep. 804 (1883). Where a purchaser of bonds knows that he is purchasing from an agent of the corporation, and that the agent intends to use the proceeds for his private purposes, he is not a *bona fide* purchaser. *Chew v. Henrietta, etc. Co.*, 2 Fed. Rep. 5 (1880). A partner of one of the contractors who is a party to a fraudulent issue of bonds was held not to be a *bona fide* purchaser under the facts in the case. *Smith v. Florida, etc. R. R.*, 43 Fed. Rep. 731 (1890), a case involving the bonds which were passed upon in *Railroad Cos. v. Schutte*, 103 U. S. 118 (1880), and *Trask v. Jacksonville, etc. R. R.*, 124 U. S. 515 (1888).

² See § 767, *infra*.

corporation, and such officer made the sale, not for the corporation, but as the holder and owner of the bonds himself, this in itself may destroy the *bona fides* of the purchaser, if it turn out that the officer was committing a breach of trust.¹

The danger, incident to an issue of mortgage bonds at less than their par value, is generally added to by the fact that the directors of the corporation are usually personally interested in the issue. It is an old and well-established principle of law that a director is disqualified from contracting with his corporation. He is acting as a trustee, and as trustee cannot contract with himself as an individual.² It is undoubtedly true that a director may buy bonds at less than par if the transaction is fair, and if no stockholder objects.³ But any stockholder may object to bonds, issued for construction work in which the directors were interested. Upon such objection, the mortgage securing the bonds being under foreclosure, the court will allow the bondholders taking with notice to prove only such part of the bonds as represent actual value received by the corporation,⁴ while *bona fide* holders may enforce their bonds at par.⁵

1 See §§ 293, 727, *supra*. A purchaser of a note of a corporation payable to an officer of the corporation is not a *bona fide* purchaser. *Stough v. Ponca Mill Co.*, 54 Neb. 500 (1898). A purchaser or pledgee of bonds from a director may be a *bona fide* holder, even though he knew that he was dealing with a director, inasmuch as a director may be a lawful holder of such bonds. *Duncomb v. N. Y. etc. R. R.*, 84 N. Y. 190 (1881).

2 See §§ 649, 653, 662, *supra*.

3 A purchaser at ninety cents on the dollar of bonds issued to a director at seventy cents is protected, even though he was informed of the facts. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892); *Re Compagnie Bellegarde*, L. R. 4 Ch. D. 470 (1876); *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883); *Bank of Toronto v. Cobourg, etc. Ry.*, 10 Ont. Rep. (Can.) 376 (1885). See also § 692, *supra*. As to the purchase of bonds by the directors from outsiders at less than par, see § 660, *supra*.

4 *Thomas v. Brownville, etc. R. R.*, 109 U. S. 522 (1883). See also *Wardell v. Union, etc. R. R.*, 103 U. S. 651 (1880); s. c., 4 Dill. 330; s. c., 29 Fed. Cas. 211. Where the incorporating act requires all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of \$500,000 in bonds, of which bonds \$480,000 are turned back by the vendor to the directors, who divide them among themselves, the bonds are void in the hands of directors. The directors in this instance had erected over the entrance to the cemetery a statue of Immortality, and had done so "with great pomp and solemnity." *Campbell v. Cypress, etc. Cemetery*, 41 N. Y. 34 (1869). Bonds may be issued by a corporation to a director as security for a debt from it to him. A director cannot buy bonds from the corporation at less than par, except at the risk that the company will undo the transaction. A director must give up bonds which he takes as a

5 See note 2, p. 2630, *supra*.

Moreover, if all the stockholders assent, and the general creditors of the corporation are not injured, the issue is legal.¹ Inasmuch as in New York an agreement of a contractor to divide with the officers of the company profits made in the construction of the railroad is legal, unless avoided by the corporation, and is not subject to collateral attack, such a contract will be sustained in Pennsylvania if the contract was made in New York and pertained to a New York corporation, even though such corporation was thereafter consolidated with a Pennsylvania corporation.² Where a director is secretly interested with a contractor in bonds issued for construction, a contract by which the director sells his interest to the contractor cannot be enforced by the director, the issue having been illegal.³ In Ohio this disqualification of directors from purchasing from the corporation its bonds at a discount is embodied in the statutes, and the bonds are declared not merely voidable, but absolutely void.⁴ It is of course legal for the company to sell its bonds to stockholders.⁵

A more difficult question arises when bonds are issued to persons who control the directors of the company, such directors being mere "dummies" of the persons to whom the bonds are issued. There have been decisions to the effect that bonds issued below par to the persons, who have put in their "dummies" as directors of the company, are invalid and may be attacked by stockholders or corporate

bonus on his subscription. But the *bona fide* purchasers may enforce them. *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190 (1881). Fraud in issuing them to a director does not affect a *bona fide* purchaser. *Hulett's Case*, 2 J. & H. 306 (1862). For a case that carefully considers the facts which render certain bonds legal and others fraudulent, see *Bronson v. La Crosse R. R.*, 2 Wall. 283 (1863). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. *Burgess v. St. Louis County R. R.*, 99 Mo. 496 (1890). On this subject of laches see also ch. XLIV, *supra*.

1 Bonds issued at their full value to the president in payment for work done by him under a contract between himself and his company are

valid and enforceable, where all the stockholders assented to such contract. *Arkansas, etc. Co. v. Farmers', etc. Co.*, 13 Colo. 587 (1889). See also ch. XLIV, *supra*, and §§ 649, 730, *supra*.

2 *Rumsey v. New York, etc. R. R.*, 64 N. J. Eq. 807 (1902).

3 *Cobb v. Crittenden*, 161 Fed. Rep. 510 (1908).

4 See note 1, p. 2625, *supra*.

5 The holder of a majority of the stock of a railroad company may legally cause its bonds to be issued to himself at ninety cents on the dollar in payment of a debt due him. *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). A stockholder may of course purchase bonds upon their original issue by the corporation. *Bergen v. Porpoise Fishing Co.*, 42 N. J. Eq. 397 (1886).

creditors, or by the corporation itself.¹ If, however, all the stockholders assent, the contract and issue are legal.²

It may be illegal for the directors to vote to issue a large amount of bonds at less than their real value to a construction company in which they have stock or in which they are directors.³ It is fraudulent to issue bonds at less than their actual value in order to defraud other creditors and the stockholders, and to buy in the property cheaply at foreclosure sale.⁴

1 In *Central Trust Co. v. New York, etc. R. R.*, 18 Abb. N. Cas. 381 (1887), the foreclosure of a railroad mortgage was sought. The corporation defended against the bonds on the ground that they were issued below par to persons who controlled the board of directors by means of "dummies." The court sustained this contention and held that the bonds still in the hands of the guilty parties must be reduced in amount to the amount actually paid therefor. In *Cleveland Rolling M. Co. v. Crawford*, 9 Ry. & Corp. L. J. 172 (Ill. Cir. Ct. 1891), corporate creditors sought to hold the defendant liable for corporate debts, by reason of the fact that bonds and stocks, whose par value was four times greater than the value of construction work done by defendant, had been issued to defendant for construction work, and that the corporation was controlled by defendant through "dummies." A demurrer was overruled, the court saying: "He could no more shield himself behind the nominal action of the corporation by its 'dummy' board of directors than a guardian or executor *de son tort* could shield himself behind the accounts of the legal guardian or executor procured to be made in the name of such legal guardian or executor." Where two persons organize a railroad corporation by means of "dummy" stockholders, their clerks and employees, and put their clerks, etc., in as "dummy" directors, and these "dummies" issue all the stock and a large mortgage on the corporate property to the two promoters for construction work, one of the pro-

moters cannot call the other to an account. The court will not aid the parties. *Jackson v. McLean*, 100 Mo. 130 (1890). And where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two by means of "dummy" intermediaries at an improvident price, one of the contractors cannot compel the other to divide the profits. *Jackson v. McLean*, 36 Fed. Rep. 213 (1888). See also §§ 663, 664, *supra*.

2 *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892), and §§ 649, 662, 730.

3 See §§ 649, 662, 663, *supra*. Where with the consent of all the directors and stockholders, one of the directors is interested in a contract with the corporation, but upon the corporation becoming insolvent and being dissolved the court cancels the contract at the instance of creditors, such contractor is entitled to pay for services already rendered, and to reimbursement for actual and necessary outlays in connection with the contract. *Griffith v. Blackwater, etc. Co.*, 55 W. Va. 604 (1904).

4 A foreclosure sale based on fraudulently issued bonds will be set aside as against purchasers with notice, and such purchasers held liable for the real value of the road. *Drury v. Cross*, 7 Wall. 299 (1868). Judgment creditors may bring an action to set aside a mortgage and to restrain a foreclosure, where the bonds secured thereby were issued to the stockholders for purposes foreign to the cor-

Promoters are somewhat similar to directors in their fiduciary relationship towards the corporation, its stockholders, bondholders, and creditors. Hence a promoter may be liable where he transfers property to the corporation for stock and bonds much greater in value than the value of the property he so transfers.¹ Where brokers

porate purposes, in fraud of corporate creditors, the object being to close out the property and organize a new corporation for the purpose of going on with the business. *Phenix Nat. Bank v. Cleveland Co.*, 11 N. Y. Supp. 873 (1890). For an issue of bonds fraudulently by issuing them in pledge and then purchasing the bonds at a pledgee's sale, see *James v. Railroad Co.*, 6 Wall. 752 (1867).

1 See § 651, *supra*. In the case of *Dickerman v. Northern T. Co.*, 176 U. S. 181, 206 (1900), the court said it was not called upon to decide whether promoters who receive a large quantity of bonds and stock as their profit are liable for the par value of the stock, or whether the remedy is a rescission of the transaction.

Where promoters pay out less than \$30,000 to secure options on land and then sell the options to the corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in selling and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends.

The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900). A stockholder in a holding corporation cannot maintain a suit in behalf of the corporation on the ground that its promoters made large, unlawful and secret profits by being interested in the constituent company whose stock was turned in to the holding company in exchange for the stock of the latter, it appearing that when the stock was so turned in the promoters were the only parties interested. If any of the original parties were defrauded their remedy is a suit at law for damages against the guilty parties. The court said (p. 241): "We have here nothing more than the ordinary transaction of parties coming together and agreeing in writing to form a corporation that shall take over from them certain definitely understood properties and cash, for which is to be issued its entire capital stock. It is doubtless true that in many instances there is great overcapitalization, and that the general public is frequently misled by the large amounts of preferred and common stock issued by corporations. The rights of the public are not involved in this litigation. . . . The stockholders of the constituent companies and the individual defendants were the organizers of the corporation and became its first stockholders; they dealt wholly between themselves as sellers and buyers, organizers and corporation; no other persons had any interest in this initial transaction; if fraud had been practiced by any one of the organizers upon those associated with him, the cause of action would have vested

and promoters issue bonds greatly in excess of the value of the corporate property and by fictitious sales give a high market quotation of the bonds and borrow money thereon, the lender may hold them liable in a suit for loss due to a conspiracy.¹ In Massachusetts the supreme court has recently held that where a person buys property for the purpose of forming a corporation to take it over, and this plan is carried out by the use of dummies as directors, who issue stock therefor, the par value of which is many times greater than the actual value of the property, the corporation itself may thereafter rescind the transaction and return the property and demand back the stock, even though all the stockholders, directors and officers approved the transaction when it was carried out, it appearing, however, that the property received was worthless and that it was a part of the original plan to sell a large part of the stock to the public, which plan was carried out, and it appearing also that the original stockholders and officers were merely representatives of the vendor, and that there was no independent judgment on the part of the board of directors. The court pointed out that this was a different case from one where it was not contemplated that the public should become interested, except by purchase from the original stockholders.² The federal

in the party injured." *Blum v. Whitney*, 185 N. Y. 232 (1906). Where a promoter causes the stockholders in various electric companies to turn in their stock to a new corporation in exchange for bonds of the latter, and also gives to such stockholders the right to purchase, at \$30 a share, stock in the latter, a stockholder who has done so and then discovers that the promoter has made \$20,000,000 profit in stock of the new company, may bring suit to compel the promoter to turn over the profit to the corporation and may join the new corporation as a party defendant. It is no defense that the board of directors of the latter thinks it inexpedient that the suit be brought. *Groel v. United, etc. Co.*, 70 N. J. Eq. 616 (1905). The court said (p. 1064): "The authorities hold that it is a matter of discretion in the court whether to permit a suit to be brought by a stockholder on behalf of his corporation, and that the court will exercise its discretion having in view the circumstances of the parties, their relationships to each other and

to the cause of action, the refusal to sue," etc. Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that \$75,000 of stock should be subscribed for within a certain time, and then proceeds to organize the company, he himself subscribing for \$25,000 of the stock, and the corporation then purchases certain worthless patents and agency contracts and issues therefor \$63,250 of full-paid stock, including the \$25,000 subscribed for by him, and afterwards the corporation collects \$4,000 of such donations and borrows money from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the \$4,000. *Moore v. Universal, etc. Co.*, 122 Mich. 48 (1899).

¹ *McElroy v. Harnack*, 213 Pa. St. 444 (1906).

² Where a person buys all the stock of a corporation for about \$613,000, and some real estate for about \$175,000, and sells the former to a corpo-

courts reached a different conclusion in the same transaction.¹ A somewhat similar fraud is where a mortgage is foreclosed in accordance with a reorganization agreement, whereby the stockholders of the old corporation participate in the benefits of the new to the detriment of creditors of the old.²

§ 766a. *Who may complain of an issue of bonds at less than par—Stockholders—The state—The corporation itself—Bondholders—Corporate creditors.*—Even though the validity of an issue of bonds

ration formed by him for that purpose, for \$2,500,000 par value of stock, having also an actual value of \$2,500,000, and sells the real estate for \$750,000 par value of stock, having also the same actual value, but it turns out that the real estate was worthless, the corporation so issuing the stock may maintain a separate suit for rescinding the sale and issue of stock for the real estate, or for damages, if the stock cannot be returned, it appearing that the promoter was a director at the time of the sales, and that the fair market value of the stock at the time of issue was par, and so continued to be for a long time thereafter; it further appearing that he made no disclosure of the facts to the corporation and did not see to it that the corporation had adequate independent advice. The court said: "That is an obligation resting upon every fiduciary who makes a sale of his own property to his beneficiary, no matter whether it is a case of trustee and *cestui que trust*, guardian and ward, solicitor and client, or promoter of a corporation and the corporation itself. There is no pretense that in the transaction in question the plaintiff corporation was represented by an independent board." It is no defense that every stockholder and director knew of and acquiesced in the transaction at the time, it appearing that the stock was afterwards sold to the public without any disclosure of the facts. *Old Dominion, etc. Co. v. Bigelow*, 188 Mass. 315 (1905), the court refusing to follow *Old Dominion, etc.*

Co. v. Lewisohn, 136 Fed. Rep. 915; *aff'd*, 148 Fed. Rep. 1020, involving the other issue of stock. The court pointed out that in cases to the contrary it was not contemplated that other parties should become interested in the stock, except by purchase from the original stockholders. If there are two such promoters it seems that in a suit against one, he is liable for the whole stock so issued.

¹ *Old D., etc. Co. v. Lewisohn*, 210 U. S. 206 (1908).

² See § 886, *infra*. A holder of bonds guaranteed by a railroad corporation may intervene in a suit brought to foreclose a mortgage on such railroad, and may set up that the foreclosure is for the benefit of the stockholders and for the purpose of disposing of and cutting out such guaranty. *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 674 (1899). A reorganization agreement whereby the bondholders are to receive new bonds and the stockholders new stock, to the exclusion of general creditors of the old corporation, is illegal and may be set aside at the instance of creditors of the old corporation, it being shown that the principal owners of the bonds were also the principal owners of the stock, and hence that in the foreclosure the rights of creditors were not protected and that the stockholders paid nothing for the new stock. The court held that the creditor had an equitable lien on the property subject only to the new mortgage. *St. Louis T. Co. v. Des Moines, etc. Ry.*, 101 Fed. Rep. 632 (1900).

is questionable, yet it is not every person who can complain.¹ A stockholder may enjoin the issue or cause it to be set aside where it is fraudulent or beyond the powers of the corporation.² But all stockholders who have assented to the issue, and all transferees of their stock, are estopped from objecting to the bonds.³

The attorney-general, in behalf of the state, certainly cannot enjoin the issue.⁴ Where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company who seeks to set the sale aside on the ground that the mortgage was invalid is in the position of one who asks to be let in to redeem from a mortgagee in possession under an unexpired mortgage. He cannot in that same action ask that the purchaser at foreclosure sale, who is about to bond the property, shall pay the judgment creditors' claim out of such bonds.⁵ But a judgment creditor may attack the legality of the bonds or of the foreclosure where the company has become insolvent and he has exhausted his remedy against it.⁶ But a decree invalidating the sale does so only as to complaining judgment creditors, and not as to other creditors or bondholders, or the company itself.⁷ General creditors who have proved their claims may attack the legality of an issue of mortgage bonds.⁸ General creditors whose suit against the company has been consolidated with a foreclosure suit may contest the validity of the bonds. An intervening creditor may also attack them.⁹ Creditors who become such after the bonds were issued cannot attack the validity of the bonds on the ground that they were issued for less than their real value, together with a large amount of stock.¹⁰ A subsequent mortgagee cannot make such an attack except as a judgment creditor.¹¹ A purchaser of the bonds with notice cannot complain.¹² In England it is held that although none of the stockholders and creditors of a company which is in difficulties object to a new issue of bonds and stock for contract work, a part of the bonds and stock being then given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company the scheme is illegal, and innocent purchasers of the stock may hold the directors who did the act liable for the stock and bonds thus given as a bonus.¹³ Such a purchaser's remedy, however, is not to have the whole issue set aside as illegal.¹⁴

1 See § 848, *infra*.

2 See § 848, *infra*.

3 See § 848, *infra*.

4 See § 848, *infra*.

5 See § 848, *infra*.

6 See § 848, *infra*.

7 See § 848, *infra*.

8 See § 848, *infra*.

9 See § 848, *infra*.

10 See § 848, *infra*.

11 See § 848, *infra*.

12 See § 848, *infra*.

13 See § 848, *infra*.

14 See § 848, *infra*.

The corporation itself may under some circumstances complain, especially where some of the stockholders object;¹ and it is held that a receiver may.² Even if the bonds, and hence the mortgage, are held to be invalid, the court may retain jurisdiction in order to distribute the property.³

§ 766b. *Usury as affecting bonds issued at less than par.*—It is to be borne in mind that the statute against usury may invalidate bonds issued below par. A bond bearing the full legal interest and yet issued below par is practically an agreement to pay more than the legal rate of interest. Consequently this defense may in certain cases be set up by the corporation.⁴ A mortgage executed

¹ See § 848, *infra*, and § 729, *supra*.

² See § 848, *infra*.

³ See § 848, *infra*.

⁴ Craven County Com'rs v. Atlantic, etc. R. R., 77 N. C. 289 (1877), where a stockholder brought action to have declared void railroad bonds so issued. In Schermerhorn v. Talman, 14 N. Y. 93 (1856), the court said that the sale of the securities (certificates of deposit in that case) is not a sale, but a loan, and "that neither individuals nor corporations can sell their mere promises to pay." That which is called a sale is nothing but a loan (p. 117). "If it appears that, at the end of all the payments, the lender will have received more than his principal, with lawful interest, the contract is usurious" (p. 121). See also Neuse River Nav. Co. v. Newbern, 7 Jones, L. (N. C.) 275 (1859). In Sturges v. Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, McLean, J., in a railroad case, said: "From the authority given to the directors to sell notes, bonds, scrip, and certificates for the payment of money or property which the company had previously received as donations, or in payment of the subscriptions to the capital stock, above or below par, an argument is drawn that stock may be disposed of to subscribers for less than \$50 a share. It appears to me the provision authorizes an inference in conflict with the one drawn. If bonds or other instruments for the payment of money be transferred at

less than their face, with legal interest on the entire sum, in payment for the money loaned, it would be usurious, and this was the reason for the above provision. Without it the sale of the bonds, etc., would have been illegal." A \$1,000 bond may be sold for \$850, and yet not be usurious. *McTighe v. Macon Constr. Co.*, 94 Ga. 306 (1894). Usury is no defense as against *bona fide* holders of mortgage bonds. *Weed v. Gainesville, etc. R. R.*, 119 Ga. 576 (1904). A stockholder cannot enjoin the corporation from issuing six per cent. bonds at seventy-five cents on the dollar, even though such contract is usurious, where it is shown that the issue is reasonable and necessary for the protection of the corporation. *George N. Fletcher & Sons v. Alpena, etc.*, 136 Mich. 511 (1904). Bonds may be issued at less than their par value where corporations are forbidden by statute from setting up the defense of usury. *Stevens v. Watson*, 4 Abb. App. Dec. 302 (1865). Where the charter authorizes the company to borrow money "on such terms as might be agreed upon by the parties," twelve per cent. interest may be agreed upon. *Morrison v. Eaton, etc. R. R.*, 14 Ind. 110 (1860). If the rate of interest is legal where the corporation exists and the bonds are payable, there is no usury, although the rate is higher than in other states where suit is brought. *Butler v. Edgerton*, 15 Ind. 15 (1860). *Cf. But-*

in New York state by a New Jersey corporation is valid in New Jersey so far as usury is concerned, if it is valid in New York.¹ A foreign corporation may set up the defense of usury, even though it could not do so by the laws of the state in which it is incorporated.²

A corporation, like any person, may at common law set up the defense of usury. But the statutes of many of the states now prohibit this defense on the part of the corporation, and in all the states the courts go to the extreme in defeating the defense if possible.³

ler v. Myer, 17 Ind. 77 (1861). Where the bonds of a corporation were sold for cash by the corporation for eighty-seven and one-half cents on the dollar, with an agreement that, if other bonds were sold at a less rate within a certain time, any difference would be paid to the first vendee, and bonds were sold later at seventy-one cents on the dollar, a suit will not lie by the first vendee to recover the sixteen and one-half cents on the dollar. The issue below par was held to be usurious. The Ohio statute relative to such issues was held to apply to domestic corporations. McGregor v. Covington, etc. R. R., 1 Disney (Ohio), 509 (1857). In the case of Short v. Post, 58 N. J. Eq. 130 (1899), where two mortgages and a large amount of stock were issued by a corporation for property worth no more than the first mortgage, and the receiver of the corporation defended against such first mortgage on the ground that the mortgage was usurious because some of the stock had been given to the mortgagee without consideration, the court held the defense not good under the facts in that case.

¹ Franklin T. Co. v. Rutherford, etc. Co., 57 N. J. Eq. 42 (1898). A loan made by a New York corporation in Pennsylvania to be paid in New York is not usurious, if not usurious under the laws of New York. People's, etc. Assoc. v. Berlin, 201 Pa. St. 1 (1901).

² Stack v. Detour, etc. Co., 114 N. W. Rep. 876 (Mich. 1908).

³ In North Dakota, by statute, a railroad company cannot plead usury against the holder of a bond or other

obligation. Rev. Civ. Code (1895), § 2962; also in South Dakota, Comp. L. of Dak. (1887), § 2993. In Iowa a railroad corporation may dispose of bonds for construction and equipment at less than par, and cannot plead usury against them. 1 Rev. Code (1888), ¶ 1283; so also in Maine, Rev. Stat. (1883), ch. 51, § 56; Minnesota, § 2529 (1891); Nebraska, Comp. Stat. (1895), ¶ 1820 (ch. 16, § 117); New Jersey, Gen. Stat. (1895), vol. 3, p. 3703, § 6; New York Laws 1850, ch. 172. See Curtis v. Leavitt, 15 N. Y. 9, 152 (1857); Central Gold Min. Co. v. Platt, 3 Daly, 263 (1870); Graham v. Atlantic, etc. Co., N. Y. Daily Reg., Oct. 14, 1884. In Wisconsin also a corporation cannot plead usury. Rev. Stat. (1878), § 1690. Many states have no usury laws. See Jones on Mortgages, § 633. A charter provision authorizing the corporation to issue securities at not over seven per cent. interest does not prevent the company borrowing money at a greater rate of interest. Union Nat. Bank v. Wheeler, 60 N. Y. 612 (1875). The issue of bonds in New York below par cannot be attacked on the ground of usury, even by a lien creditor of the corporation. Atlantic Trust Co. v. The Vigilancia, 73 Fed. Rep. 452 (1896). The statutory provision that a corporation shall not plead usury in defense does not prevent a suit in equity being brought to set aside as inequitable and usurious a settlement of accounts, in which a corporation is retrospectively charged with compound interest, since equity has power to afford relief against im-

§ 766c. *Bonds delivered or to be delivered to contractors for construction work — Failure of the contractor to complete the work—Remedy of contractor for failure of corporation to deliver—Right of adverse claimants to particular bonds or stock.*—Before leaving this subject of the issue of bonds at less than par, it is well to refer to bonus issued to a contractor for work which the contractor does not complete. The general rule is that where bonds are issued to a contractor in payment for work which he afterwards fails to complete, the bonds cannot be enforced at their full par value unless they have passed into *bona fide* hands.¹ Thus, where

provident and extravagant bargains, irrespective of the statutes against usury. *Higgins v. Lansingh*, 154 Ill. 301 (1895). The courts are inclined to extend the application of laws which forbid a corporation from setting up the defense of usury. *Junction R. R. v. Bank of Ashland*, 12 Wall. 226 (1870); *Cromwell v. Sac County*, 96 U. S. 51 (1877). Coupons at an illegal rate do not prevent a recovery of the sum actually loaned and legal interest. *Philadelphia, etc. R. R. v. Lewis*, 33 Pa. St. 33 (1859). But any corporation as assignee of a usurious contract may set it up. *Merchants', etc. Nat. Bank v. Commercial, etc. Co.*, 49 N. Y. 635 (1872). As to usury set up against a corporation, see § 690, *supra*.

¹ *State v. Brown*, 64 Md. 199 (1885); *Silliman v. Fredericksburg, etc. R. R.*, 27 Gratt. (Va.) 119 (1876); *Chicago, etc. Ry. v. Loewenthal*, 93 Ill. 433 (1879), holding that the mortgage becomes invalid. Where a contractor who is paid in stock assigns the stock and then fails to complete the contract, the assignee who took with full knowledge of the contract is not entitled to the stock, the contract saying that if it was not performed it should be null and void. *Sargent v. Kansas Mid. R. R.*, 48 Kan. 672 (1892). Where, according to contract, bonds are issued to a contractor in payment for work before the work is done, a purchaser or pledgee of the bonds from him is protected, even though he took the bonds with full

knowledge of all the facts. *Mercantile Trust Co. v. Zanesville, etc. Ry.*, 52 Fed. Rep. 342 (1892). It is no defense to bonds in *bona fide* hands that they were issued to a contractor for work which he did not finish in the time agreed upon. *McElrath v. Pittsburg, etc. R. R.*, 55 Pa. St. 189 (1867). Even though a contract for the construction of a road is not finished, yet, if the bonds have been delivered and have passed into *bona fide* hands, the holders are protected. *Wells v. Northern T. Co.*, 195 Ill. 288 (1902). In the case of *Fouche v. Merchants', etc. Bank*, 110 Ga. 827 (1900), where \$50,000 of stock was issued in payment for certain bonds and property, and the bonds were never delivered, and the property that was delivered was worth only \$2,500, the court held the stock was not full-paid, even though the certificate recited that it was full-paid and non-assessable, and the court held that the stockholders and transferees with notice were liable on such stock.

The New York statute against the issue of stock below par and the issue of bonds below their fair market value does not prevent the issue of stock and bonds by a railroad company for construction work, and such stock and bonds may be delivered in advance of the work being done. *Hudson River, etc. R. R. v. Hanfield*, 36 N. Y. App. Div. 605 (1899). Individual stockholders may intervene in a trustee's foreclosure suit and attack the validity of certain bonds on the

a corporation has issued stock for work to be done, and the work is not done, the corporation may compel a person in whose hands the stock was deposited to deliver it back to the corporation. The person holding the stock may interplead.¹

ground that such bonds had been issued for construction work which had not been finished, and had subsequently been issued in payment for services by officers, the mortgage providing that bonds should be issued only for construction work, and the bonds not being in *bona fide* hands. *Central T. Co. v. California, etc. R. R.*, 110 Fed. Rep. 70 (1901); *aff'd*, 128 Fed. Rep. 882. Where the corporation refuses to pay the interest on certain bonds on the ground that they were issued for property concerning which misrepresentations were made, the court will not foreclose the mortgage at the instance of such bondholder, unless the bondholder first brings a suit at law on the coupons and has the question of fraud determined. *Nashua, etc. Bank v. Burlington, etc. Co.*, 99 Fed. Rep. 14 (1900). But where a contractor who is paid in stock assigns the stock and then fails to complete the contract, the assignee who took with full knowledge of the contract is not entitled to the stock, the contract saying that if it was not performed it should be null and void. *Sargent v. Kansas Midland R. R.*, 48 Kan. 672 (1892). In *Hampton, etc. R. R. v. Bank*, 48 S. C. 120 (1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

If a corporation accepts an absolute order upon it by the contractor to de-

liver to a third person certain stock, it cannot afterwards decline to issue the stock on the ground that the contractor has not performed his work. *Hite Nat. Gas Co.'s Appeal*, 118 Pa. St. 436 (1888). Where a contractor who has been paid in bonds in advance does not perform, and by compromise he gives up all the bonds except a few which it is agreed he may retain, such compromise cannot afterwards be repudiated by the company. *Oregon, etc. R. R. v. Forrest*, 128 N. Y. 83 (1891).

¹ *Equity Gas-Light Co. v. McKeige*, 139 N. Y. 237 (1893). Where a corporation has issued stock for services which have never been performed it may maintain a bill in equity to cancel such stock. *Hillside, etc. Ass'n v. Holmes*, 97 Minn. 261 (1906). Although a party to whom bonds and stock have been sold or issued to be paid for in instalments has paid in part and is unable to pay the remainder, the vendor cannot rescind and demand back the securities unless he returns the money already paid. *American Water-works Co. v. Venner*, 18 N. Y. Supp. 379 (1892). As to the form of a syndicate contract to build the Southern Pennsylvania Railroad, and an action by a member to set the contract aside, and a refusal of an injunction, *pendente lite*, see *Bagaley v. Vanderbilt*, 16 Abb. N. Cas. 359 (1885). As to an issue of bonds on certificates as fast as a road is completed, see § 816, *infra*. A vendor taking mortgage bonds in payment thereby waives a condition in the contract of sale that the title should not pass until the sale was completed. *Hinchman v. Point Defiance Ry.*, 14 Wash. 349 (1896). In *U. S. Trust Co. v. Western Contract Co.*, 81 Fed. Rep. 454 (1897), bonds and stock

Moreover, the contractor may be liable in damages, even though his failure to complete was due to a misunderstanding on his part as to his title to his property.¹

On the other hand, if the corporation fails to deliver the stock or bonds, after the contractor has completed his work, he may recover damages to the extent of the value of the stock or bonds.² A

were deposited with a railroad corporation to pay the principal and interest on certain other bonds and floating debts of another corporation. After the contract had been partially performed the former corporation became insolvent, and the court passed upon the various rights of the parties. Where bonds are to be issued *pro rata* for each five miles of completed railroad ready for rolling-stock on the certificate of the chief engineer, but the contract is to be forfeited if the road is not completed, the contractor is entitled to his bonds for completed sections on the engineer's certificate, even though the road is not completed. *Perkins v. Locke*, 27 S. W. Rep. 783 (Tex. 1894). Where a water-works company issues all its stock and bonds to a contractor for construction work in advance of the work, and the contractor pledges them to a banker for advances, the other creditors of the water-works company cannot claim an interest in such securities, even though the banker had assumed the contractor's obligation to one other creditor. *McNeal Pipe, etc. Co. v. Bullock*, 174 Pa. St. 93 (1896).

¹ Where parties who suppose they own a timber tract worth \$600,000, sell the same to a corporation for \$500,000 full-paid stock, and it afterwards transpires that their title is defective as to a part of the property, and the corporation in order to perfect the title pays out \$215,000, although the stock actually issued for that part of the property was only \$55,000, the parties to whom the stock was so issued are liable only for the \$55,000, especially where a settlement has been made with some of them

on that basis. A contract between the original parties by which some guaranteed others against liability on account of any defects in the title cannot be enforced by the corporation, and hence cannot be made the basis of the measure of damages. On the other hand, the parties receiving the \$55,000 of stock cannot return it and avoid liability on the ground that the consideration for the issue of stock had failed. If the stockholders are few in number, the court may decree payment directly to such of the stockholders as are entitled to participate in the distribution of the \$55,000. *Jenkins v. Bradley*, 104 Wis. 540 (1899).

² If a person sells and conveys property to a company to be paid for in stock, which the vendee refuses to deliver, the vendor may recover the value of the stock. *Humaston v. Telegraph Co.*, 20 Wall. 20 (1873). Where a person sells property to a corporation, to be paid for in stock, and the corporation issues all its stock to other parties, he may hold the corporation liable in damages. *Pendery v. Carleton*, 87 Fed. Rep. 41 (1898). Liquidated damages, specified in a contract in case of failure of a party not transferring property in consideration of stock to be issued by a corporation, cannot be proved against his bankrupt estate, the stock never having been issued and the property never transferred, and no actual damage having been suffered. *Northwest, etc. Co. v. Kilbourne, etc. Co.*, 128 Fed. Rep. 256 (1904). Even though a contractor who receives practically the entire capital stock for work to be done, does not fulfill the contract, and even though he dis-

contractor who constructs a road for stock to be delivered may maintain a bill in equity for the delivery of the stock after the road is

poses of some of the stock, yet, unless liquidated damages for such breach are specified in the contract or actual damage is proved, the corporation itself can recover nothing for such breach, the only purpose of the corporation being that particular enterprise, and no business having been transacted by the corporation in consequence of such breach of the contract. *South African, etc. Co. v. Peck*, 120 Fed. Rep. 88, (1903). For a breach of an agreement to give a certain quantity of stock in payment for services to be performed, the person entitled to the stock may sue for damages. *Alford v. Wilson*, 20 Fed. Rep. 96 (1884). A corporation may agree to issue stock to a person in payment for services in procuring a loan for the corporation and guaranteeing payment of the same. If the corporation refuses to perform, the person may obtain damages to the amount of the actual value of the stock. *Saunders v. United States, etc. Co.*, 25 Wash. 475 (1901). Where a corporation deposits stock with its treasurer to be delivered in payment for property according to contract, the treasurer is liable in trover for the value of the stock if he refuses to deliver the stock to the party after such party has completed the contract. *McDonald v. McKinnon*, 92 Mich. 254 (1892). Bonds which are to be issued for building an extension must be delivered when the extension is completed. *San Antonio, etc. Ry. v. Busch*, 21 S. W. Rep. 164 (Tex. 1893). Where a road agrees to issue bonds and fails to do so, the measure of damages is the highest market price of the bonds between the time they should have been delivered and the time of the trial, with interest thereon, irrespective of the price which was to be paid for the bonds. *San Antonio, etc. Ry. v.*

Busch, 21 S. W. Rep. 164 (Tex. 1893). Where a corporation agrees to pay for a railway by bonds upon the same, and does not fulfill, the vendor may hold it liable for the full par value of the bonds, although they were worth less than par. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). A subscriber of money to a corporation, for which the subscriber is to receive "stock, bonds, or other securities as may be determined" by the board of directors, is entitled to bonds if the board of directors have so ordered, even though the corporation afterwards became insolvent. *Barrow v. Smith*, 109 Ga. 767 (1900). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. *Tilkey v. Augusta, etc. R. R.* 83 Ga. 757 (1889). A vendor of the stock of a street railway company may collect damages for breach of the contract of the vendee to construct the street railway to certain land owned by the vendor, even though the corporation, the stock of which was sold, had agreed to acquire certain rights of way and had not done so. *Blagen v. Thompson*, 23 Oreg. 239 (1892).

A contract to accept, in payment for property, the bonds of a corporation to be formed to take over the property, if the bonds are delivered within a certain time, such time being made of the essence of the contract, and cash to be paid if they were not delivered, is legal, and if the bonds are not tendered within that time the cash may be collected. *Barrett v. Twin City, etc. Co.*, 118 Fed. Rep. 861 (1902); *aff'd*, 126 Fed. Rep. 302.

A contractor cannot recover any damages for the failure to deliver stock if the stock is worthless and the company insolvent. *Central*

completed, where he shows that he cannot prove the pecuniary value of the stock, and hence that damages at law would not be sufficient.¹ A *bona fide* purchaser of bonds from a corporation takes good title

Trust Co. v. Condon, 67 Fed. Rep. 84 (1895). See also § 336, *supra*. Several persons defrauded as to their contract whereby they were to receive stock cannot sue jointly. Each must sue separately. *Summerlin v. Front-eriza, etc. Co.*, 41 Fed. Rep. 249 (1890). If an employee is by contract to be paid in stock, and payment is not made, he may obtain judgment for money to an amount equal to the par value of the stock. *Delafield v. San Francisco, etc. Ry.*, 40 Pac. Rep. 958 (Cal. 1895). A land-owner who agrees to take pay from a railroad for a right of way in shares of stock must take the stock at its par value, and not at its market value. *Hoffman v. Bloomsburg, etc. R. R.*, 157 Pa. St. 174 (1893). Stock issued to a contractor instead of money to be paid to him may be voted by him, at least to the extent or proportion of such part of his liability as he has fulfilled. *Price v. Holcomb*, 89 Iowa, 123 (1893); *Pendleton Mfg. Co. v. Mahanna*, 18 Pac. Rep. 563 (Oreg. 1888).

Where property is deeded to trustees to deed to a corporation for part of the stock, the remaining stock to be for working capital, the *cestuis que trust* are entitled to the stock before the rest is sold. The statute of limitations does not run. *Philes v. Hickies*, 18 Pac. Rep. 595 (Ariz. 1888). If the corporation prevents the completion of the contract, the contractor may recover as damages the value of the work already done, and also the profits lost. *Myers v. York, etc. R. R.*, 2 Curtis, 28 (1854); s. c., 17 Fed. Cas. 1122; *aff'd.*, 18 How. 246. If the corporation refuses to issue the stock according to contract, the contractor may recover as damages the *market* value of the stock. *Porter v. Buckfield Branch R. R.*, 32

Me. 539 (1851); *Barker v. Troy, etc. R. R.*, 27 Vt. 766 (1855). If the contract provides for payment to the contractor in stock, without stating that the stock is to be taken at its par value, the contractor may demand the stock at its market value; and if it is worthless, he may then demand money in lieu thereof. *Hart v. Lau-man*, 29 Barb. 410 (1859). The contractor cannot, however, complain because the capital stock has been increased, nor is a tender of the stock to him necessary. *Moore v. Hudson River R. R.*, 12 Barb. 156 (1851). For failure to deliver bonds as called for by a contract, the vendee may recover the highest market price between the date of the breach of the contract and the date of the trial. *San Antonio, etc. Ry. v. Wilson*, 4 Tex. Civ. App. 178 (1893).

Although a contractor who is to take stock and bonds in payment assigns his contract to a trustee and issues debenture bonds against it, and also assigns scrip certificates of the company exchangeable for mortgage bonds on completion of the work, yet no equitable lien on the property of the company is thereby created. *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896). Where the company defaults in paying in stock as agreed, the measure of damages is the actual value of the stock. *Central Trust Co. v. Richmond, etc. R. R.*, 68 Fed. Rep. 90 (1895). An executory contract of a corporation to issue debentures is enforceable, even though the corporation has become insolvent. *Pegge v. Neath, etc. Co.*, [1898] 1 Ch. 183. As to the usual railroad contract for construction work, see § 911, *infra*.

¹ *Baumhoff v. St. Louis & K. R. Co.*, 104 S. W. Rep. 5 (Mo. 1907).

as against a party to whom the corporation had contracted to deliver such bonds.¹

A construction company may maintain a bill in equity against a street railway company to compel the latter to deliver to the former four-fifths of the latter's capital stock and certain mortgage bonds in accordance with a contract between them for the construction of the road, inasmuch as such stock cannot be procured on the market and has no general market value, and whatever value it has was given to it chiefly by the construction work. Even though it turns out that prior to the commencement of the suit the railroad company has sold the stock and since the commencement of the suit had sold the bonds, yet the court may render a decree for the value of the stock and bonds.² The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.³ A contractor who has contracted to build a road, payment to be in bonds, cannot claim an equitable lien on the bonds before the contract is finished.⁴

¹ *Lembeck v. Jarvis, etc. Co.*, 70 N. J. Eq. 757 (1906), *aff'g* 69 N. J. Eq. 757.

² *Altoona, etc. Co. v. Kittanning, etc. Ry.*, 126 Fed. Rep. 559 (1903). If, in organizing and issuing the stock, the amount to be issued for the property is not what the contract calls for, the vendor may compel a specific performance. *Bailey v. Champlain, etc. Co.*, 77 Wis. 453 (1890). See also §§ 61, 337, *supra*. Specific performance will be granted to compel a corporation to issue common stock in payment for property in accordance with a contract of the corporation, where the stock has no market value, and it appears that there have never been any sales of such stock. *Selover v. Isle, etc. Co.*, 91 Minn. 451 (1904). Where work for the corporation is to be paid for in stock and the stock has been issued to a trustee for that purpose the contractor may enjoin any transfer or sale of such stock. *Macdonald v. Gerrick*, 29 Mont. 373 (1904). A bill in equity does not lie to compel an underwriting syndicate to assign to plaintiff an interest therein, which they had

contracted to sell to him, even though he alleges that the value is uncertain and that specific performance is the only full and adequate relief. *Gilbert v. Bunnell*, 92 N. Y. App. Div. 284 (1904).

³ *Slide, etc. Mines v. Seymour*, 153 U. S. 509, 520 (1894). But where a contractor to construct a railroad owns all the stock and bonds for which he is to build a railroad, and he buys material and pays therefor in bonds, a chattel mortgage which he individually gives to a director of the company on the engines and cars which he turns over to the railroad company is not prior in right to the mortgage bonds of the company, even though such chattel mortgage was recorded. *Flanagan Bank v. Graham*, 42 Oreg. 403 (1903).

⁴ *Strang v. Richmond, etc. R. Co.*, 101 Fed. Rep. 511 (1900). A contract of a railroad to pay a certain claim out of the proceeds of the first bonds sold does not create a lien on such proceeds upon foreclosure. *Central T. Co. v. California, etc. R. R.*, 110 Fed. Rep. 70 (1901); *aff'd*, 123 Fed. Rep. 882. The executory contract of

Where a mortgage covers bonds to be thereafter delivered, and instead of such delivery the mortgagor deposits the bonds as security with the United States government and then makes another mortgage covering such bonds, the first mortgagee is entitled to the bonds upon their being released by the United States government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second mortgage have passed into *bona fide* hands.¹

a railroad company to issue bonds, no particular bonds being specified, does not create any equitable lien on the bonds, and if they have been issued to other parties the only remedy is a suit for damages. *Cushing v. Chapman*, 115 Fed. Rep. 237 (1902). A contract to deliver bonds is not fulfilled by delivering an accepted order on the treasurer of the corporation for the bonds when thereafter issued. *Twin City, etc. Co. v. Barrett*, 126 Fed. Rep. 302 (1903). A person depositing securities with a trust company to distribute as directed by him cannot file a bill for an accounting unless he shows what disposition was to be made of them. *Young v. Mercantile T. Co.*, 140 Fed. Rep. 61 (1905); *aff'd*, 145 Fed. Rep. 39. The court will not enjoin a corporation from selling its bonds and stock, although a contractor is entitled to receive them after his contract work is finished. The theory of this case is that the court could not compel the contractor to perform, and hence will not enjoin the other party. *Peto v. Brighton, etc. Ry.*, 1 H. & M. 468 (1863). The courts of Massachusetts will not, at the suit of a foreign construction company, enjoin a foreign railroad company and a resident from the issue by the railroad company to the resident of bonds and stock which the railroad company has contracted to deliver to the construction company. The suit should be at the residence of the railroad company. *Kansas, etc. Co. v. Topeka, etc. R. R.*, 135 Mass. 34 (1883). A promise and contract of

promoters to subscribers to certain bonds may create an equitable lien on the bonds enforceable in equity, if the bonds have not passed into *bona fide* hands. *Badgerow v. Manhattan Trust Co.*, 64 Fed. Rep. 931 (1894). An agreement of a railroad company to deliver its bonds in payment for sections of its road as fast as such sections were completed does not give any lien upon the bonds, and if the railroad company pledges them to others the pledgee is protected. There is not even an equitable lien upon the bonds. *Badgerow v. Manhattan Trust Co.*, 74 Fed. Rep. 925 (1896).

¹ *Central T. Co. v. West India, etc. Co.*, 169 N. Y. 314 (1901). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all its stock to other parties who took with notice, and it is unnecessary to bring into the suit other parties who actually have the stock, the stock having been held by the company as collateral security. *Morey v. Fish, etc. Co.*, 108 Wis. 520 (1901). A suit lies to compel a corporation to issue stock in accordance with a contract for construction work. *Citizens', etc. Assoc. v. Belleville, etc. R. R.*, 117 Fed. Rep. 109 (1902). See also §§ 58, 61, 192, *supra*. Where the president claims certain unissued stock as assignee of a contractor who was entitled to it, and another person also claims it as assignee of the contractor, and

In general, all the bonds share equally in the proceeds of a foreclosure sale, but where the corporation agreed with the first purchasers to issue only a certain amount per mile, although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers of bonds have been paid.¹ In a trustee's suit to foreclose, rival claimants of certain bonds cannot have their rights decided.²

Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he holds bonds specified in such certificate, to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person named in the certificate, although the certificate itself is not actually delivered until several years after the date of the certificate.³ Where a corporation

the president issues the stock to himself without authority of the board of directors, the corporation may institute a suit to compel him to give it up, and in such suit the court will determine who is entitled to such stock. *Lakewood Gas Co. v. Smith*, 62 N. J. Eq. 677 (1902). Where a railroad pledges its bonds to a contractor to secure payments to be made to him, and he then pledges the bonds to a person who advances money to a sub-contractor, and such person wrongfully repledges the bonds to a bank to secure those moneys and also other moneys, the original pledgee may hold the second pledgee liable for the illegal pledge to the bank. *Interurban, etc. Co. v. Hayes*, 191 Mo. 248 (1905). A person holding second mortgage bonds in trust for another may purchase for himself at a foreclosure sale under the first mortgage. *Yuengling v. Betz*, 120 N. Y. App. Div. 709 (1907). Even though a party agrees to make future advances of money and is to receive bonds as security therefor, yet if, prior to such advances being made and the bonds received, the pledgor has contracted with another party to deliver to the latter said bonds, the latter is entitled to the bonds as against the first-named party who makes such advances subsequently

and received the bonds with notice of such intervening contract. *Columbia, etc. Co. v. Mercer*, 57 S. W. Rep. 787 (Ky. 1900). A person to whom a corporation issues full-paid stock in settlement of a claim is not bound by any prior contracts of the corporation in regard to that stock where he took the stock without notice of the contracts. *Angle v. Chicago, etc. Ry.*, 94 Fed. Rep. 717 (1899). Where, after a subscription for stock is made, the company contracts to issue all its stock to a contractor in payment for work, and thereupon the subscriber gives up his stock to the company and it is issued to the contractor, the subscriber is not liable on such stock, even though the contractor does not fulfill, and even though the subscriber causes the contract with the contractor to be made. *Riverton Water Co. v. Hummel*, 175 Pa. St. 575 (1896).

¹ *McMurray v. Moran*, 134 U. S. 150 (1890).

² *Knickerbocker T. Co. v. Oneonta, etc. R. R.*, 116 N. Y. App. Div. 78 (1906); *aff'd*, 188 N. Y. 38.

³ If such coupons have been canceled and returned to the corporation issuing the bonds, and the trustee is held liable for such coupons, the trustee may hold the corporation liable. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899).

has not yet issued stock as called for by a contract a claimant of such stock may bring suit in the state where the corporation was organized to obtain the stock, even though the other claimant is a non-resident.¹ An oral agreement on the part of a railroad contractor to take bonds in partial payment cannot vary the written agreement unless fraud or mistake is shown.²

§ 767. *Negotiable character of bonds of a corporation payable to order, bearer, or holder—Lost or stolen bonds—Registered bonds.*—A *bona fide* purchaser of the bonds of a corporation is protected not only against defenses set up by the corporation,³ but also against the claims of prior owners of the bonds. This class of bonds are negotiable like promissory notes,⁴ and this feature of negotiability

A decree directing a receiver to deliver bonds to a party as his property carries also the coupons which have already been collected. *People v. Globe Sav. Bank*, 211 Ill. 99 (1904). Where stock is deposited in a bank to be delivered to a purchaser upon payment or returned to the depositors, and payment is not made, the bank is not bound to determine how the stock should be divided among the depositors. *Christian v. First Nat. Bank*, 155 Fed. Rep. 705 (1907).

1 *Jennings v. Rocky Bar, etc. Co.*, 29 Wash. 726 (1902). See also § 363, *supra*. A claimant of stock in a corporation may institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, even though the holders of the stock are non-residents and are brought into the case by publication and substituted service. The court acquires jurisdiction over the defendant. *Jellenik v. Huron, etc. Co.*, 177 U. S. 1 (1900), rev'g 82 Fed. Rep. 778. Especially if the certificates of stock are within the jurisdiction, the court may obtain jurisdiction over non-resident defendants by publication. *Ryan v. Seaboard, etc. R. R.*, 83 Fed. Rep. 889 (1897); *Merritt v. American, etc. Co.*, 79 Fed. Rep. 228 (1897).

2 *Ferguson, etc. Co. v. Manhattan T. Co.*, 118 Fed. Rep. 791 (1902).

3 See § 766, also § 38, *supra*. Ques-

tions relative to forgery or fraud on the part of corporate officers in issuing corporate securities are considered elsewhere. See § 293, *supra*. Even though the board of directors authorizes a sale of the company's bonds by the president and treasurer, and a sale is made by the treasurer alone and he embezzles the proceeds, a *bona fide* purchaser from him is protected. *Doty v. Oriental, etc. Co.*, 67 Atl. Rep. 586 (R. I. 1907).

4 *White v. Vermont, etc. R. R.*, 21 How. 575 (1858); *Murray v. Lardner*, 2 Wall. 110 (1864); *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); *aff'd sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899); *Carr v. Le Fevre*, 27 Pa. St. 413, 418 (1856); *Bunting v. Camden, etc. R. R.*, 81 Pa. St. 254 (1876); *Hubbard v. New York, etc. R. R.* 36 Barb. 286 (1862); *New Albany, etc. Co. v. Smith*, 23 Ind. 353 (1864); *Junction R. R. v. Cleneay*, 13 Ind. 161 (1859); *American File Co. v. Garrett*, 110 U. S. 288 (1884); *Wickes v. Adirondack Co.*, 2 Hun, 112 (1874); *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870); *Morris Canal, etc. Co. v. Lewis*, 12 N. J. Eq. 323 (1858); *Chapin v. Vermont, etc. R. R.*, 74 Mass. 575 (1857). In this case railway bonds payable "to —" were held negotiable, the legislature having ratified "the proceedings" whereby the mortgage was executed. *Brainerd v.*

is by far the most important feature of corporation bonds. The fact that the parties to whom bonds are issued are aware of their invalidity does not affect the rights of subsequent holders of the same bonds in good faith and without notice.¹ The bond of an individual is not negotiable like a note.²

The negotiability of corporate "bonds" seems to have arisen in

New York, etc. R. R., 25 N. Y. 496 (1862); Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548 (1883); Morton v. New Orleans, etc. Ry., 79 Ala. 590 (1885); Grand Rapids, etc. R. R. v. Sanders, 17 Hun, 552 (1879); Chesapeake, etc. Co. v. Blair, 45 Md. 102 (1876); Stanton v. Alabama, etc. R. R., 2 Woods, 523 (1875); s. c., 22 Fed. Cas. 1070; State v. Cobb, 64 Ala. 127 (1879); Langston v. South Carolina R. R., 2 S. C. 248 (1870). In Massachusetts corporation bonds under seal are negotiable by statute. Union Cattle Co. v. International Trust Co., 149 Mass. 492 (1889). This statute declares negotiable all bonds or other obligations under seal for the payment of money to bearer, or some person or bearer, or to order, and issued by a corporation or joint-stock company. Stat. 1852, ch. 76. Scrip calling for a bond in the future is negotiable. Goodwin v. Robarts, L. R. 1 App. Cas. 486 (1876); s. c., L. R. 10 Exch. 337 (1875), distinguishing Crouch v. Credit Foncier, L. R. 8 Q. B. 374 (1873). But trust certificates are not negotiable. Railroad v. Howard, 7 Wall. 392 (1868). Coupon bonds payable to bearer, issued by a corporation under proper authority, have all the qualities of commercial paper and are negotiable instruments. Virginia v. Chesapeake, etc. Co., 32 Md. 501 (1870). Railroad bonds are negotiable. Society for Savings v. New London, 29 Conn. 174 (1860). The bonds of a manufacturing corporation are negotiable. Lehman v. Tallassee Mfg. Co., 64 Ala. 567, 593 (1879). See also many cases in § 766, *supra*. In England the negotiability of foreign bonds is recognized. Gorgier v. Mieville, 3 B. & C. 45 (1824). The

House of Lords, in London, etc. Bank v. Simmons, [1892] A. C. 201, reversed [1891] 1 Ch. 270, and held that *bona fide* holders of negotiable bonds of a corporation were protected. A bond or debenture, whether English or American, if payable to bearer and dealt in as being transferable by delivery, is a negotiable instrument. Edelstein v. Schuler, 87 L. T. Rep. 204 (1902). Corporate bonds are negotiable and pass by delivery and may be sold by the corporation at different prices to different persons. Weed v. Gainesville, etc. R. R., 119 Ga. 576 (1904). A *bona fide* purchaser of bonds from a corporation takes good title as against a party with whom the corporation had contracted to deliver such bonds. Lembeck v. Jarvis, etc. Co., 70 N. J. Eq. 757 (1906), aff'g 69 N. J. Eq. 450. A bond issued by an unincorporated joint-stock association, negotiable in form, is negotiable in law. Hibbs v. Brown, 190 N. Y. 167 (1907).

1 Belden v. Burke, 147 N. Y. 542 (1895). Bonds negotiated by the president without authority are valid in *bona fide* hands. Pittsburgh, etc. Ry. v. Lynde, 55 Ohio St. 23 (1896); aff'd *sub nom.* Pittsburgh, etc. Ry. v. Long Island L. & T. Co., 172 U. S. 493 (1899).

2 Bonds issued by an individual, though negotiable in form, are specialties and are not negotiable. Bockes v. Hathorn, 20 Hun, 503 (1880), holding also that the bonds of an individual, when once paid, cannot be re-issued. Bonds executed by an individual are not negotiable. Hefferman v. Brierly, 62 S. W. Rep. 852 (Ky. 1901).

the following manner: The seal may be looked upon in one of three ways: (1) as merely the signature of the corporation, thus making the instrument one not under seal and hence a negotiable note; (2) or as corresponding to an individual's seal, making the instrument a regular bond; or (3) as being both the signature and also the seal, similar to an individual seal. The first way of considering the corporate seal probably gave rise to the negotiability of corporate "bonds." In modern times, however, these instruments are called bonds and not notes.¹ However, the law is well settled that the bonds of a corporation are negotiable although the seal of the corporation is attached. The negotiability of a bond is not destroyed by the fact that the corporate seal is attached,² or that the company retains the right to pay the bond before maturity,³ or that registration is provided for,⁴ or that the payee's name is left blank,⁵ or that it is convertible into stock,⁶ or that it is payable on or before a specified date,⁷ or that there is a provision against personal lia-

¹ Railroad bonds "are called bonds, or railroad bonds, but they are in fact, both the bonds and the coupons, mere bills or notes, and as strictly negotiable as bank bills." *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). The court said also that they should not be under seal, but the court would disregard the seal anyway. The fact that an obligation for money issued by a corporation is under seal does not make it a bond. "It is under seal; but so, in the absence of special powers, must every instrument be which is executed by a corporation." *Re Imperial, etc. Co.*, L. R. 11 Eq. 478, 491 (1870). See also § 761, *supra*. A debenture similar to an American bond is held in England to be nothing but a promissory note. *Re Imperial, etc. Co.*, L. R. 11 Eq. 478 (1870). See also § 770, *infra*, where this same question arises in connection with the statute of limitations. The corporate seal upon a bond raises a presumption of a consideration. *Campbell v. Cypress, etc. Cemetery*, 41 N. Y. 34 (1869).

² *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251. *Re General Estates Co.*, L. R. 3 Ch. 758 (1868).

See also cases in preceding notes, and § 761, *supra*.

³ *Union Cattle Co. v. International Trust Co.*, 149 Mass. 492 (1889). Bonds payable to bearer are negotiable, even though they are subject to redemption by annual drawings. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900).

⁴ *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878); *Reid v. Bank of Mobile*, 70 Ala. 199 (1881).

⁵ A registered municipal bond with coupons attached is negotiable where the name of the payee is left blank on the face of the bond, even though in books kept for that purpose the name of the registered owner is entered. Hence, a purchaser in good faith of such a bond is protected, although the bond was stolen. A *bona fide* pledgee is likewise protected. *Manhattan Sav. Inst. v. N. Y. etc. Bank*, 170 N. Y. 58 (1902). See also § 815, *infra*.

⁶ *Welch v. Sage*, 47 N. Y. 143 (1872); *Hotchkiss v. National Bank*, 21 Wall. 354 (1874). A provision in a bond that it may be converted into stock does not affect its negotiability. *Lisman v. Milwaukee, etc. Co.*, 161 Fed. Rep. 472 (1908).

⁷ *Union, etc. Co. v. Southern, etc.*

bility on the part of the stockholders,¹ or that overdue coupons are attached to the bonds,² or by the fact that the interest has been due and unpaid for a period sufficient, if the interest had been demanded, to make the bonds due, no demand having been made.³ But the

Co., 51 Fed. Rep. 840 (1892). Corporate bonds are negotiable, even though they are payable in fifty years, with the right to pay in five years. *American Nat. Bank v. American, etc. Co.*, 19 R. I. 149 (1895).

¹ The bonds and coupons of an unincorporated joint-stock association may be negotiable, even though they provide against personal liability of the stockholders, and even though the trustee of the mortgage securing their payment may with the consent of a majority of the bondholders in interest waive default in payment of the coupons. *Hibbs v. Brown*, 112 N. Y. App. Div. 214 (1906); *aff'd*, 190 N. Y. 167. Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint-stock association shall not be personally liable. *Hibbs v. Brown*, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void.

² *Long Island L. & T. Co. v. Columbus, etc. Ry.*, 65 Fed. Rep. 455 (1895). See also same case, 55 Ohio St. 23 (1896); *aff'd sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). The fact that undue coupons are attached to bonds puts the purchaser on inquiry, but does not in itself render the bonds dishonored paper. *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). A purchaser may be *bona fide* although he buys bonds two days before maturity and there are eight overdue semi-annual

coupons thereon. But he is not a *bona fide* purchaser of such overdue coupons. *Gilbough v. Norfolk, etc. R. R.*, 1 Hughes, 410 (1877); *s. c.*, 1st Fed. Cas. 354. Several past-due coupons on a municipal bond are sufficient to put upon inquiry a purchaser of the bond from a thief. *First Nat. Bank v. Scott County*, 14 Minn. 77 (1869). "The dishonor of the unpaid coupons for interest did not infect with dishonor the bond or other coupons, putting on inquiry those who, in the usual course of trade, in good faith, and upon a valuable consideration, should acquire them." *State v. Cobb*, 64 Ala. 127, 158 (1879); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885). The fact that an unpaid coupon is attached to a bond does not render a purchaser a non *bona fide* purchaser. *Cromwell v. Sac County*, 96 U. S. 51 (1877); *Railway Co. v. Sprague*, 103 U. S. 756 (1880). Unpaid coupons on bonds do "not necessarily constitute notice of any invalidity in the bonds." *Grand Rapids, etc. R. R. v. Sanders*, 54 How. Pr. 214 (1877). "It cannot be said that the holder of the bond, with its undetached coupons, is put upon notice of a defense as to the delay because some of the coupons happened to be overdue." *McElrath v. Pittsburgh, etc. R. R.*, 55 Pa. St. 189 (1867). It is legal for a company to issue its bonds, with overdue coupons attached. *McElrath v. Pittsburgh, etc. R. R.*, 55 Pa. St. 189 (1867). A purchaser may be a *bona fide* purchaser, even though he knew that there had been a default in interest. *Central, etc. Co. v. Farmers', etc. Co.*, 116 Fed. Rep. 700 (1901); *aff'd*, 114 Fed. Rep. 263.

³ *Railway Co. v. Sprague*, 103 U. S. 756 (1880). See also *Morgan v. United States*, 113 U. S. 476 (1885); *North-*

negotiability is destroyed by the fact that the bonds call for labor to be done,¹ or that provision is made for extending the time of payment,² or by the fact that the bonds are overdue,³ or by the place and method of payment being left in blank.⁴ If the purchaser took with notice, and there were no *bona fide* purchasers in the line of his title, he takes subject to the equities.⁵ Where a party purchases bonds from a *bona fide* holder, he thereby becomes a *bona fide* holder himself, even though he had notice of defenses to the bonds.⁶ A *bona fide* pledgee of bonds is protected the same as a *bona fide* purchaser.⁷

In determining who is and who is not a *bona fide* purchaser, the facts of each case by itself must be taken into consideration,⁸ es-

ampton Nat. Bank v. Kidder, 106 N. Y. 221 (1887). Where, after six months' default the principal is to become due by the terms of the bonds, it is doubtful whether at the end of the six months the bonds become past due and non-negotiable, but certainly not where the defaulted interest is afterwards paid. Pittsburgh, etc. Ry. v. Lynde, 55 Ohio St. 23 (1896); aff'd, *sub nom.* Pittsburgh, etc. Ry. v. Long Island L. & T. Co., 172 U. S. 493 (1899). A purchaser of bonds, the coupons of which have long been in default and who pays only two per cent. of the par value of the bonds therefor, is bound to inquire as to the validity thereof. Bramblet v. Commonwealth, etc. Co., 83 S. W. Rep. 599 (Ky. 1904).

¹ Knight v. Wilmington, etc. R. R., 1 Jones, L. (N. C.) 357 (1854).

² McClelland v. Norfolk, etc. R. R., 110 N. Y. 469 (1888). But not by a provision for waiving default. Hibbs v. Brown, 190 N. Y. 167 (1907).

³ Vermilye v. Adams, etc. Co., 21 Wall. 138 (1874).

⁴ Ledwich v. McKim, 53 N. Y. 307 (1873).

⁵ Northampton Nat. Bank v. Kidder, 106 N. Y. 221 (1887); Hervey v. Illinois Mid. Ry., 28 Fed. Rep. 169 (1884).

⁶ Grand Rapids, etc. R. R. v. Sanders, 54 How. Pr. 214 (1877); rev'd on another point in 17 Hun, 552; Northampton Nat. Bank v. Kidder, 106

N. Y. 221 (1887); Cromwell v. Sac County, 96 U. S. 51 (1877). A holder of bonds is a *bona fide* holder if any prior holder thereof was a *bona fide* holder. Union, etc. Co. v. Southern, etc. Co., 51 Fed. Rep. 840 (1892). A purchaser with notice from a *bona fide* purchaser is protected as a *bona fide* purchaser himself. Board of Commissioners, etc. v. Sutliff, 97 Fed. Rep. 270 (1899). Bonds issued to *bona fide* purchasers and sold by the latter to purchasers with notice, and then sold by the latter to *bona fide* purchasers, may be enforced by the latter as *bona fide* purchasers. Central, etc. Co. v. Farmers', etc. Co., 114 Fed. Rep. 263 (1902). A purchaser with notice from a *bona fide* purchaser is protected. Central, etc. Co. v. Farmers', etc. Co., 116 Fed. Rep. 700 (1901); aff'd, 114 Fed. Rep. 263. A purchaser of bonds with notice does not, by repurchasing the bonds from a *bona fide* party to whom the former has sold the bonds, become thereby a *bona fide* purchaser himself. Elwell v. Tatum, 6 Tex. Civ. App. 397 (1893).

⁷ Lembeck v. Jarvis, etc. Co., 70 N. J. Eq. 757 (1906), aff'g 69 N. J. Eq. 450.

⁸ The rule laid down in Welch v. Sage, 47 N. Y. 143 (1872), is as follows: "The law may be regarded as settled that a purchaser, for value advanced, of negotiable paper, including bonds, is not bound to exercise such

pecially where the original issue of the bonds was fraudulent or

care and caution as wary, prudent men would exercise. Negligence will not impair his title. It is a question simply of good faith in the purchaser. Unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict." A purchaser of bonds at an auction sale, no interest having been paid for ten years, and the purchaser knowing that they had been the subject of litigation, is not a *bona fide* purchaser. *Trask v. Jacksonville, etc. R. R.*, 124 U. S. 515 (1888). The amount paid for bonds as well as the value of the bonds themselves may be taken into consideration in determining whether the holder is a *bona fide* purchaser. *Grand Rapids, etc. R. R. v. Sanders*, 54 How. Pr. 214 (1877); rev'd on another point in 17 Hun, 552. Where the trustee named in the mortgage is himself the vendor of the bonds, and he sells \$4,000 of bonds for \$150, the purchaser is not a *bona fide* purchaser. *Riggs v. Pennsylvania, etc. R. R.*, 16 Fed. Rep. 804 (1883). Where a party contracts to deliver notes for stock, and before the delivery of the notes the stock is sent to the corporation for transfer, and the corporation refuses to transfer the same on the ground that it was overissued stock, the vendee has no recourse against the corporation if he delivers the notes to the vendor after receiving such information from the corporation. In this case the vendor was president of the corporation. *Hayden v. Charter, etc. Park*, 63 Conn. 142 (1893). The fact that one certificate of stock gives notice of irregularity does not convey notice to the holder thereof as regards another certificate of stock held by him. *Knox v. Eden Musée, etc. Co.*, 74 Hun, 483 (1893); rev'd on another point in 148 N. Y. 441. A purchaser of negotiable bonds or other commercial paper, in good faith, for valuable con-

sideration, and before maturity, is entitled to protection, although he may have had suspicion of a defect of title or knowledge of circumstances sufficient to excite such suspicion in the mind of a prudent man, and even although he may have been guilty of gross negligence; and this protection equally extends to a mortgage or other security given for such commercial paper or bond. *Spence v. Mobile, etc. Ry.*, 79 Ala. 576, 587 (1885). An assignment or bill of sale of bonds and coupons to a person who knows nothing thereof until nine years thereafter, the purpose being solely to enable him to bring suit in his name in the United States court, conveys no title. *Lake Co., etc. v. Dudley*, 173 U. S. 243 (1899). A person who purchases second mortgage bonds eighteen years after the first mortgage has been foreclosed is not such a *bona fide* purchaser as is entitled to attack the foreclosure sale on the ground of technical irregularities, especially where the property has passed into new hands and been improved at large expense, there being no fraud involved. *Raphael v. Rio Grande, etc. Ry.*, 132 Fed. Rep. 12 (1904). Even though no transfer of the stock on the books of the company is demanded, a pledge of stock in consideration of the extension of a past-due debt may make the pledgee a *bona fide* pledgee. *Just v. State Sav. Bank*, 132 Mich. 600 (1903). Mere suspicion on the part of a purchaser of negotiable paper of a defect in the seller's title, or knowledge of facts which would excite suspicion in the mind of a prudent man, is not sufficient to vitiate or impair his title; there must be bad faith or something equivalent to it; and while gross negligence is not of itself bad faith, it may be evidence of it. The bonds in this case referring on their face to the deed of trust executed by the railroad company for their security, which deed expressly provided

without consideration.¹ A person taking bonds from a corporation to secure a private debt is bound to ascertain the right of the officer to so issue the bonds.² A director cannot claim to be a *bona fide* purchaser of bonds upon their issue by the corporation. He is bound to know what transpires in the meetings of the board of directors.³ A *bona fide* purchaser of a bond which has been stolen takes good title.⁴ Where bonds have been lost or destroyed, a

that the entire debt, principal and interest, should become due and payable within ninety days after refusal to pay the semi-annual interest due by the coupons, on demand made at the agency of the corporation in the city of New York, a purchaser having knowledge of such demand and refusal at the time he acquired the bonds cannot claim to be an innocent purchaser without notice; but when he has proved the payment of value, the onus of proving knowledge or notice of such extrinsic fact is on the party who seeks to impeach his title. *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885). Concerning the subject of what constitutes a *bona fide* purchaser, see also § 771, *infra*, and § 293, *supra*.

¹ See § 766, *supra*.

² *Germania, etc. Co. v. Boynton*, 71 Fed. Rep. 797 (1896). See also § 293, *supra*. A pledgee of bonds of a corporation from an officer of a corporation for his personal debt is not protected and is liable if he sells the bonds to a *bona fide* purchaser. *Medina, etc. Co. v. Buffalo, etc. Co.*, 119 N. Y. App. Div. 245 (1907). Where a corporate note is issued to a third person and then passes into the hands of an officer, the person taking it from the officer is not affected by the rule that a person taking corporate paper in its original issue by a corporation is bound to ascertain the facts if the officer is personally interested in the transaction. *Cheever v. Pittsburgh, etc. R. R.*, 150 N. Y. 59 (1896). In the federal courts a person taking from the president of a corporation a note signed by the corporation and indorsed by him is not bound to in-

quire into the consideration. *Doe v. Northwestern Coal, etc. Co.*, 78 Fed. Rep. 62 (1896). A principal taking bonds as collateral security to a note sent to him by his agent is not chargeable with notice of the fact that the agent, as the agent of a corporation, has fraudulently put the bonds into circulation. *Thomson-Houston Elec. Co. v. Capitol Elec. Co.*, 56 Fed. Rep. 849 (1893).

³ *Greenville Gas Co. v. Reis*, 54 Ohio St. 549 (1896). See also § 727, *supra*. A bond or debenture payable to bearer, unless registered, is a negotiable instrument, and a *bona fide* pledgee of the same from the secretary of the company is protected, even though the secretary fraudulently stole the bond from the company itself. *Bechuana-land, etc. Co. v. London, etc. Bank*, [1898] 2 Q. B. 658, the court refusing to follow *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374.

⁴ Quoted and approved in *Cochran v. Fox Chase Bank*, 209 Pa. St. 34 (1904). A *bona fide* purchaser of a stolen bond is protected. *Hibbs v. Brown*, 190 N. Y. 167 (1907). A *bona fide* purchaser of negotiable corporation bonds is protected even though the bonds were stolen by the vendor. *Dutchess County Ins. Co. v. Hachfield*, 73 N. Y. 226 (1878). A *bona fide* purchaser of stolen railroad bonds is protected. *Murray v. Lardner*, 2 Wall. 110 (1864); *Evertson v. Newport Nat. Bank*, 60 N. Y. 14 (1876); *Gilbough v. Norfolk, etc. R. R.*, 1 Hughes, 410 (1877); s. c., 10 Fed. Cas. 354. Municipal bonds are negotiable, even though the payee's name is left blank. A *bona fide* purchaser from one who steals such bonds is protected. A

court of equity will direct the company to issue new and suitable representatives thereof to the owner upon full indemnity being given.¹

newspaper advertisement of the loss is not notice, unless such purchaser had knowledge thereof. *Manhattan, etc. Institution v. N. Y., etc. Bank*, 42 N. Y. App. Div. 147 (1899); *aff'd*, 170 N. Y. 58. Where a trustee has deposited funds with a bank as trustee for a long time, and obtains a loan as trustee, and pledges bonds as security, the bank may be a *bona fide* holder of the same, even though the bonds have been stolen and have been issued twenty years prior thereto and the corners appear to have been burned. Depositing funds as "trustee" did not give notice that he was acting for others and did not require an investigation as to his authority. *Manhattan Sav. Ins. v. N. Y., etc. Bank*, 170 N. Y. 58 (1902). The owner of bonds, which had been stolen, who pays money to get them back from the bankers into whose hands they have passed, cannot recover back the money so paid, unless he proves that the bankers were not *bona fide* holders. *Lawyers', etc. Co. v. Jones*, 113 N. Y. App. Div. 105 (1906). The *bona fide* purchaser of stolen railroad bonds payable to bearer is protected. *Carpenter v. Rommel*, 5 Phila. 34 (1862). So, also, as to water-works bonds. *Consolidated Assoc. v. Avegno*, 28 La. Ann. 552 (1876). Buying a security *bona fide* twelve months after receiving notice that it had been stolen does not invalidate the purchaser's title. *Raphael v. Bank of England*, 17 C. B. 161 (1855). A national bank may be protected as a *bona fide* purchaser of government bonds which have been stolen, although it had not paid any attention to a notice sent to it of the theft of the bonds. *Seybell v. National Currency Bank*, 54 N. Y. 288 (1873). Where the bonds are stolen before the trustee's certificate is attached, such certificate being required

by the terms of the bond, the bonds are void absolutely, and there can be no *bona fide* purchaser of them. *Maas v. Missouri, etc. Ry.*, 83 N. Y. 223 (1880). If stolen bonds are sold, the owner may follow the proceeds of the sale into the hands of one who takes with notice. *Newton v. Porter*, 69 N. Y. 133 (1877). Where negotiable bonds are stolen from the owner, and they pass into *bona fide* hands, and then the thief obtains them by fraud from such *bona fide* hands and returns them to the first owner, the latter is entitled to keep them. *London, etc. Co. v. London, etc. Bank*, L. R. 21 Q. B. D. 535 (1888). A *bona fide* purchaser of stolen coupons not yet due is protected. *Spooner v. Holmes*, 102 Mass. 503 (1869). See also § 771, notes, *infra*.

¹ *Chesapeake, etc. Co. v. Blair*, 45 Md. 102 (1876). A person losing negotiable bonds may compel the company to issue new ones to him upon giving ample indemnity, since a *bona fide* purchaser of the lost bonds may enforce them, and he may be a *bona fide* holder although he had suspicions and grounds of suspicion as to the title, and was guilty of gross negligence in not investigating, but yet acted in good faith. *New Orleans, etc. R. R. v. Mississippi College*, 47 Miss. 560 (1873). See also *Lawrence v. Lawrence*, 42 N. H. 109 (1860). Equity will compel payment of a lost bond where full indemnity is given. *Force v. Elizabeth*, 27 N. J. Eq. 408 (1876). So, also, of coupons where the bonds and coupons were destroyed by fire on a steamboat. *Rogers v. Chicago, etc. Ry.*, 6 Abb. N. Cas. 253 (1878). A lost bond will be paid if indemnity is given. *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867). The owner of a lost coupon may recover interest from the date when he made a demand and tendered proper indemnity. *Fitchett*

Although there is a suit pending to restrain a mortgagor railroad company from negotiating its bonds, yet where the company does negotiate them, even in violation of an injunction, the *bona fide* purchaser of the bonds is protected. The doctrine of *lis pendens* does not apply.¹ A person selling bonds has no purchase-money lien on such bonds for the price thereof.² The holder of bonds is presumed to be the *bona fide* holder of them,³ but this burden is easily shifted.⁴ A person suing on bonds payable to bearer need not show how he came by them,⁵ nor to whom they were first issued.⁶ Where the trustee of a mortgage in foreclosing proves the issue of the bonds and that it is the holder thereof, this raises a presumption that the owners of the bonds are *bona fide* holders for value, and, if the corporation claims that the bonds were issued without

v. North Pennsylvania R. R., 5 Phila. 132 (1863).

¹ *Farmers', etc. Co. v. Toledo, etc. R. R.*, 54 Fed. Rep. 759 (1893). The doctrine of *lis pendens* does not apply to negotiable corporate bonds. *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); *aff'd sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). See also § 364, *supra*.

² *Barstow v. Pine Bluff, etc. Ry.*, 57 Ark. 334 (1893).

³ *Macon County v. Shores*, 97 U. S. 272 (1877); *Murray v. Lardner*, 2 Wall. 110 (1864). The holder of a municipal bond is presumed to be a *bona fide* holder. *Kennicott v. Wayne County*, 6 Biss. 138 (1874); s. c., 14 Fed. Cas. 333; *aff'd*, 94 U. S. 498. The possession of a negotiable bond is *prima facie* evidence of title, and ordinarily is presumptive evidence that the holder is *bona fide*. *Western N. C. R. R. v. Drew*, 3 Woods, 691 (1879); s. c., 29 Fed. Cas. 747. The burden of proof that the plaintiff is not a *bona fide* purchaser of bonds which he is suing on, and which were stolen and the theft advertised, is upon the company which is being sued. *Gilbough v. Norfolk, etc. R. R.*, 1 Hughes, 410 (1877); s. c., 10 Fed. Cas. 354. *Bona fide* ownership is presumed. *Lehman v. Tallassee, etc. Co.*, 64 Ala. 567 (1879). The holder of

bonds payable to "holder" is presumed to be the owner of them. *Martin v. Somerville, etc. Co.*, 16 Fed. Cas. 903 (1863). The holder of bonds payable to bearer is presumed to be the owner upon foreclosure proceedings until the contrary is shown. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885); *Carroll v. Le Fevre*, 27 Pa. St. 413 (1856).

⁴ *Smith v. Sac County*, 11 Wall. 139 (1870); *Stewart v. Lansing*, 104 U. S. 505 (1881). Even though bonds are issued in violation of law, which first requires the capital stock to be paid up, yet the corporation must pay back what it received for the bonds and must pay the full par value to *bona fide* holders, but after proof of illegality of issue no one is presumed to be a *bona fide* purchaser. *Shellenberger v. Altoona, etc. R. R.*, 212 Pa. St. 413 (1905).

⁵ A holder of bonds payable to bearer need not prove how he came by them. He is presumed to be the rightful owner. *Chicago, etc. R. R. v. Peck*, 112 Ill. 408 (1885).

⁶ Where the bonds are payable to bearer, "no rule of law requires it to be shown by averment to whom such bonds, or any of them, were negotiated in the first instance." *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878), holding also that the bondholder need not show how much was paid for the bonds or when they

consideration, it must prove that the holders are not *bona fide* holders.¹

The registration of a bond by the corporation obligates the corporation to protect the registered holder. Where trustees under a will hold registered bonds, the registration being to them as trustees, it is illegal for the corporation to allow one of them to transfer such registered bonds, and the corporation is liable for the same if such transfer is in breach of trust on the part of the trustees.² Nevertheless, municipal bonds are negotiable, even though the payee's name is left blank, and the bond is registered on the company's books. A *bona fide* purchaser from one who steals such bonds is protected.³ Where the treasurer of a charitable corporation forges a resolution of the board of trustees authorizing him to sell bonds registered in the name of the corporation, and he executes fraudulently a power of attorney from the corporation to him as treasurer to make such sale, the corporation which issued the bonds and then allowed a transfer on such forged resolution is liable to the charitable corporation for so doing. The charitable corporation may hold liable a broker who witnessed the power of attorney even in good faith. If the corporation which issued and registered the bonds is held liable it has recourse against the broker by reason of the stock exchange rule which renders liable a broker who witnesses signatures to transfers of stock or bonds.⁴

§ 768. *The negotiability of the bonds extends also to the mortgage.*—The bonds of a corporation are negotiable, and the corporation is unable to set up many defenses against *bona fide* holders which it might have set up against the parties to whom the bonds were originally issued. But does this protection and negotiability extend also to the mortgage as well as the bonds? Can the cor-

were issued. See also §§ 771, 772, *infra*.

¹ Atlantic T. Co. v. Crystal Water Co., 72 N. Y. App. Div. 539 (1902).

² Cooper v. Illinois, etc. R. R., 38 N. Y. App. Div. 22 (1899). In this case the bonds had been registered in the name of the executor of the estate, who, upon his death, was succeeded by two trustees, and one of these trustees caused the corporation to transfer the bonds from the name of such executor to bearer. The court held, however, that a broker who sells the bonds is not liable, although he knew that the bonds were registered in the

name of the executor prior to the transfer thereof to bearer. See also § 327, *supra*, and Holmes v. Northern, etc. Ry., 65 N. Y. App. Div. 49 (1901).

³ A newspaper advertisement of the loss is not notice, unless such purchaser had knowledge thereof. Manhattan, etc. Institution v. N. Y., etc. Bank, 42 N. Y. App. Div. 147 (1899); *aff'd*, 170 N. Y. 58. A debenture running to a person or other registered holder for the time being is not negotiable, although transferable. *Re Palmer's, etc. Co.*, [1904] 2 Ch. 743.

⁴ Clarkson Home v. Missouri, etc. R. R., 182 N. Y. 47 (1905).

poration defend against the mortgage on grounds which it cannot set up against *bona fide* holders of the bonds? In the federal courts and in most of the states of the Union the corporation cannot. The mortgage follows and partakes of the negotiability of the bonds.¹

¹ A negotiable note secured by a mortgage enables a *bona fide* indorsee thereof to enforce the mortgage free from defenses that exist against the payee. *Carpenter v. Logan*, 16 Wall. 271 (1872). See also § 775, *infra*. Such also is the rule where bonds are so secured and have passed into *bona fide* hands. *Kenicott v. Supervisors*, 16 Wall. 452 (1872); *Chicago Ry., etc. Co. v. Merchants' Bank*, 136 U. S. 268, 283 (1890); *Swift v. Smith*, 102 U. S. 442, 444 (1880); *Collins v. Bradbury*, 64 Me. 37 (1875); *Towne v. Rice*, 122 Mass. 67, 73 (1877); *Heath v. Silverthorn, etc. Co.*, 39 Wis. 146 (1875). The prevailing rule is that the transfer of a negotiable note or bond gives a *bona fide* transferee the same protection as to a mortgage securing the note or bond as it gives him in regard to the latter; in other words, the mortgage being an incident to the negotiable paper partakes of its negotiability, and a defense which was not good as against the note or bond is not good as against the mortgage. *O'Rourke v. Wahl*, 109 Fed. Rep. 276 (1901). In *Spence v. Mobile, etc. Ry.*, 79 Ala. 576, 587 (1885), the court said: "Two states—Ohio and Illinois—depart from the general ruling which extends the immunity accorded to negotiable instruments to the mortgages given to secure their payment. *Baily v. Smith*, 14 Ohio St. 396 (1863); *Kleeman v. Frisbie*, 63 Ill. 482 (1872). And in 2 Pom. Eq., § 708, n. 1, the reasoning of these cases is commended. Our ruling in *Hawley v. Bibb* [69 Ala. 52] is supported by the great weight of authority." See also *Converse v. Michigan Dairy Co.*, 45 Fed. Rep. 18 (1891); *Swett v. Stark*, 31 Fed. Rep. 858 (1887). "The same immunity from defenses in the hands of *bona fide* holders applies to mortgages securing such bonds as to the bonds themselves." *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). The general rule is that, where a negotiable note is secured by a mortgage, the mortgage may be enforced by a *bona fide* purchaser of the note. But in some states the negotiability of the note does not extend to the mortgage. The former rule prevails in the federal courts. *Myers v. Hazzard*, 50 Fed. Rep. 155 (1881). See also § 764, *supra*. The question of whether the mortgage partakes of the negotiability of the negotiable paper which it secures has not often arisen, because in most of the states the practice is for an individual to give his personal non-negotiable bond instead of a note for the principal debt. The early cases holding that the negotiability of the note extends to the mortgage are *Reeves v. Scully, Walk.* (Mich.) 248 (1843); *Dutton v. Ives*, 5 Mich. 515 (1858); *Fisher v. Otis*, 3 Pin. (Wis.) 83 (1850); *Croft v. Bunster*, 9 Wis. 503 (1859). The mortgagee of a corporation is not chargeable with knowledge of facts appearing on its records in regard to the title to the property. *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 684 (1885); *aff'd*, 133 U. S. 534. The lower court, in the case of *Belden v. Burke*, 72 Hun, 51, 74, 75, held that a *bona fide* purchaser of bonds secured by a mortgage was, nevertheless, chargeable with notice of defenses against the mortgage itself; but the court of appeals in 147 N. Y. 542 (1895), reversed this decision and held that subsequent holders of bonds in good faith and without notice were entitled to the benefit of the mortgage, even though the original parties to

This rule of law would seem to be one of the first requirements of trade. The average corporate bond would be a very dangerous instrument if the mortgage were liable to be swept away by some defense which the bond purchaser knew nothing about. It is a wise rule of public policy which causes the mortgage to partake of the negotiability of the instrument which it secures. Nevertheless in Ohio and Illinois a contrary rule prevails.¹ Where the bondholders purchased their bonds with knowledge of the fact that a manufacturing company has erected machinery on the property covered by the mortgage, under a contract by which said company reserved title in the machinery, and the right to take it away in default of payment, the lien of the manufacturing company is prior in right to that of the bondholders.² If negotiable bonds are given as collateral security to a note that is not negotiable, the bonds lose their negotiability as regards that note.³

§ 769. *Miscellaneous features of bonds—Issue in payment for the property of another corporation—Consolidations—Bondholders' suits—Bonds exchangeable into stock.*—Where bonds are secured

whom the bonds were issued might not have been so entitled.

Land patents granted by the United States to a railroad company may be vacated for mistake, even as against a mortgagee of such railroad. *United States v. Southern, etc. R. R.*, 117 Fed. Rep. 544 (1902); *aff'd*, 200 U. S. 341 and 133 Fed. Rep. 651.

1 The supreme court of Ohio, in the early case of *Baily v. Smith*, 14 Ohio St. 396 (1863), established the rule for that state that the mortgage did not partake of the negotiability of the note which it secured. A *bona fide* purchaser of a note who takes with the note an assignment of chattels mortgaged to secure the note takes the latter subject to the equities. *Commercial Nat. Bank v. Burch*, 141 Ill. 519 (1892). The supreme court of Illinois has held, however, that railroad bonds are negotiable, and the mortgage securing them may be enforced in behalf of *bona fide* purchasers, even though the bonds were issued below par, in violation of the statute. *Peoria, etc. R. R. v. Thompson*, 103 Ill. 187 (1882), overruling *Chicago, etc. Ry. v. Loewenthal*, 93 Ill.

433 (1879). *Cf. Hodson v. Eugene Glass Co.*, 156 Ill. 397 (1895). If a statute prohibits the issue of bonds below par, a *bona fide* holder may enforce them, but the mortgage is void and he becomes an unsecured creditor. *Union Trust Co. v. New York, etc. R. R.*, 17 Weekly Law Bull. 176 (Ohio, 1887). In general, see also *Kleeman v. Frisbie*, 63 Ill. 482 (1872). In *Pomeroy, Eq.*, § 708, note 1, the reasoning of these cases is commended. Where by the charter all rights are to be forfeited unless the road is completed within a certain time, and it is not so completed, and the state forfeits all its rights and turns them over to another company, a mortgage of the old company falls also. Where no part of the money from the bonds was expended on the road, holders of bonds with notice get nothing. *Silliman v. Fredericksburg, etc. R. R.*, 27 Gratt. (Va.) 119 (1876).

2 *Central Trust Co. v. Arctic, etc. Mfg. Co.*, 77 Md. 202 (1893). See §§ 855, 857, *infra*.

3 *Thomson-Houston Elec. Co. v. Capitol Elec. Co.*, 56 Fed. Rep. 849 (1893).

by a mortgage on property which is taken over from an insolvent party, difficult questions arise as to the rights of creditors of that insolvent party as against the bondholders and stockholders.¹ Where a New Jersey corporation having power to purchase its own stock and issue its bonds in payment therefor has made such an issue, the bonds may be enforced in *bona fide* hands, even though the stock so purchased was worthless.²

A railroad company is liable on its bonds although by consolidation with another company all its property has passed out of its possession.³ The consolidated company may be made liable on the bonds.⁴ The holders of mortgage bonds cannot claim the right to exchange the same for new bonds, even though the mortgage securing the new bonds provides for such exchange.⁵

A judgment creditor cannot attack consolidated bonds on the ground that the old bonds which have been taken up were informally and illegally issued.⁶

¹ As to this, see ch. XL, *supra*. Bondholders who took with notice that the property was received by the corporation from another corporation or firm in payment for stock, and that the latter corporation or firm was in debt, cannot enforce them as against such creditors. *Blair v. St. Louis, etc. Ry.*, 22 Fed. Rep. 36 (1884).

² *Hoskins v. Seaside, etc. Co.*, 68 N. J. Eq. 476 (1905).

³ A bondholder in a corporation that is afterwards consolidated with another cannot be compelled to look to the consolidated company only. *Market Street Ry. v. Hellman*, 109 Cal. 571 (1895); *Gale v. Troy, etc. R. R.*, 51 Hun, 470 (1889).

⁴ See § 897, *infra*. The holder of a bond unsecured by mortgage cannot prevent a consolidation where such consolidation is authorized by an existing statute. The consolidated company is liable for the debts of the constituent companies, including this bonded debt, but one of the constituent companies may place a mortgage on the property to secure other debts and still leave this bonded debt unsecured. Where a consolidated company agrees to "protect" unsecured bonds of the consolidating companies, an equitable lien is created on the consolidated

company property. *Tysen v. Wabash Ry.*, 11 Biss. 510 (1883); s. c., 15 Fed. Rep. 763. As to this litigation, see *Compton v. Jesup*, 167 U. S. 1 (1897). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). In suing a foreign consolidated company on bonds issued by one of the constituent companies, the statutes rendering the former liable must be pleaded. *Rothschild v. Rio Grande, etc. Ry.*, 59 Hun, 454 (1891). As to the liability of the consolidated company under the New York statute, see *Janes v. Fitchburg Ry.*, 50 Hun, 310 (1888); *Polhemus v. Fitchburg R. R.*, 50 Hun, 397 (1888); *aff'd*, 123 N. Y. 502.

⁵ *Morse v. Chicago, etc. R. R.*, 84 N. Y. App. Div. 406 (1903).

⁶ *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. *Farmers' L. & T. Co.*

A contract to deliver the bonds of a company is not fulfilled by tendering the bonds of a company into which the former company has been merged by consolidation.¹

Bonds are sometimes by their terms made convertible into stock. This subject is considered elsewhere.² A person entitled to mortgage bonds, but who accepts stock in lieu thereof, cannot after insolvency claim the bonds.³ Where bonds are convertible into preferred stock within ten days after any dividend has been paid on the stock upon unmatured coupons being delivered up, it is too late to demand exchange after the ten days, or after the coupons have matured and been paid.⁴ Where debentures are issued at eighty cents on the dollar and by their terms the holder may convert them into stock equal to the par value of the debentures, this is the same as issuing stock at a discount for cash, and may be enjoined by its shareholders.⁵

The right of bondholders to complain of *ultra vires* or fraudulent acts of the corporation and directors, and in general to bring suits to protect the corporate property, is considered elsewhere.⁶

§ 770. *Suits at law on bonds—Demand of payment—Form of action—Statute of limitations.*—A suit at law may be brought to obtain judgment on a bond of a corporation, even though the bond, with many other bonds, is secured by a mortgage.⁷ Nevertheless

r. Toledo, etc. Ry., 67 Fed. Rep. 49 (1895). A street-railway company and a land company cannot legally join in the execution and issue of bonds and mortgages on the property of both, even though the proceeds are used to pay the debts of the latter and to construct the railway of the former. But each is liable on the bonds to the extent of the proportion of the money received by it. *Northside Ry. v. Worthington*, 88 Tex. 562 (1895). A general creditor of a consolidated corporation cannot attack the validity of the bonds of the corporation on the ground that the consolidation was not legal. *Louisville T. Co. v. Louisville, etc. Ry.*, 84 Fed. Rep. 539 (1898); reversed on other grounds in 174 U. S. 674.

¹ *New Jersey, etc. Ry. v. Strait*, 35 N. J. L. 322 (1872).

² See § 283, *supra*. Where a railroad issues bonds convertible into stock within ten days after any dividend,

and another railroad buys all the stock of the former, and never pays any dividends, the holder of the bonds cannot demand stock in exchange therefor and maintain a suit for refusal, especially where there is no proof that the stock was of greater value than the bonds. *Lisman v. Milwaukee, etc. Ry. Co.*, 161 Fed. Rep. 472 (1908).

³ *Lembeck v. Jarvis, etc. Co.*, 69 N. J. Eq. 450 (1905); *aff'd*, 70 N. J. Eq. 757.

⁴ *Carpenter v. Chicago, etc. R. R.*, 119 N. Y. App. Div. 169 (1907).

⁵ *Moseley v. Koffyfontein Mines, Ltd.*, [1904] 2 Ch. 108.

⁶ See § 735, *supra*, and § 830, *infra*.

⁷ The holders of bonds which are due may sue upon them, notwithstanding they are secured by a mortgage. "The fact that a mortgage had been given as security for the debt with trusts and covenants, which a court of equity would control and enforce in a proper case, afforded not a shadow

the bondholder, after obtaining judgment, cannot levy execution on the property covered by the mortgage. The law does not allow this as against the mortgagor, nor as against the other bondholders.¹ No demand of payment need be made.² In New Jersey, by statute, a mortgage bond or coupon cannot be sued upon until after foreclosure is had.³ Where the trustee enters a deficiency judgment a bondholder cannot thereafter bring suit on his bond.⁴

The mode of issuing bonds depends upon the orders of the board of directors, or of the mortgage itself.⁵ A bondholder who buys prior liens on the property does so for the benefit of other bondholders, who, within a reasonable time after they know of such purchase, offer to contribute such part of the sum paid by him as the par value of the bonds held by the contributing bondholder bears toward all the bonds.⁶

of defense. The bond was the principal debt, the mortgage the incidental security. Remedies peculiar to each exist, both in law and equity, but they do not clash and destroy each other—they co-exist." Philadelphia, etc. R. R. v. Johnson, 54 Pa. St. 127 (1867). A bondholder may bring suit at law on his bond and obtain judgment without regard to the mortgage. *Kimber v. Gunnell, etc. Co.*, 126 Fed. Rep. 137 (1903). The agreement of a corporation to pay a specified sum of money, with the provision that it shall not be chargeable against a certain part of the capital stock, can be enforced in equity only, inasmuch as in accounting is involved. *Heflin, etc. Co. v. Hilton*, 124 Ala. 365 (1899).

¹ See § 772, *infra*.

² *Shaw v. Bill*, 95 U. S. 10 (1877), where the corporation was insolvent. Demand of payment need not be made, alleged, or proved in an action on the bond, even though the bond is payable at a certain place, but the defendant may set up that the money was there to pay the bond. *Langston v. South Carolina R. R.*, 2 S. C. 248 (1870). If the bonds are payable at the office of the company in a particular place and it has no office there, the demand may be made elsewhere. *Alexander v. Atlantic, etc. R. R.*, 67 N. C. 198 (1872). See also § 772, *infra*, concerning de-

mand of payment of coupons. Where the company has the right to pay off the bonds, it may do so and stop interest by depositing the money at the place stated in the bond as the place of payment. But the offer to pay must not be conditioned on all the past-due coupons being also turned in. So held in regard to municipal bonds. *Bailey v. Buchanan County*, 54 N. Y. Super Ct. 237 (1887).

³ *Holmes v. Seashore Electric Ry.*, 57 N. J. L. 16 (1894).

⁴ *Grant v. Winona, etc. Ry.*, 85 Minn. 422 (1902). Where the trustee has obtained judgment on the entire issue of bonds, an individual holder of bonds cannot sue the company on his bonds. Upon the trustee obtaining judgment the bonds were all merged therein. *Laing v. Queen City Ry.*, 49 S. W. Rep. 136 (Tex. 1898). The bonds ran to the trustee or bearer, and the court construed all the papers as constituting the trustee of the debt as well as of the property mortgaged.

⁵ As to the right of a particular officer to sell them, see *Chew v. Henrietta, etc. Co.*, 2 Fed. Rep. 5 (1880). If valid on their face, compliance with the charter is presumed. *Nichols v. Mase*, 94 N. Y. 160 (1883). See also ch. XLIII, *supra*.

⁶ *Booker v. Crocker*, 132 Fed. Rep. 7 (1904).

The corporation cannot set up in defense to its bonds that it was irregularly incorporated.¹

The bond may be sued upon as though it were a promissory note.² Bonds secured by a mortgage are debts within the meaning of the New York statute making the directors personally liable for failure to file annual reports.³

The statute of limitations begins to run on a bond the same as on other agreements to pay money, but it is a matter of doubt whether the statute relative to sealed instruments or the statute applicable to promissory notes applies to the bonds of a corporation.⁴

Where a party sues to foreclose a mortgage and fails because the mortgage was *ultra vires* of the corporation, he cannot in that action recover on the bonds.⁵ A decree at the instance of a corporation declaring void a trust agreement is not a bar to a holder of one of the bonds, secured thereby, collecting his bonds.⁶ Bonds of an insolvent corporation become due on its dissolution, and accordingly the stockholders' statutory liability thereon commences at that date.⁷

§ 771. *Coupons and interest on bonds—Negotiability of coupons—Participation in foreclosure—Interest on overdue bonds and coupons—Purchase of coupons when presented for payment.*—Nearly all bonds of corporations have attached to them coupons, representing the semi-annual or annual interest on the bonds themselves. These coupons are usually in the form of promissory notes payable to the bearer. They are generally signed by the engraved signature of the treasurer of the company.⁸

Coupons may be detached from the bond and sold like promis-

1 § 637, *supra*.

2 A corporation bond may be sued and declared upon as though it were a bill of exchange or promissory note. *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). A railway bond payable to bearer may be sued upon in *assumpsit* and set forth as a "bond." It may be joined with the common counts in *indebitatus assumpsit*. *Ide v. Passumpsic, etc. R. R.*, 32 Vt. 297 (1859). The holder of bonds payable to bearer is an original payee and not an assignee merely. *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883). For the form of complaint on a railroad bond, see *Miller v. New York, etc. R. R.*, 8 Abb. Pr. 431 (1859). The holder of the bond may of course sue upon it in his own name. *Carr v.*

Le Fevre, 27 Pa. St. 413 (1856). See also § 761, *supra*.

3 *Morgan v. Hedstrom*, 164 N. Y. 224 (1900).

4 See § 772, *infra*, as to coupons; and § 846, *infra*.

5 *Dudley v. Congregation, etc. St. Frances*, 138 N. Y. 451 (1893).

6 *National Salt Co. v. Ingraham*, 143 Fed. Rep. 805 (1906).

7 *Ramsden v. Knowles*, 151 Fed. Rep. 718 (1906). See also § 642, *supra*.

8 A lithographed signature on the coupons is good. *McKee v. Vernon County*, 3 Dill. 210 (1874); s. c., 16 Fed. Cas. 188. Coupons of bonds may be signed by a printed fac-simile of a corporate officer's autograph adopted by the corporation for that purpose, though not expressly authorized by

sory notes. They are negotiable, and a *bona fide* purchaser of them is protected.¹ The holder need not prove his title.² But if the

statute. *Pennington v. Baehr*, 48 Cal. 565 (1874).

¹ *Fox v. Hartford, etc. R. R.*, 70 Conn. 1 (1897); *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501, 547 (1870); *Spooner v. Holmes*, 102 Mass. 503 (1869), where the coupons had been stolen; *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251, where a guaranty of the coupon was enforced; *Haven v. Grand Junction, etc. Co.*, 109 Mass. 88 (1871), the coupons being payable to bearer; *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867). To same effect, and holding that detached coupons create a distinct obligation, *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866). See also *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868); *Clark v. Iowa City*, 20 Wall. 583 (1874); *Walnut v. Wade*, 103 U. S. 683 (1880); *Thomson v. Lee County*, 3 Wall. 327 (1865); *Aurora City v. West*, 7 Wall. 82 105 (1868); *Morris Canal, etc. Co. v. Fisher*, 9 N. J. Eq. 699 (1855). That coupons are negotiable, see also *Chesapeake, etc. Canal Co. v. Blair*, 45 Md. 102 (1876), where bonds were lost and representatives thereof were issued by the company to the owner. *Cicero v. Clifford*, 53 Ind. 191 (1876), a municipal bond coupon case; *Gilbough v. Norfolk, etc. R. R.*, 1 Hughes, 410 (1877); s. c., 10 Fed. Cas. 354, holding that a *bona fide* purchaser of stolen bonds might enforce coupons not yet due, but not the overdue coupons. See also *Dillon, Mun. Corp.*, for many cases relative to coupons on municipal bonds. The purchaser from a *bona fide* purchaser is protected; even though the former was not a *bona fide* purchaser himself. *Grand Rapids, etc. R. R. v. Sanders*, 54 How. Pr. 214 (1877); *rev'd on another point* in 17 Hun, 552; *Miller v. Berlin*, 13 Blatchf. 245 (1876); s. c., 17 Fed. Cas. 306; *Northampton Nat. Bank v. Kid-*

der, 106 N. Y. 221 (1887). Coupons are negotiable without indorsement, and title passes by delivery. *Johnson v. Stark County*, 24 Ill. 75 (1860). Where overdue coupons from bonds stolen before maturity are sued for, the holder must prove that he, or a *bona fide* purchaser prior to him, purchased the coupons before maturity. *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147 (1881). Payment of interest coupons on bonds cannot be refused on the ground that certain forged bonds are in circulation. *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888). The numbers on coupons do not destroy their negotiability. *Evertson v. Newport Nat. Bank*, 66 N. Y. 14 (1876). "Coupons, where payable to bearer, are promissory notes negotiable by the law merchant, and possess all the attributes of promissory notes." *Cooper v. Thompson*, 13 Blatchf. 434 (1876); s. c., 6 Fed. Cas. 491. A coupon may be enforced, even though the bond itself has been paid. *New, etc. Co. v. Price*, 50 S. W. Rep. 963 (Ky. 1899). Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint stock association shall not be personally liable. *Hibbs v. Brown*, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void.

² The holder of coupons suing thereon need not prove the origin of his title. He sues as holder and not as assignee. *McCoy v. Washington County*, 3 Wall. Jr. 381 (1862); s. c., 15 Fed. Cas. 1341. A possession of uncanceled coupons, detached from ne-

bonds are not negotiable the coupons are not, even though the latter are negotiable in form.¹ If the coupon does not run to order or bearer, it is not negotiable.² Coupons resemble promissory notes, and a purchaser of the coupon after it becomes due is not a *bona fide* purchaser.³ A purchaser of overdue coupons is not bound by a general understanding between his vendor and the company that the coupons would not be presented for payment until it was convenient for the company to pay.⁴

Coupons stand upon the same footing as the bond in regard to the terms of the bond.⁵ A provision in the bond that it and the coupons shall be redeemable within a certain time follows the coupons, although the latter are detached, the coupons being still held by the bondholder.⁶

gotiable bonds, is *prima facie* evidence of title with all the rights of a purchaser. *Duncan v. Mobile, etc. R. R.*, 3 Woods, 567 (1877); s. c., 8 Fed. Cas. 19; aff'd, 96 U. S. 659. A person suing on coupons may allege that he is the owner and holder and need not allege that he is the owner for value. *New, etc. Co. v. Price*, 50 S. W. Rep. 963 (Ky. 1899).

¹ *McClelland v. Norfolk, etc. R. R.*, 110 N. Y. 469 (1888), holding that under a mortgage power the majority of the bondholders might extend the time of payment of the coupons. But see *Manning v. Norfolk, etc. R. R.*, 29 Fed. Rep. 838 (1887).

² In *Myers v. York, etc. R. R.*, 43 Me. 232 (1857), and *Jackson v. York, etc. R. R.*, 48 Me. 147 (1858), the court held that a coupon worded, the company "will pay thirty dollars on this coupon," is not negotiable, it not being to bearer or order, though taken from a negotiable bond. But a similar coupon attached to a municipal bond was held to be negotiable in *Smith v. Clark County*, 54 Mo. 58 (1873), and in *McCoy v. Washington County*, 3 Wall. Jr. 381 (1862); s. c., 15 Fed. Cas. 1341, a municipal-bond case, where the court said that the coupon took its negotiability from the bond. In *Wright v. Ohio, etc. R. R.*, 1 Disney (Ohio), 465 (1857), the court held that coupons worded as "warrants for thirty-five dollars . . . pay-

able in New York on the first day of," etc., were not negotiable. Coupons are not negotiable if they are not payable to bearer nor to any one's order. *Evertson v. Newport Nat. Bank*, 66 N. Y. 14 (1876). See also *Clarke v. Janesville*, 1 Biss. 98 (1856); s. c., 5 Fed. Cas. 962, holding a municipal-bond coupon not negotiable.

³ *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868), holding also that a guaranty of the coupon passes to any holder. Where railroad-bond coupons are stolen and are purchased after they become due, the purchaser is not protected. *Wylie v. Speyer*, 62 How. Pr. 107 (1881). A contract to sell railroad bonds implies that the unpaid coupons are included, where the intent of the parties was to practically give title to a railroad free from all debts. Another purchaser of the coupons with notice is not protected. *Farmers' L. & T. Co. v. Oregon, etc. R. R.*, 58 Fed. Rep. 639 (1893). Where a person sells coupon bonds on a contract, by which he is entitled to the bonds on the payment of a certain sum, the coupons which accrue in the meantime belong to the vendee. *Fox v. Hartford, etc. R. R.*, 70 Conn. 1 (1897).

⁴ *Fox v. Hartford, etc. R. R.*, 70 Conn. 1 (1897).

⁵ *Guilford v. Minneapolis, etc. Ry.*, 48 Minn. 560 (1891).

⁶ And a tender stops the interest on

The coupon, although detached from the bond, is secured by the mortgage.¹ But coupons detached from the bond before the bond is certified by the trustee as required by its terms are not entitled to the benefit of the mortgage.² After a coupon has been detached it is no longer subject to conditions contained in the bond or mortgage.³ Although the coupons participate ratably in any mortgage which secures the bonds, yet they are not entitled to any priority in payment over the bonds when a foreclosure takes place.⁴

the coupons. *Bailey v. Buchanan* County, 115 N. Y. 297 (1889), holding also that detached coupons in the hands of the holders of the bonds are mere incidents of the latter, and may be redeemed if the bonds may be.

1 *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867); *Sewall v. Brainerd*, 38 Vt. 364 (1865); *Stevens v. New York, etc. R. R.*, 13 Blatchf. 412 (1876); s. c., 23 Fed. Cas. 22, giving a priority in payment to the coupons. Although the coupons are detached from the bond, yet they are protected by the mortgage and secured by it. *Union Trust Co. v. Monticello, etc. R. R.*, 63 N. Y. 311 (1875). The coupons are secured by the mortgage equally with the bonds. *Long Island T. Co. v. Long Island, etc. R. R.*, 85 N. Y. App. Div. 36 (1903); aff'd, 178 N. Y. 588.

2 *Holland Trust Co. v. Thomson-Houston El. Co.*, 170 N. Y. 68 (1902), aff'g 62 App. Div. 299. Coupons that become due before the mortgage is executed and before the bonds are issued do not share in the security of the mortgage, even though such coupons were detached and sold, and even though in the hands of *bona fide* purchasers they might be collected by suit. So also as to coupons detached before the mortgage was executed and the bonds delivered, although becoming due afterwards. *Holland Trust Co. v. Thomson-Houston, etc. Co.*, 62 N. Y. App. Div. 299 (1901). Coupons detached and sold before the bonds are issued may not be entitled to the security of the mortgage. *Klein v. East River, etc. Co.*, 182 N. Y. 27 (1905).

3 *Haskins v. Albany, etc. Co.*, 74 N. Y. App. Div. 31 (1902).

4 *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867); *Re Sewall*, 38 Vt. 364 (1865). Even though by the mortgage no preference is given to interest on foreclosure, yet there may be a preference for interest not paid on some bonds while interest on the other bonds was paid. *Real Estate T. Co. v. Union T. Co.*, 102 Md. 41 (1905). The coupons are not entitled to any priority of payment over the bonds on a distribution of the funds after a foreclosure. *Duncan v. Mobile, etc. R. R.*, 3 Woods, 567 (1877); s. c., 8 Fed. Cas. 19; aff'd, 96 U. S. 659. *Cf. Stevens v. New York, etc. R. R.*, 13 Blatchf. 412 (1876); s. c., 23 Fed. Cas. 22. The interest has no priority over the principal in the distribution upon foreclosure, even though the interest on some bonds had been paid while the interest on others had not been. *M'Tighe v. Keystone, etc. Co.*, 99 Fed. Rep. 134 (1900). The acceptance of funded interest bonds for overdue coupons does not waive the mortgage security. It is a change and extension of the debt, but not of the security. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586 (1880). See § 765, *supra*. The court may, with the consent of the interested parties, authorize the receiver to issue certificates extending the unpaid coupons without invalidating the lien of the coupons. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 341 (1879); s. c., 22 Fed. Cas. 274. No preference is given to the coupons. *Dunham v. Cincinnati, etc. Ry.*, 1 Wall. 254 (1863).

When coupons are presented for payment and are cashed, they are held to be canceled so far as the bonds and other coupons are concerned.¹ Even though a third person was buying them instead of the company paying them, the bondholders may insist on their mortgage lien free from these purchased coupons, unless the party presenting the coupons knew that he was selling them. The reason is that it takes two parties to make a sale, and moreover the coupon holders might have preferred to foreclose rather than to sell.²

As to distribution, see also § 881, *infra*. Where a corporation issues debentures secured by a deposit of mortgages with coupons, and the coupons are to be and are actually delivered to the corporation as they become due, and the corporation fails, and the depository forecloses the mortgage, not knowing that the coupons on the mortgage had not been paid, the holder of such coupons cannot claim an interest in the property which has been bought in by the depository. *State Finance Co. v. Commonwealth, etc. Co.*, 69 Minn. 219 (1897). Where past-due coupons are, by the terms of the mortgage, entitled to payment before the bonds themselves, the holders of such coupons may intervene in the foreclosure suit, and, if they do so in time, may compel the purchaser at the sale to pay them in cash, where such purchaser made payment in bonds. *Holland Trust Co. v. Thomson-Houston Elec. Co.*, 9 N. Y. App. Div. 473 (1896); *aff'd*, 153 N. Y. 645. See also *Low v. Blackford*, 87 Fed. Rep. 392 (1898).

¹ *United, etc. Co. v. Farmers' L. & T. Co.*, 11 Colo. App. 225 (1898).

² Quoted and approved in *Farmers' L. & T. Co. v. Iowa Water Co.*, 78 Fed. Rep. 881 (1897). Also in *Baker v. Meloy*, 95 Md. 1 (1902), the court saying: "This embodies a proposition that is sustained by authority, and which, in the absence of authority, addresses itself most strongly to reason and the common understanding." In *Cameron v. Tome*, 64 Md. 507 (1885), the court stated the law as follows: "That as against bondholders who

presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up, under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured." Coupons presented and paid cannot afterwards participate. It takes two to make a sale. *Morton, etc. Co. v. Home, etc. Co.*, 66 N. J. Eq. 106 (1904). Where the corporation pays to its fiscal agent the money necessary to pay coupons, but the agent uses it for other purposes, and subsequently takes up the coupons, the mortgage does not secure such coupons. *Farmers' L. & T. Co. v. New England, etc. Co.*, 137 Fed. Rep. 729 (1905). Coupons which were supposed to be paid cannot be enforced as having been bought. *Venner v. Farmers' L. & T. Co.*, 90 Fed. Rep. 348 (1898). Although the president and manager of the corporation claims that when he paid coupons he did so from his personal funds and for the purpose of holding the coupons as unpaid and as a lien, yet where the parties presenting the coupons supposed that they were paid, and the directors knew nothing to the contrary, the coupons cannot be enforced by the president. *Lloyd v. Wagner*, 93 Ky. 644 (1893). In *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501 (1870), the court held that persons "taking up

A person who sells bonds with a representation that past-due coupons have been paid may be compelled to deliver up such cou-

and holding" coupons as they came due under agreement with the directors, whose authority was only to obtain a loan and pay the coupons, cannot claim that the coupons are still unpaid. In the case of *Duncan v. Mobile, etc. R. R.*, 3 Woods, 567 (1877); s. c., 8 Fed. Cas. 19; aff'd, 96 U. S. 659, the court allowed the purchaser of coupons to participate in the assets, although purchased when they came due and were presented for payment, where the owners presenting them knew that they were purchased instead of being paid, and did not object, the court saying that the rule was that "there was no purchase unless there was an intent on the part of the original holder to sell;" but in this case there was such intent. Where coupons are presented at the place of payment, and money is paid for them, such coupons cannot participate in the security as against bondholders who supposed the coupons were so paid and canceled. This is the rule even though, instead of being paid, the coupons were purchased by an outside party when they were received at the place of payment. *Union Trust Co. v. Monticello, etc. Ry.*, 63 N. Y. 311 (1875); *Martin v. Citizens' Trust Co.*, 94 Tenn. 176 (1894). Coupons cashed by the mortgagor are paid as against the bondholders, although actually purchased by an outside party instead of being paid. *Bockes v. Hathorn*, 20 Hun, 503 (1880). A purchase of coupons by a syndicate is not payment and cancellation of them by the company. *Claffin v. South Carolina R. R.*, 8 Fed. Rep. 118 (1880). A person who advances money to the corporation to pay coupons cannot claim that the coupons are a lien under the mortgage unless the bondholders consented. *Fidelity, etc. Co. v. West Pennsylvania R. R.*, 138 Pa. St. 494 (1891).

Where bondholders are entitled to participate in a reorganization on a certain basis, a person purchasing coupons under an agreement with the company when they become due may be shut out of the reorganization. *Child v. New York, etc. R. R.*, 129 Mass. 170 (1880). In *Hand v. Savannah, etc. R. R.*, 17 S. C. 219 (1881), the court held that uncanceled coupons having been taken up by parties who advanced the money to an embarrassed corporation for that purpose, although marked paid in the company's books, these parties have an equity to claim for their coupons the benefit of the lien which originally secured them. The court also said that the recognition of this equity may be required at the hands of persons seeking the equitable powers of the court to enable them to contest the liability of the company to pay these coupons. When the parties practically know that the company is not paying out its money for the coupons, the sale is sustained and the coupons are enforceable. *Ketcham v. Duncan*, 96 U. S. 659 (1877). But where the parties presenting them know nothing about this, they may exclude these from participating in the assets until they are first paid. *South Covington, etc. Ry. v. Gest*, 34 Fed. Rep. 628 (1888). Railroad coupons which are paid and so understood cannot afterwards be enforced as having been merely assigned. *Holliester v. Stewart*, 111 N. Y. 644 (1889). It is a question of fact whether a taking up of overdue coupons was intended as a cancellation of them or only a transfer of interest. *Wood v. Guarantee, etc. Co.*, 128 U. S. 416 (1888). Where a person pays corporate bond coupons as they become due, and takes a note of the corporation in payment, the coupons no longer exist as a corporate liability. The person

pons.¹ Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he holds bonds specified in such certificate to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person named in the certificate, although the certificate itself is not actually delivered until several years after the date of the certificate.² The pledgee of bonds may collect the coupons thereon as they become due.³ Money deposited to pay coupons cannot be attached as belonging to the company.⁴ But the trustee of a mortgage with whom money is deposited by the corporation to pay the interest may return to the corporation any balance which it has for coupons not yet presented for payment. The trustee is merely the agent of the corporation in this respect and there is no irrevocable trust as to such funds in favor of the coupon holders.⁵

cannot claim that he is secured by the mortgage which secured the coupons. *South Covington, etc. Ry. v. Gest*, 34 Fed. Rep. 628 (1888). But where, in order to maintain the credit of a company, a director, upon presentation of its coupons for payment, pays out his own money and takes the coupons, he may enforce them, there being sufficient assets to pay all other creditors first. *Haven v. Grand Junction, etc. Co.*, 109 Mass. 88 (1871). Where a parent company, owning the stock of branch companies, passes into a receiver's hands, coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. *Phinizy v. Augusta, etc. R. R.*, 62 Fed. Rep. 771 (1894). Where on the sale of bonds sufficient is deducted from the price to pay the first coupons, and is left with the vendee for that purpose, such coupons are considered paid. *Farmers' L. & T. Co. v. Oregon, etc. R. R.*, 67 Fed. Rep. 404 (1895). As to the purchase of coupons, compare *Atlantic Trust Co. v. Kinderhook, etc. Ry.*, 17 N. Y. App. Div. 212 (1897). Where the coupons are cashed by a bank and punched as being paid, the bank cannot afterwards claim that they are still secured by mortgage. *United Waterworks Co. v. Farmers' L. & T. Co.*, 82 Fed. Rep. 144 (1897).

¹ And his wife may also be compelled so to do. *Chicago, etc. Ry. v. Turner*, 79 Mich. 133 (1889).

² If such coupons have been canceled and returned to the corporation issuing the bonds, and the trustee is held liable for such coupons, the trustee may hold the corporation liable. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899).

³ The pledgees of bonds have a right to collect the coupons, although the debt which is secured by the bonds is not yet due. Such a pledgee may also start foreclosure proceedings the same as the full owner. "He only differed from an absolute owner in this: that he was bound to account for any surplus received from the bonds and coupons, over and above what was necessary to the payment of his debt." *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514 (1878); s. c., 29 Fed. Cas. 261. See also § 468, *supra*.

⁴ *Rogers Locomotive, etc. Works v. Kelley*, 88 N. Y. 234 (1882), aff'g 19 Hun, 399. Money paid to a trustee with which to pay coupons cannot be attached by a general creditor. *Holland Trust Co. v. Sutherland*, 177 N. Y. 327 (1904).

⁵ *Staten Island, etc. Club v. Farmers' L. & T. Co.*, 41 N. Y. App. Div. 321 (1899).

It is well settled that bonds bear interest after they become due, unless the corporation has the money ready for payment at the time and place of payment and continues to keep the money there for that purpose.¹ There is some doubt as to whether the coupons bear interest from the time when they become due, where no presentation or demand of payment has been made.² Certainly the com-

¹ Interest at the legal rate as fixed by statute runs on bonds after their maturity, and commences to run on bonds and coupons from the time they fall due, even though no demand of payment is made; but of course the company may show that the money was there to pay with. *Langston v. South Carolina R. R.*, 2 S. C. 248 (1870). Where the company does not deposit the money for the payment of the bonds at the time and place of payment, it is liable for interest up to the time when payment is actually made. Publication of a notice in a newspaper is not sufficient to stop interest unless the bondholders actually receive such notice. A circular stating that a higher rate of interest will be paid if the bonds are not presented for payment is binding on a corporation. *Kelley v. Phenix Nat. Bank*, 17 N. Y. App. Div. 496 (1897). Simple interest at the legal rate is recoverable on the principal of the bonds after they become due, "not upon and by virtue of the original contract, but as damages for the detention of money due." *Ashuelot R. R. v. Elliot*, 57 N. H. 397, 437 (1874); s. c., 58 N. H. 451. *Langston v. South Carolina R. R.*, 2 S. C. 248 (1870); *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501, 551 (1870). Interest is allowed on the bonds after they are declared due. *Welsh v. St. Paul, etc. R. R.*, 25 Minn. 314 (1878). If bonds are redeemable and are called by the company, which, however, is unable to pay them, they continue to bear interest. *Gordillo v. Weguelin*, L. R. 5 Ch. D. 287 (1877). Bonds do not bear interest after they become due and no demand is made, where the company proves that it was ready,

able and willing to pay them, even though it did not set aside a specific sum for that purpose, the money being in its general account. *Emlen v. Lehigh, etc. Co.*, 47 Pa. St. 76 (1864). In a foreclosure of a mortgage securing bonds, interest on the bonds is figured to the commencement of the foreclosure suit where the assets are not sufficient to pay the debts. *Gillett v. Chicago Title & T. Co.*, 82 N. E. Rep. 891 (Ill. 1907). Municipal bonds after maturity bear interest at the rate which they bore before maturity, even though it is in excess of the legal rate. *Pruyn v. Milwaukee*, 18 Wis. 367 (1864). The principal bears interest unless the company is ready to pay and gives notice. *Price v. Great Western, etc. Ry.*, 16 M. & W. 244 (1847). See also *Ohio v. Frank*, 103 U. S. 697 (1880); *Brewster v. Wakefield*, 22 How. 118 (1859). The interest on the bonds after maturity is the same as that before maturity. *Beckwith v. Hartford, etc. R. R.*, 29 Conn. 268 (1860); *Cromwell v. Sac County*, 96 U. S. 51 (1877). Interest continues on the bonds from the time of foreclosure at the rate specified in the bond, although different from the statutory rate. *Jackson, etc. Co. v. Burlington, etc. R. R.*, 29 Fed. Rep. 474 (1887). Interest is allowed up to the date of distribution. *Re London, etc. Co.*, L. R. [1892] 1 Ch. 639.

² Coupons bear interest from the date of their maturity, even though not presented for payment, if there was no money on deposit to pay them. *Parsons v. Utica, etc. Co.*, 66 Atl. Rep. 1024 (Conn. 1907). Interest is allowed on overdue coupons from the time they are detached from the bonds and are sold. *Long Island T.*

pany is not obliged to pay interest on the coupons if it can show that it was ready and willing to pay the coupons, if they had been

Co. v. Long Island, etc. R. R., 85 N. Y. App. Div. 36 (1903); *aff'd*, 178 N. Y. 588. Coupons bear interest from their maturity, even though not presented, unless it is shown that the money was deposited to pay them. *Abraham & Son v. New Orleans, etc. Assoc.*, 110 La. 1012 (1903). See also cases in following note. In Minnesota it is held that under the Minnesota statute, coupons will not bear interest from their date, even though the agreement was that they should bear interest. *Lee v. Melby*, 93 Minn. 4 (1904). After the principal sum has been declared due interest continues thereon, until decree, at the rate specified in the bonds themselves, but the interest on past-due coupons is the legal rate of interest. All bondholders are bound by the decree determining the amount of interest allowed. *Farmers' L. & T. Co. v. Northern, etc. Ry.*, 94 Fed. Rep. 454 (1899). Where the principal and interest of a bond is payable in New York state, the statutes of that state relative to interest govern, and no interest is allowed on coupons which remain attached to the bonds. *Columbus, etc. R. R. Appeals*, 109 Fed. Rep. 177 (1901). In *Alexander v. McDowell County*, 67 N. C. 330 (1872), the court said that demand was necessary before action on a municipal coupon, inasmuch as the changing officials necessitated such a rule, although a different rule prevailed as to individuals. But interest runs from the time of non-payment. *McLendon v. Anson County*, 71 N. C. 38 (1874). Interest may be recovered on overdue coupons from the time of demand of payment. *Fox v. Hartford, etc. R. R.*, 70 Conn. 1 (1897). Coupons bear interest after their maturity. *Cromwell v. Sac County*, 96 U. S. 51 (1877); *Aurora City v. West*, 7 Wall. 82 (1868)—municipal-bond cases. In New York it is held that coupons which remain in the hands of the holder of the bonds, whether attached or detached, do not bear interest from the maturity of such coupons. *Williamsburg Sav. Bank v. Solon*, 136 N. Y. 465 (1893). To same effect, *Beattys v. Town of Solon*, 136 N. Y. 662 (1893); *Buffalo Loan, etc. Co. v. Medina Gas, etc. Co.*, 12 N. Y. App. Div. 199 (1896); *aff'd*, 162 N. Y. 67; *Klein v. East River, etc. Co.*, 33 N. Y. Misc. Rep. 596 (1901); *rev'd* on another point in 182 N. Y. 27; *Jackson v. York, etc. R. R.*, 48 Me. 147 (1858); *Crosby v. New London, etc. R. R.*, 26 Conn. 121 (1857). Bond coupons detached from the bond bear interest from maturity. *Philadelphia, etc. R. R. v. Knight*, 124 Pa. St. 58 (1889); *Internal Imp. Fund v. Lewis*, 34 Fla. 424 (1894). In Rhode Island the coupons bear interest from the time of demand of payment. *Whitaker v. Hartford, etc. R. R.*, 8 R. I. 47 (1864); *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866). Coupons bear interest from the time that the company is in default in paying them. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586 (1880). There are many municipal corporation cases also on this subject; and to the same effect, *San Antonio v. Lane*, 32 Tex. 405 (1869); *Genoa v. Woodruff*, 92 U. S. 502 (1875); *Jeffersonville v. Patterson*, 26 Ind. 15 (1866); *Davis v. Yuba County*, 75 Cal. 452 (1888), a municipal-bond case, where the interest was allowed from the time when payment was demanded. Interest is a creation of contract and not of the common law. *Pekin v. Reynolds*, 31 Ill. 529 (1863). In *Corcoran v. Chesapeake, etc. Co.*, 1 MacArthur (D. C.), 358 (1874); *aff'd*, 94 U. S. 741, the court held that interest began to run on coupons only after demand and refusal of payment,

presented for payment, and has continued to keep separate, for that purpose, sufficient funds.¹ There is also doubt as to whether coupons have three days of grace.²

§ 772. *Suit to collect coupons—Execution cannot be levied upon the mortgaged property—Demand of payment—Statute of limitations.*—A coupon-holder may sue at law on an overdue coupon.³ But it is well-settled law that neither a mortgage bondholder nor

and that a waiver by the state of its lien so as to make it second to other bonds and coupons is not a waiver of interest on those coupons. In Connecticut the coupon does not bear interest after maturity. *Rose v. Bridgeport*, 17 Conn. 243 (1845). The company may decline to pay a coupon unless it is presented and delivered up. *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514 (1878); s. c., 29 Fed. Cas. 261. If the bonds are payable in England with interest at five per cent., the interest collectible after default is the legal rate in England, and not the legal rate in the state wherein the railroad company is. *Coghlan v. South Carolina R. R.*, 142 U. S. 101 (1891). The trustee is not the party to demand payment of the coupons. *Taber v. Cincinnati, etc. Ry.*, 15 Ind. 459 (1860).

1 *Philadelphia, etc. R. R. v. Smith*, 105 Pa. St. 195 (1884); *North Pennsylvania, etc. R. R. v. Adams*, 54 Pa. St. 94 (1867), holding also that demand of payment at maturity is excused if the corporation was unable to pay; *Langston v. South Carolina R. R.*, 2 S. C. 248 (1870); *Mills v. Jefferson*, 20 Wis. 50 (1865); *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868); *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251, allowing same as damages for delay of payment; *Welsh v. St. Paul, etc. R. R.*, 25 Minn. 314 (1878); *Burroughs v. Commissioners*, 65 N. C. 234 (1871); *Beaver County v. Armstrong*, 44 Pa. St. 63 (1862); *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501, 547 (1870); *Gelpcke v. Dubuque*, 1 Wall. 175 (1863); *Hollingsworth v. Detroit*,

3 McLean, 472 (1844); s. c., 12 Fed. Cas. 352; *Walnut v. Wade*, 103 U. S. 683 (1880). No interest is allowed on the coupons if the money was deposited to pay them. *Grand Trunk Ry. v. Central, etc. R. R.*, 105 Fed. Rep. 411 (1900).

2 *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888). The coupon is deemed due on the day fixed for the payment of interest. It is not a bill of exchange, although in the form of an order to pay money. *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868). In New York they are entitled to days of grace. *Evertson v. Newport Nat. Bank*, 66 N. Y. 14 (1876). But the common-law rule has now been changed in New York by statute. L. 1894, ch. 607. There are no days of grace on coupons so far as concerns the provision that the bonds shall become due six months after default on maturity and demand of payment. *Alabama, etc. Mfg. Co. v. Robinson*, 56 Fed. Rep. 690 (1893).

3 *Montgomery, etc. Soc. v. Francis*, 103 Pa. St. 378 (1883). In New Jersey a statute prevents such a suit. *Holmes v. Seashore Elec. Ry.*, 57 N. J. L. 16 (1894). A holder of coupons from railroad bonds may sue on them, and his right to do so is not taken away by the fact that they are secured by a mortgage. *Manning v. Norfolk, etc. R. R.*, 29 Fed. Rep. 838 (1887). The holder of a coupon may obtain judgment thereon although the mortgage provides that he shall not levy execution on the road. *Widener v. Railroad*, 1 W. N. Cas. 472 (Pa. 1875). Suit on one interest coupon is no bar to a subsequent suit on another, though the latter was due

the holder of a coupon can levy an execution upon the mortgaged property in order to enforce a judgment obtained upon the bond or coupon. There are two reasons for this rule: First, that a mortgagee at common law cannot so enforce his security; second, other bondholders and coupon-holders are entitled to participate equally in the security.¹ Other bondholders may enjoin the execution or

at the time of the first suit. *Butterfield v. Ontario*, 44 Fed. Rep. 171 (1890). The holder of coupons may sue on them even though the mortgage is being foreclosed and the principal sum mentioned in the bonds has become due, and even though in the trustee's foreclosure suit no judgment for deficiency can be granted, the trustees not suing on the bonds. *Welsh v. St. Paul, etc. R. R.*, 25 Minn. 314 (1879). In suing a railroad for interest on registered bonds it must be alleged that the agreement of the railroad was made under seal or upon a consideration, and that the covenant was made with or for the plaintiff's benefit. *Holmes v. Northern, etc. Ry.*, 65 N. Y. App. Div. 49 (1901).

¹ The bondholders cannot recover judgment at law and sell out the mortgaged premises. *Pugh v. Fairmount, etc. Co.*, 112 U. S. 238 (1884). A bondholder who has obtained judgment on his bonds cannot, by an execution levied on the property mortgaged to secure the bonds, obtain an advantage over other bondholders. *Bowen v. Brecon Ry.*, L. R. 3 Eq. 541 (1867). In *West Branch Bank v. Chester*, 11 Pa. St. 282 (1849), it seems that a sale of the equity of redemption, based on a judgment obtained by a bondholder for interest, was upheld. The holder of coupons may obtain judgment and levy on such property as is not covered by the mortgage securing his coupons. *Commonwealth v. Susquehanna, etc. R. R.*, 122 Pa. St. 306 (1888); *Dupont v. Bushong*, 1 W. N. Cas. 378 (1875); *Pennock v. Coe*, 23 How. 117 (1859). A bondholder cannot obtain judgment at law on unpaid coupons or the bond,

and by levy of execution sell the mortgaged railway and franchises and buy it in and turn it over to a reorganized company to operate. The state will oust such a corporation from possession. The only execution which the bondholder can levy in such a case is on property not subject to the mortgage. The mortgage securing that bond and others still exists. *Commonwealth v. Susquehanna, etc. R. R.*, 122 Pa. St. 306, 321 (1888). Where bonds are secured by a chattel mortgage, one bondholder cannot obtain payment from such chattels in preference to other bondholders by levying an execution on them, even though the chattel mortgage has not been recorded as required by the statutes. *Fish v. New York, etc. Paper Co.*, 29 N. J. Eq. 16 (1878). One of the parties secured by a mortgage cannot levy an attachment on the mortgaged property "without alleging that the residue of the debts secured had been paid, and bringing the trustees or legal title-holders before the court." *Martin v. Mobile, etc. R. R.*, 7 Bush. (Ky.), 116 (1870). Where a judgment is obtained upon coupons, the judgment cannot be levied on the income of the road. The mortgagor company and the trustee of the mortgage may enjoin such collection. *Roberts v. Denver, etc. R. R.*, 8 Colo. App. 504 (1896). A holder of bonds secured by a trust deed on all the property of a corporation, who seeks to enforce payment by an action at law, will not be permitted to enforce a lien by execution, to the embarrassment of the other bondholders. *Hacketts-town Nat. Bank v. Yuengling Brewing Co.*, 74 Fed. Rep. 110 (1896).

attachment.¹ But a bondholder may obtain judgment at law and levy upon any property not covered by the mortgage.² A bondholder who buys prior liens on the property does so for the benefit of other bondholders, who, within a reasonable time after they know of such purchase, offer to contribute such part of the sum paid by him as the par value of the bonds held by the contributing bondholder bears towards all the bonds.³

The holder of coupons need not demand payment before commencing suit thereon.⁴ Where the principal is to become due thirty days after default in the payment of interest and after demand thereof, a written demand is sufficient, even though the coupons are not presented.⁵

The question whether a demand of payment is necessary before commencing foreclosure proceedings turns upon the provisions of the mortgage.⁶

1 A bondholder may enjoin another bondholder from levying an execution on the property mortgaged. They are to be treated as partners, and one is not allowed to obtain an advantage over others. Moreover, they have all agreed that the property shall be sold as a whole. And again, the reorganization provision in the mortgage is a covenant that is binding. See *Philadelphia, etc. R. R. v. Woelpper*, 64 Pa. St. 366 (1870), giving the decision of the court below. A bondholder may enjoin an execution sale. *Butler v. Rham*, 46 Md. 541 (1877).

2 *Western, etc. Hospital v. Mercantile, etc. Co.*, 189 Pa. St. 269 (1899).

3 *Booker v. Crocker*, 132 Fed. Rep. 7 (1904).

4 *Walnut v. Wade*, 103 U. S. 683 (1880); *Smith v. Tallapoosa County*, 2 Woods, 574 (1874); s. c., 22 Fed. Cas. 682; *New, etc. Co. v. Price*, 50 S. W. Rep. 963 (Ky. 1899). Demand of payment need not be alleged in a suit on coupons. It is a matter of defense to the company. *Philadelphia, etc. R. R. v. Johnson*, 54 Pa. St. 127 (1867). Demand of payment of the coupons is not required where the place specified therefor no longer exists. *Long Island T. Co. v. Long Island, etc. R. R.*, 85 N. Y. App. Div.

36 (1903); *aff'd*, 178 N. Y. 588. A coupon is like a note, and not like a bill. *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62 (1880). Coupons are like other commercial paper in that, although payable at a particular place, suit may be brought or foreclosure commenced on them without demand of payment at that place. So held where payment was to be "at financial office of said company in the city of New York." *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514 (1878); s. c., 29 Fed. Cas. 261. Coupons need not be presented before suit if the company has resolved to default, and has no funds to pay with. In the suit the mortgage need not be introduced. *Conshohocken Tube Co. v. Iron Car Equip. Co.*, 161 Pa. St. 391 (1894). See also § 770, *supra*, as to demand of payment of a bond.

5 *New Jersey, etc. Co. v. Security, etc. Co.*, 42 Atl. Rep. 746 (N. J. 1899). Where there are no funds deposited by the mortgagor to pay coupons a default occurs without demand, and the principal may be declared due under the terms of the mortgage. *Arnot v. Union Salt Co.*, 109 N. Y. App. Div. 433 (1905); *rev'd* on another point in 186 N. Y. 501.

6 See § 836, *infra*.

The holder of coupons, upon which he is suing, need not produce the bonds to which they were attached, nor need he be interested in them.¹ Inasmuch as coupons are practically promissory notes, the form of action on coupons is the same as that upon promissory notes.²

The statute of limitations applicable to coupons is the same as that applicable to the bonds. This is generally twenty years.³

¹ *Thomson v. Lee County*, 3 Wall. 327 (1865). "Suits on the coupons are sustained entirely independently of the bonds to which they were originally annexed. It is therefore of very little consequence whether they are promissory notes, bills, drafts, or checks, for they have the same quality of negotiability as either of those instruments, and the holder sues upon them and recovers in his own name." *Beaver County v. Armstrong*, 44 Pa. St. 63 (1862). It is not necessary to produce the bond, and the surrender and cancellation of the bond after the coupon was transferred do not affect the coupon. *Miller v. Berlin*, 13 Blatchf. 245 (1876); s. c., 17 Fed. Cas. 306. In suing on the coupons the bonds to which they were attached need not be set out. *Ring v. Johnson County*, 6 Iowa, 265 (1858). The holder of a coupon may sue on it although he does not own the bond. *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866); *Knox County v. Aspinwall*, 21 How. 539 (1858); *Cromwell v. Sac County*, 94 U. S. 351, 362 (1876); *Kenosha City v. Lamson*, 9 Wall. 477 (1869). The holder of coupons who sues thereon need not produce or prove an interest in the bond itself. He should set forth the number of the bond, however, the date, sum, and time of payment. *Kennard v. Cass County*, 3 Dill. 147 (1874); s. c., 14 Fed. Cas. 307. Coupons may be sued on without producing the bonds. *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501 (1870); *New London, etc. Bank v. Ware, etc. R. R.*, 41 Conn. 542 (1874). The payment of a coupon payable to bearer must be to the holder of it, and not to the holder of the bond. *Sewall v. Brainerd*, 38 Vt. 364 (1865).

² A general count in debt is sufficient to recover on a coupon. *National Exch. Bank v. Hartford, etc. R. R.*, 8 R. I. 375 (1866). It may be proved under the common counts. *Johnson v. Stark County*, 24 Ill. 75 (1860). An action in tort for the conversion of coupons lies against a purchaser of the same from a thief, but not if such purchaser is *bona fide*. *Spooner v. Holmes*, 102 Mass. 503 (1869). A single count may include several coupons. *New London, etc. Bank v. Ware, etc. Co.*, 41 Conn. 542 (1874). In a suit upon coupons they should be put in evidence. *De Graaf v. Wyckoff*, 13 Daly, 366 (1885). For the pleading, etc., on an interest warrant, see *Crosby v. New London, etc. R. R.*, 26 Conn. 121 (1857).

³ *Kenosha City v. Lamson*, 9 Wall. 477 (1869). "A suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond." *Lexington v. Butler*, 14 Wall. 282 (1871). See also *Huey v. Macon County*, 35 Fed. Rep. 481 (1888). See ch. XLIX, § 846, *infra*. Interest coupons attached to a sealed bond are a part of the bond and the twenty years' statute of limitations applies to them the same as to the bond. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899). The statute of limitations as against the mortgage of a corporation is a personal defense and can be interposed only by the mortgagor. *Hanchett*

The statute commences to run from the time when the coupons become due.¹ The right of the company to pay coupons in land scrip does not prevent the holders from suing for money if the scrip is not issued.² The federal courts have no jurisdiction of a suit brought by the holder of coupons, where it appears that he does not own them, but is merely allowing his name to be used to

v. Blair, 100 Fed. Rep. 817 (1900). The statute of limitations runs in behalf of a foreign corporation after it has acquired a domicile in the state for purposes of litigation. *Travellers' Ins. Co. v. Fricke*, 99 Wis. 367 (1898). Even though bonds do not become due until 1884, yet if the company becomes insolvent and is dissolved in 1872 and its property is sold out under a prior judgment, the twenty years' statute of limitations may begin to run from 1872. *Gunnison v. Chicago, etc. Ry.*, 117 Fed. Rep. 629 (1902); *aff'd*, 130 Fed. Rep. 259. In *Best v. Davis S. M. Co.*, 65 Hun, 72 (1892), it was held that the six years' statute of limitations applied to corporate bonds, the court saying: "The obligations being promissory notes and not sealed instruments, the six years' statute of limitations applies." Where the instrument recites that it is under seal it will be presumed to be a sealed instrument, especially where a seal follows the name of the officer who signs it. So held as regards the statute of limitations. *Rusling v. Union Pipe, etc. Co.*, 5 N. Y. App. Div. 448 (1896); *aff'd*, 158 N. Y. 737 (1899). In the case *Downer v. Union Land Co.*, 115 N. W. Rep. 207 (Minn. 1908), bonds were held to be barred by the six years' statute of limitations, and it was also held that a judgment creditor's suit to sequester the corporate property did not stop the running of the statute as to other creditors.

¹ *Clark v. Iowa City*, 20 Wall. 583 (1874). So held whether the coupons are detached from the bonds or not. *Koshkonong v. Burton*, 104 U. S. 668 (1881); *Amy v. Dubuque*, 98 U. S.

470 (1878); *Huey v. Macon County*, 35 Fed. Rep. 481 (1888). *Contra*, where the coupon is not detached. *Kenosha City v. Lamson*, 9 Wall. 477 (1869); *Lexington v. Butler*, 14 Wall. 282 (1871). The statute of limitations on the coupons of municipal bonds begins to run from the date when the coupons became due. *Huey v. Macon County*, 35 Fed. Rep. 481 (1888). The statute of limitations of ten years applies to detachable interest coupons. *Griffin v. Macon County*, 36 Fed. Rep. 885 (1888). As to the effect of the statute of limitations on the interest, see *Re Cornwall Minerals Ry.*, [1897] 2 Ch. 74. The statute of limitations does not begin to run six months after default, merely because at that time the bondholders have an option to declare the whole sum due. *Nebraska, etc. Bank v. Nebraska, etc. Co.*, 14 Fed. Rep. 763 (1883). Fifteen years' delay in enforcing a railroad mortgage after the principal became due is, in Vermont, a bar to foreclosure; but a foreclosure commenced during that time preserves the security for all bondholders, although they are not parties to the suit. *Re Chickering*, 56 Vt. 82 (1883). *Cf. Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895), *rev'g Simmons v. Taylor*, 38 Fed. Rep. 682 (1889).

² *Marlor v. Texas, etc. Ry.*, 19 Fed. Rep. 867 (1884); *s. c.*, 21 Fed. Rep. 383 (1884); *Barry v. Missouri, etc. Ry.*, 27 Fed. Rep. 1 (1886). For a case involving land scrip issued in payment of coupons, the coupons, however, being kept alive as collateral, to be retired and paid in money, whenever the finances of the company fully warrant it, see *Little*

give jurisdiction to the court.¹ Where by the terms of a lease the lessee is to apply the net earnings to mortgage bonds and coupons of the lessor, a coupon holder may maintain a bill in equity to compel the lessee to account for such net earnings.²

§ 773. *Income bonds.*—A corporation may issue an “income bond,” the interest on which is not payable annually, but is payable only in case there is income sufficient to pay the regular charges and interest due from the corporation and to leave a surplus which is applicable to the income bonds.³ An income bond differs from preferred stock in that it cannot vote; it generally is secured by mortgage; and its right to interest is more clear than that of dividends. The power to issue irredeemable bonds, interest on which is to be paid after certain dividends have been declared on the stock, is a question still in dispute.⁴

The rights of income bondholders are governed and determined entirely by the terms of the bonds themselves and the mortgage securing them, if such a mortgage exists.⁵

Rock, etc. Ry. v. Huntington, 120 U. S. 160 (1887).

¹ Lake County, etc. v. Dudley, 173 U. S. 243 (1899).

² Schmidt v. Louisville, etc. Ry., 119 Ky. 287 (1904).

³ Garrett v. May, 19 Md. 177 (1862), upholding the giving of a mortgage which took precedence over prior income bonds.

⁴ The supreme court of Pennsylvania, by a divided court, about 1882, held that a railroad company without express authority might issue irredeemable interest-bearing bonds at a large discount, the interest to be paid only after a certain dividend had been declared on the common stock. The bonds were called “deferred income bonds.” Philadelphia, etc. R. R. v. Stichter, 21 Am. L. Reg. (Pa.) 713 (1882); 11 W. N. Cas. 325. A contrary conclusion was reached in Taylor v. Philadelphia, etc. R. R., 7 Fed. Rep. 386 (1881). An “income bond” under the New York statute is secured by a lien in regard to its principal only. Its interest is unsecured. The income bondholder cannot control the discretion of the directors in paying such interest or raising the

funds for other purposes. Day v. Ogdensburgh, etc. R. R., 107 N. Y. 129 (1887). A building and loan association has no inherent power to issue income stock. Bettie v. Republic, etc. Ass’n, 64 Atl. Rep. 176 (N. J. 1906).

⁵ An income mortgage was foreclosed in Seibert v. Minneapolis, etc. Ry., 58 Minn. 39 (1894), for default in applying net earnings to the payment of interest due on the bonds, and also for failure to repair and replace rolling-stock, the mortgage providing for foreclosure in such a case. In State v. Cowen, 83 Md. 549 (1896), trustees representing income bondholders were placed in control of the property by the court for four years. The trustees expended \$500,000 in improvements, and thereby the business greatly increased. The court thereupon extended the time to the trustees to operate the canal, and said that if the income did not pay the operating expenses and produce a net revenue the property would be sold. The court held also that such trustees might contract with other companies for the use of the property. The case of Barry v. Missouri, etc. Ry., 27 Fed. Rep. 1 (1886), considered

Frequently there is difficulty in determining whether any "income" actually exists which should be applied to the payment of interest on income bonds. The same difficulty that is experienced in ascertaining whether there are net profits for a dividend is experienced in ascertaining whether there is a surplus properly applicable to income bonds. In general, the courts decide each case on the terms and conditions of the income bonds themselves. The various rights, remedies, and incidents peculiar to different kinds of income bonds are set forth in the notes below.¹ Where an

the rights of income bondholders under the particular mortgage in that case. The income bond provided for the payment of the interest, "provided such net or surplus earnings shall be sufficient therefor." The court held that "unless within some one of the six months' periods between the date and the maturity of the bonds net income is realized, the company is not in default, and is under no present obligation to pay interest," but nevertheless the words of the bond may give the holder the right to claim this interest at a later date, "whenever there is net income applicable thereto." It must be paid before any dividends are declared. "According to the scheme of the mortgage, as denoted by the several provisions referred to, the surplus earnings of each interest period belong to the holders of coupons for that period. If the earnings are insufficient to pay the interest in full, the holders are entitled to scrip certificates for the residue; if the net earnings more than suffice to pay the interest for the six months, the surplus falls into a general fund for the payment of holders of scrip certificates ratably; if there are no net earnings until an exercise of the power of sale under the eighth article, the unearned interest becomes principal, and is to be paid as principal out of the proceeds of the sale. The coupon-holders have the first lien upon the surplus earnings for the period represented by their coupons, but as to earnings

from any other period they have only the rights of certificate-holders; and whether they surrender their coupons or not, if the earnings are insufficient to pay the interest in full they stand as certificate-holders for their interest unearned." The coupon-holders and the certificate-holders were held to stand upon substantially the same ground. It was the duty of the company to keep its accounts so as to show the net income for each six months. The trustee was bound to see that this was done. An accounting was ordered.

¹ Passing upon the rights of income bondholders in a suit brought by them to have their interest paid, the court said: "The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period. . . . It is preposterous to assert that the company could properly charge against income for any period during the life of the mortgage a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. It might with equal propriety seek to offset its whole funded debt against its income." *Barry v. Missouri, etc. Ry.*, 27 Fed. Rep. 1, 5 (1886). An income bondholder may obtain an accounting by the mortgagor railroad in order to determine whether there is any income applicable to his bonds.

income bond provides that the interest in any year shall be chargeable only on the income for that year, the holder of the bond may,

Improper items of the account will be stricken out. But where most of the income bonds have been turned in for a lower security, the complainant is entitled to an income based only on all the income bonds as originally issued. *Barry v. Missouri, etc. Ry.*, 34 Fed. Rep. 829 (1888). Where an income bondholder applies for an injunction against a misappropriation of the income of a railroad, giving figures, the injunction will be granted though in large part the allegations are made on information and belief, if the defendant does not specifically explain the figures and merely denies the misapplication. *Barry v. Missouri, etc. Ry.*, 36 Fed. Rep. 228 (1888), holding also that an income bondholder may enjoin an application of the company's funds to other unusual corporate purposes, thereby affecting the payment of interest due to him. An income bondholder may file a bill for an accounting where the funds upon which he has a lien have been mingled with other funds and no separate account has been kept. If the directors have made no determination in the matter, it is immaterial that the mortgage provided for a final determination by them. Suit lies. Losses incurred by reason of new lines, leased lines, etc., are not to be paid before funds are set apart to pay the interest on income bonds, the income mortgage being a lien on the income of the main line. Ordinarily an income mortgage on present and future property as a security for interest is "but little more than the pledge of the good faith of the company in managing its lines." The company ordinarily under such a mortgage may improve, alter, or extend its lines and may lease others without violating its obligation to the income bondholders. If the directors have neglected to ascer-

tain whether net income exists, the court will undertake to do so. *Spies v. Chicago, etc. R. R.*, 40 Fed. Rep. 34 (1889), holding also that although an income bondholder is entitled to an accounting as to the income applicable to the interest on his bonds, yet, if he charges fraud against the directors, he must prove fraud or his bill will be dismissed, even though fraud need not have been alleged. In *Day v. Ogdensburgh, etc. R. R.*, 107 N. Y. 129 (1887), income bondholders were held not entitled to any surplus in one year to make up for a deficiency in the payment of interest in a prior year. The court held also that the company might take a lease of another railroad and use its income to pay the rental, and the income bondholders could not object. The holder of coupon bonds secured by a mortgage on the proceeds from the sale of certain lands owned by a railroad may by bill in equity subject that income to the payment of the coupons, even though the railroad has been consolidated with another and the consolidated railroad owns the lands. *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883). Where by the terms of the lease the lessee is to apply the net earnings to mortgage bonds, and coupons of the lessor, a coupon holder may maintain a bill in equity to compel the lessee to account for such net earnings. *Schmidt v. Louisville, etc. Ry.*, 119 Ky. 287 (1904). For an instance of bonds and a mortgage on the income of the property of a canal company, see *Stewart v. Chesapeake, etc. Canal Co.*, 5 Fed. Rep. 149 (1881). In this case a bondholder asked to have a receiver appointed for the purpose of operating the canal and applying the profits to the interest on the bonds. Mismanagement was charged. The court refused to appoint the receiver, the proof not being sufficient,

file a bill in equity for a disclosure and an accounting as to the income for the particular year, where he alleges that it has been misappropriated and diverted.¹

The ordinary income bond of a corporation does not create such a trust relationship between the holder and the company as authorizes a suit for an accounting. The bond does not operate as an equitable assignment of the profits, and does not create an equitable lien thereon. If the company refuses to apply the profits as called for by the bond, it is a breach of contract, the remedy for which is at law. If the income bond gives discretion to the directors as to payments for repairs, an error of judgment on their part cannot be reviewed by the court where there was room for a difference of opinion.² Income bondholders cannot prevent the consol-

but retained the suit for the purpose of compelling the company to render accounts from time to time. The court stated that the only remedy of the bondholders was a receiver, foreclosure not being possible of such a mortgage. Concerning the construction of the rights of an income bondholder, see also *Lehigh, etc. Co. v. Central R. R.*, 34 N. J. Eq. 88 (1881). Income bonds do not necessarily restrict the owner to payment in land scrip, where the company may so pay interest thereon, in any year when the income is sufficient. Unless the company declares its election to pay in scrip, the owner may sue for the money as soon as the income is sufficient. Failure of the bondholder to demand payment of the interest is no bar, he having been notified that the company could not pay it. *Texas, etc. Ry. v. Marlor*, 123 U. S. 687 (1887). Where an income bond has its coupons payable in money or land scrip at the option of the company, and the company does not exercise its option when the coupons become due, the holder may insist on payment in money and sue therefor. *Marlor v. Texas, etc. Ry.*, 21 Fed. Rep. 383 (1884). It is immaterial that the mortgage is a lien on land only and not on the railroad. *Marlor v. Texas, etc. Ry.*, 19 Fed. Rep. 867 (1884). Where the income mortgage contains

no provision for the trustee taking possession, the only remedy may be "that no dividend can be declared until the interest on it is regularly paid." *Union Trust Co. v. Missouri, etc. Ry.*, 26 Fed. Rep. 485 (1880). In New York, by statute, income bonds with voting privileges may be issued. Laches on the part of a dissenting stockholder in objecting to interest-bearing stock will bar his remedy. *Taylor v. South, etc. R. R.*, 13 Fed. Rep. 152 (1882). An income bondholder bringing suit to compel the corporation to account and pay his interest coupons must allege a request to the trustee in the deed of trust to bring the suit and a refusal by him. The trustee must also be joined as a party defendant. *Morgan v. Kansas, etc. Ry.*, 15 Fed. Rep. 55 (1882).

¹ *Morse v. Bay State Gas Co.*, 91 Fed. Rep. 938 (1897); *Edwards v. Bay State Gas Co.*, 91 Fed. Rep. 946 (1898).

² *Thomas v. New York, etc. Ry.*, 139 N. Y. 163 (1893), holding also that a refusal of the directors to certify that the interest had been earned is sufficient as an allegation without alleging a demand for such certificate. As to the pleadings of an income bondholder in a suit to compel the payment of interest, see *Thomas v. New York, etc. Ry.*, 19 N. Y. Supp. 766 (1892).

idation of the company with another company under statutes existing at the time when the income bonds were issued.¹ The unpaid interest on an income bond, even though cumulative, does not belong to the tenant for life if the bond is sold with all rights as regards arrears.²

§ 774. *Accommodation paper by a corporation—Bona fide holders.*—It is a well-established rule that a corporation cannot ordinarily be bound by its signature to or indorsement or guaranty of the note or paper of another person for the accommodation of the latter. The directors are authorized by the stockholders to do business for corporate purposes, but are not authorized to use the corporation to perform acts of friendship or accommodation to others. The general rule is that the accommodation indorsement, signature, or guaranty of the corporation is illegal and cannot be enforced.³

¹ Hart v. Ogdensburgh, etc. R. R., 69 Hun, 378 (1893).

² Re Taylor's Trust, [1905] 1 Ch. 734.

³ Bank of Genesee v. Patchin Bank, 13 N. Y. 309 (1855); National Bank v. Wells, 79 N. Y. 498 (1880), reversing s. c., 15 Hun, 51; Central Bank v. Empire, etc. Co., 26 Barb. 23 (1857); Morford v. Farmers' Bank, 26 Barb. 568 (1857); Bridgeport City Bank v. Empire, etc. Co., 30 Barb. 421 (1859); Fox v. Rural Home Co., 90 Hun, 365 (1895); aff'd, 157 N. Y. 684; Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. Rep. 742 (1898); Carney v. Duniway, 35 Oreg. 131 (1899); M. V. Monarch Co. v. Farmers' and Drovers' Bank, 49 S. W. Rep. 317 (Ky. 1899); South, etc. Nat. Bank v. La Grange, etc. Co., 40 S. W. Rep. 328 (Tex. 1897); *Ex parte* Estabrook, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794; Lafayette Sav. Bank v. St. Louis Stoneware Co., 2 Mo. App. 299 (1876); West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557 (1877), holding that a cashier is not presumed to have power to bind his bank as indorser of his personal note. The payee of such a note, in order to hold the bank, must prove that he had such power; *Ætna Nat. Bank v. Charter Oak L. I. Co.*, 50 Conn.

167 (1882), holding that a president has no implied power to bind his corporation as accommodation indorser; *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367 (1879); *Beecher v. Dacey*, 45 Mich. 92 (1881); *Smead v. Indianapolis, etc. R. R.*, 11 Ind. 104 (1858). Accommodation paper by a corporation is not enforceable except in *bona fide* hands, even though a majority of the stockholders consented to its issue. *Cook v. American, etc. Co.*, 65 Atl. Rep. 641 (R. I. 1905). The secretary has no power to endorse the company's name on a note, especially an accommodation note. *Wheeling, etc. Co. v. Connor*, 55 S. E. Rep. 982 (W. Va. 1906). Where a bank knows that a corporate note is accommodation paper it must not only prove that the note was signed by the president and treasurer, but also that they were authorized to sign or that the company received the proceeds or that there was a course of business justifying such note. *Nat. Bank, etc. v. Snyder Mfg. Co.*, 107 N. Y. App. Div. 95 (1905). A street railway company is not liable to the payee of a note for its accommodation endorsement thereof, even though the endorsement was authorized by the directors and a majority of the stockholders. *Brill Co.*

The indorsement, however, though not enforceable by parties taking it with notice that it was for accommodation, may be enforced by *bona fide* holders.¹

v. Norton, etc. Ry., 189 Mass. 431 (1905). *Prima facie* a bank is not bound as a surety on a replevin undertaking in a suit between third parties. *Sturdevant, etc. Co. v. Farmers', etc. Bank*, 69 Neb. 220 (1903). The president cannot collect an amount paid by him on a note to which he had endorsed the company's name without authority. *Triplett v. Fauver*, 103 Va. 123 (1904). A national bank cannot certify a check payable if a building contract is not performed, there being no money to respond to the check. *Fidelity, etc. Co. v. National Bank, etc.*, 106 S. W. Rep. 782 (Tex. 1908). A person taking a corporate note which he knows is accommodation paper cannot enforce it. *El Dorado, etc. Co. v. Citizens' Bank*, 107 S. W. Rep. 676 (Ark. 1908). A corporate agent has no power to sign the company's name as an accommodation endorser. *Federal Nat. Bank v. Cross Creek, etc. Co.*, 68 Atl. Rep. 1018 (Penn. 1908). An accommodation indorsement by a manufacturing corporation is not enforceable. *Preston v. Northwestern, etc. Co.*, 67 Neb. 45 (1903). A general manager has no power to guarantee in the corporate name the payment of a third person's note. *Dobson v. More*, 164 Ill. 110 (1896). The treasurer of a manufacturing corporation has no implied power to bind the corporation as an accommodation indorser, and a person taking the note with notice cannot enforce such indorsement. *Usher v. Raymond Skate Co.*, 163 Mass. 1 (1895). A pledgee of a note held by a corporation, the pledge being to secure the personal debt of the president, is not legal as against the subsequent objection of the corporation. *El Capitan, etc. Co. v. Boston-Kansas, etc. Co.*, 65 Kan. 359 (1902). A warehouse corporation has no power to

indorse paper as an accommodation, even for a consideration paid. A person discounting the same for the maker thereby has notice of the illegal indorsement. *National Park Bank v. German, etc. Co.*, 116 N. Y. 281 (1889). A corporation organized for freight transfer business is not bound, and is not liable on its bond of surety, for the debt of another. Even a co-surety cannot enforce contribution. *Lucas v. White Line, etc. Co.*, 70 Iowa, 541 (1886). A corporation cannot be surety on a note which has nothing to do with its business—pure accommodation. The payee cannot collect. *Hall v. Auburn Turnp. Co.*, 27 Cal. 255 (1865). A national bank cannot become an accommodation indorser. *National Bank v. Atkinson*, 55 Fed. Rep. 465 (1893); *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430 (1898). A cashier has no power to make the bank a surety on a replevin bond for the accommodation of a third person. *Sturdevant v. Farmers', etc. Bank*, 62 Neb. 472 (1901). *Cf.* note 2, p. 2697.

¹ *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312 (1859), holding also that a third party is not put upon his inquiry if the paper purports on its face to be regularly indorsed in the course of business; *Ex parte Estabrook*, 2 Low. 547 (1877); s. c., 8 Fed. Cas. 794; *Florence, etc. Imp. Co. v. Chase Nat. Bank*, 106 Ala. 364 (1895); *American, etc. Bank v. Gluck*, 48 Minn. 129 (1897). An innocent purchaser of paper indorsed for accommodation by a trading corporation may enforce the same against the corporation. *Jacobs Pharmacy Co. v. Southern Bkg. etc. Co.*, 97 Ga. 573 (1895). The fact that the constitution of the state prohibits fictitious indebtedness does not render void, as against a *bona fide* holder, an accommodation indorsement by a corporation. *Mar-*

Notwithstanding the general rule on this subject, there is no rule of public policy which prohibits an accommodation indorsement of commercial paper by a corporation. Consequently, if such an indorsement is made with the knowledge and assent of all the directors and stockholders, and creditors' rights are not affected, the indorsement is valid and enforceable.¹

shall, etc. *Bank v. O'Neal*, 34 S. W. Rep. 344 (Tex. 1895). A *bona fide* purchaser of a bill of exchange accepted for accommodation by a corporation may enforce it. *Farmers' Nat. Bank v. Sutton, etc. Co.*, 52 Fed. Rep. 191 (1892). To same effect, *Mechanics' Banking Assoc. v. New York, etc. Lead Co.*, 35 N. Y. 505 (1866), and cases cited; *Central Bank v. Empire, etc. Co.*, 26 Barb. 23 (1857), holding that a note made by the president and indorsed by the corporation is binding upon the corporation in the hands of one who had been induced by its agent to accept it as a transaction of the corporation and within the scope of its business. *Morford v. Farmers' Bank*, 26 Barb. 568 (1857); *Bridgeport City Bank v. Empire, etc. Co.*, 30 Barb. 421 (1859); *Monument Nat. Bank v. Globe Works*, 101 Mass. 57 (1869); *Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 2 Mo. App. 299 (1876), holding also that in a suit on the note the burden of showing that it was taken by a third party with notice of the inability of the corporation to indorse lies upon the defendant. A corporation cannot be an accommodation indorser. Yet a *bona fide* holder of the paper may hold the corporation liable. *National Bank v. Young*, 41 N. J. Eq. 531 (1886); *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357 (1887). A manufacturing corporation has no right to give accommodation paper, but such paper may be enforced by a *bona fide* holder. *Blake v. Domestic, etc. Co.*, 38 Atl. Rep. 241 (N. J. 1897). Even though the president of a company is the maker of a note, the holder of such note is not chargeable with notice thereby that

the corporation was an accommodation indorser of the same. *Hiawatha, etc. Co. v. John Strange, etc. Co.*, 106 Wis. 111 (1900). Even though a note signed by directors of a bank is indorsed by the bank itself for accommodation, the bank having no interest therein, and not receiving the proceeds thereof, yet a *bona fide* purchaser of the note may hold the bank liable. *First Nat. Bank v. Arnold*, 156 Ind. 487 (1901). In a suit on an accommodation note the holder must prove that he is a holder for value and did not know that it was accommodation paper. *National, etc. v. Snyder, etc. Co.*, 117 N. Y. App. Div. 370 (1907). A person receiving a note for the debt of another, which bears the indorsement of a corporation, not in the chain of title, is not a *bona fide* holder and if the corporation signed it as an accommodation, the corporation is not liable. *Pelton v. Spider Lake, etc. Co.*, 117 Wis. 569 (1903).

¹ *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890). Cf. *McLellan v. Detroit, etc. Works*, 56 Mich. 579 (1885). By consent of all the stockholders and the board of directors a private corporation may become liable as an accommodation indorser. *Murphy v. Arkansas, etc. Co.*, 97 Fed. Rep. 723 (1899). The board of directors have no power to indorse the note of another company for accommodation, unless all the stockholders assent, and such assent on the part of a woman stockholder is not assumed, even though the business is conducted by her husband or father. Moreover, such indorsement is subject to the claims of creditors of the corporation. *In re Prospect, etc.*, 126 Fed. Rep. 1011

Where the directors of a business corporation accept paper for accommodation, they are personally liable for payments made or liabilities incurred on such paper.¹ But where an officer causes a manufacturing company to indorse for accommodation the note of a party all of whose goods it purchases, he is not personally liable to the former company unless it is proved that the directors and stockholders were ignorant thereof and hence did not acquiesce

(1904). A railroad company has no legal power to subscribe for the stock of a land company nor become accommodation indorser of the latter's note, even though all the stockholders assent thereto, but a stockholder cannot complain where the owner of his stock at the time of the act consented thereto, excepting that a mere authorization prior to his purchase of his stock will not sustain acts done after suit commenced by him objecting to the same. *McCampbell v. Fountain, etc. R. R.*, 111 Tenn. 55 (1903). A business corporation cannot defeat an accommodation note if all the stockholders assented thereto and there are no creditors. *Perkins v. Trinity, etc. Co.*, 69 N. J. 723 (1905), the court saying: "To permit stockholders of corporations to unanimously make a disposition of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud." In the case of *First Nat. Bank, etc. v. Winchester*, 119 Ala. 168 (1898), where a private corporation had but four stockholders, and two of them bought the stock of the other two, and paid therefor by notes signed by them and the corporation, and secured by mortgage on the corporate property, the court held that the note was not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with

notice of the facts. *Approving Swift v. Smith*, 65 Md. 428 (1886). The claim that all the stockholders consented to an accommodation indorsement and to give a mortgage as security therefor must be clearly proven in order to be valid. *Steiner v. Steiner, etc. Co.*, 120 Ala. 128 (1898). Even though a corporation, as the owner of an undivided interest in land, mortgages it to secure the debt of an individual, the owner of the remaining interest in the land cannot question the title of a purchaser at foreclosure sale on the ground that the mortgage was *ultra vires*. *Collins v. Rea*, 127 Mich. 273 (1901). Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. *Solomon Co. v. Barber*, 58 Kan. 419 (1897). See also §§ 3 and 766, *supra*.

¹ *Hutchinson v. Sutton Mfg. Co.*, 57 Fed. Rep. 998 (1893). A bank taking a note of a corporation payable to its president and indorsed by him to the bank cannot collect the note as against the corporation, if it was merely an accommodation note, but where the note was indorsed by two directors they are liable to the bank, even though the corporation is not. *Klein v. German Nat. Bank*, 69 Ark. 140 (1901). A corporate officer who issues its notes as an accommodation, a small commission being paid to him, is liable to the corporation therefor. *Shepard v. Morgan*, 123 N.Y. App. Div. 128 (1908). See 112 S. W. Rep. 4 (Mo. 1908), and 126 N. Y. App. Div. 142.

therein.¹ A corporation engaged in selling manufactured goods may indorse a manufacturer's note to enable him to furnish goods.² A trust company authorized to buy and sell securities may join with a railroad in signing a note for the benefit of the railroad company which it is financing, especially where all the stockholders ratify the transaction.³ Where a trading corporation owns most of the stock of a manufacturing corporation, and is the agent of the latter in making sales, and furnishes it with money, and pays dividends to the minority stockholders under an arrangement to that effect, the indorsements by the manufacturing company on the trading company's paper are not accommodation indorsements.⁴

§ 775. *Guaranty by one corporation of the bonds or dividends of another corporation—Guaranty by an individual.*—One of the most important and yet difficult branches of railroad and corporation law is the question whether one railroad corporation may guarantee the bonds or dividends of another railroad corporation. The power of a railroad corporation in this respect is much more restricted than that of a trading or manufacturing corporation, because the former is a quasi-public corporation and its powers are strictly construed. Moreover, the location of its railroad is specified in the charter, and the guaranty of the bonds or dividends on the stock of another railroad corporation is much the same as buying the stock of the latter, which is not legal, unless expressly authorized by the charter or the statutes of the state. A railroad corporation has no implied power to guarantee the bonds or dividends on the stock of another railroad corporation.⁵ It is legal, however, for a railroad in purchasing or taking a

¹ Willard v. Holmes, 142 N. Y. 492 (1894).

² Holmes, etc. Co. v. Willard, 125 N. Y. 75 (1890).

³ First Nat. Bank, etc. v. Guardian T. Co., 187 Mo. 494 (1905).

⁴ Blake v. Domestic, etc. Co., 38 Atl. Rep. 241 (N. J. 1897). Where a corporation legally owns all the stock of another corporation it may endorse the notes of the latter. *In re New York, etc.*, 141 Fed. Rep. 430 (1905). The accommodation indorsement may be valid if the proceeds of the note are used to pay a debt due to the corporation. *Lyon, P. & Co. v. First Nat. Bank*, 85 Fed. Rep. 120 (1898). See also § 775, *infra*. As against corporate creditors, however, even

though two corporations are engaged in the same line of business and have the same officers and stockholders and are run practically as one institution and become sureties for each other, yet such suretyship is illegal and cannot be enforced. *Rogers v. Jewell, etc. Co.*, 184 Ill. 574 (1900). Under the New York statutes bonds may be issued to take up past-due notes, and where the business of a partnership and of a corporation is carried on as one institution such bonds are valid, even though some of the notes so taken up grew out of the business of the partnership, but were indorsed by the corporation. *Matter of Snyder*, 29 N. Y. Misc. Rep. 1 (1899).

⁵ See § 314, *supra*. In the case

lease of or consolidating with another railroad, as allowed by statute, to guarantee bonds of the latter or dividends on its stock.¹

Louisville, etc. Ry. v. Louisville Trust Co., 174 U. S. 552, 567 (1899), the court said: "A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful, and void, and incapable of being made good by ratification or estoppel." In the case Pennsylvania R. R. v. St. Louis, etc. R. R. 118 U. S. 290 (1886), the court refused to enforce a guaranty of rent to be paid on a railroad lease where the lease itself was void. In the case Coleman v. Eastern Counties Ry., 10 Beav. 1 (1846), the court held that a contract by which a railroad corporation undertook to guarantee a five per cent. dividend on the stock of a steamship company, is invalid, even though the operations of the steamship company would augment the traffic on the railway.

In the case of Madison, etc. Co. v. Watertown, etc. Co., 7 Wis. 59 (1858), where a plank-road company guaranteed and paid the debts of another plank-road company, which built and owned a road over that part of the former's route which the former had not constructed, the guarantor was defeated in a suit for repayment from the guaranteed corporation. In Simpson v. Dennison, 10 Hare, 51 (1852), the stockholder of a railroad company enjoined the company from guaranteeing a certain dividend on all the stock of another railroad, in consideration of the right to carry on the business of the latter railroad. A stockholder in a railway company cannot set aside the company's indorsement of another company's bonds in consideration of certain con-

tracts between them, the indorsing company having paid the interest for five years. Cozart v. Georgia, etc. Co., 54 Ga. 379 (1875). A traffic contract by which one company guarantees a fixed income to another company may be assigned as collateral to a mortgage and the issue of bonds thereunder will not be enjoined on the ground that it is practically a mortgage on the guaranteeing company, inasmuch as the contract is not negotiable and *bona fide* purchasers of the bonds are not protected against defenses to the contract itself. Kissel v. Chicago, etc. R. R., 44 N. Y. Misc. Rep. 156 (1904). For a careful discussion of the power of corporations to execute guaranties and on the power of corporations in connection therewith generally, see 31 Am. Law Rev. 363.

1 Where, under its power to lease (as to which see § 892, *infra*), a railroad buys all the stock of another railroad, it may, as a consideration for such stock, guarantee the bonds of the lessor railroad. Atchison, etc. R. R. v. Fletcher, 35 Kan. 236 (1886). Where a lease of one railroad to another is valid, the consideration of the lease may be the guaranty by the lessee of the bonds of the lessor. Low v. Central Pac. R. R., 52 Cal. 53 (1877). It is sufficient consideration for a guaranty that the guarantor is the lessee of the principal debtor and the proceeds are to be used in equipping the leased road. Codman v. Vermont, etc. R. R., 16 Blatchf. 165 (1879); s. c., 5 Fed. Cas. 1157. Where by the terms of a lease the net earnings are to be used to pay mortgage bondholders of the lessor, and the lessee afterwards passes into a receiver's hands, the court will enforce such agreement. Grand Trunk Ry. v. Central Vt. R. R., 78 Fed. Rep. 690 (1897). In the case Green Bay, etc.

But the power of a railroad company to consolidate with or purchase the railroad of another company does not give power to guaran-

R. R. v. Union Steamboat Co., 107 U. S. 98 (1882), the railroad company had charter power to construct and operate steamboats, and, instead of doing so, guaranteed to a steamboat company, for the purpose of carrying traffic in connection with its railroad, that the gross earnings of each boat for two years should amount to a certain sum. The court upheld such guaranty. See *Harrison v. Union Pac. Ry.*, 13 Fed. Rep. 522 (1882), where the guarantor was a stockholder in the corporation whose bonds were guaranteed, and the new road, when finished, would become a feeder to the guarantor, the guaranty was enforced. A railroad corporation, which has also banking powers, may guarantee bonds of another railroad corporation of which it owns a majority of the stock, where such guaranty is for its own purposes and advantage. *Central, etc. Co. v. Farmers', etc. Co.*, 114 Fed. Rep. 263 (1902). A corporation's guaranty of another corporation's bonds is an original undertaking, and may be enforced without resorting to the latter company. The guarantor of the prompt payment of the principal and interest of bonds is liable for interest on the coupons which are not paid when they become due. *Philadelphia, etc. R. R. v. Knight*, 124 Pa. St. 58 (1889). A lessee railroad, which on the face of the bonds of the lessor agrees to pay the coupons, cannot, as against *bona fide* holders, set up that its agreement was *ultra vires* or informally authorized. *Singer v. St. Louis, etc. R. R.*, 6 Mo. App. 427 (1879). Where the complaint alleges that the defendant had authority to guarantee the bonds the suit being upon the guaranty, the question of *ultra vires* cannot be raised by a demurrer. *Bryce v. Louisville, etc. Ry.*, 73 Hun. 233 (1893). Damages were allowed

to a contractor for breach of contract of a railroad company to guarantee bonds in *Leroy, etc. R. R. v. Sidell*, 66 Fed. Rep. 27 (1895). In *Leavenworth County v. Chicago, etc. R. R.*, 25 Fed. Rep. 219 (1885), *aff'd*, 134 U. S. 688, it appeared that the Rock Island railroad guaranteed the interest on the bonds of another railroad. In *March v. Eastern R. R.*, 43 N. H. 515 (1862), s. c., 40 N. H. 548, where one railroad leased its entire property and franchises to another, it was held that, under the provisions of the lease there was neither a union of interest and capital between the two roads nor any warrant of an equality of dividends between the stockholders of the two corporations. Where one railroad company contracts with another company to pay the interest on the bonds of the latter company, and then caused or consented to the latter company's issuing bonds with a statement in such bonds that the interest was guaranteed by the former company, the former company is liable for such interest, even though it was not a party to the bonds themselves. *Opdyke v. Pacific R. R.*, 3 Dill. 55 (1874); s. c., 18 Fed. Cas. 744. Where the guarantor of bonds is secured by a mortgage, the holder of the bonds is entitled to the benefit of the mortgage. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. If a railroad may lease another road, it may guarantee interest on the latter's bonds, such interest being the rent. Though the bonds are negotiable the guaranty is not. If bonds are issued for construction work which is not done, a *bona fide* purchaser of the bonds cannot enforce a guaranty thereof by another corporation. *Eastern, etc. Bank v. St. Johnsbury, etc. R. R.*, 40 Fed. Rep. 423 (1889). A railroad that owns all the stock of another railroad, and

tee the bonds of the latter company without such a consolidation or purchase.¹ In many of the states there are statutes which expressly authorize such guaranties.²

builds the latter, may take the mortgage bonds of the latter in payment, and guarantee the principal and interest of the bonds and sell the same. Where the principal may be declared due on default in payment of interest, the guarantor is liable on the principal so declared due. *Dougan v. Evansville, etc. R. R.* 15 N. Y. App. Div. 483 (1897). A railroad taking a lease of the property of another company may guarantee dividends on the stock of the latter. *Marklove v. Utica, etc. R. R.*, 48 N. Y. Misc. Rep. 258 (1905).

¹ *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899).

² The Ohio statute was involved in the case *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859), where a stockholder's suit to enjoin the fulfillment of a guaranty, which had not been made in accordance with a statute authorizing it, failed because of the laches of the stockholder. The same transaction was involved in *Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R.*, 41 Barb. 9 (1863); *aff'd*, 4 T. & C. 251, where the guaranty was upheld although the required assent of the stockholders had not been obtained. Though the bonds were void, the guaranty was upheld. In this case the court also held that bondholders and coupon holders may assume that stockholders have authorized a guaranty as required by statute and that the consideration of the guaranty under the Ohio statute might be the change of the gauge of the railroad, the bonds of which are guaranteed, the effect being to increase the business of the guarantor. In the case *Madison, etc. R. R. v. Norwich Sav. Assoc.*, 24 Ind. 457 (1865), the guaranty of bonds in the hands of *bona fide* purchaser was sustained, the bonds having been issued to and in

the name of the guarantor, although the latter acted only for accommodation. Under a statute authorizing a guaranty of bonds of any railroad company within the state, a railroad may guarantee the bonds of a railroad with which it connects by means of a leased line, and the consideration of the guaranty may be the stock of the company whose bonds are guaranteed. *Louisville Trust Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896); *aff'd*, 174 U. S. 552, holding also that where the road of a consolidated corporation runs into both Kentucky and Indiana, and the Kentucky statutes authorize a guaranty by the company and the Indiana statutes authorize a guaranty upon the petition of a majority in interest of the stockholders, the guaranty may be in accordance with the Kentucky statutes. If all the parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease will not be set aside. *Barr v. New York, etc. R. R.*, 125 N. Y. 263 (1891). Where a guaranty by one railroad corporation of the bonds of another railroad corporation is authorized by statute only in a case where the railroad line of the former extends across the state, and the line of the former does not extend across the state except by an illegal lease, the guaranty cannot be enforced by purchasers of the bonds who took with notice, but may be enforced by purchasers who took without notice. *Central Trust Co. v. Indiana, etc. R. R.* 98 Fed. Rep. 666 (1900). A railroad company may accept the bills of exchange of another railroad company, the consideration being the altering the gauge of the latter company so as to enable the cars of the former to run over the tracks. *Smead*

Even though a statute, authorizing one railroad corporation to guarantee the bonds of another corporation, provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, but a purchaser with notice cannot enforce such guaranty.¹ A suit in equity lies at the instance of a railroad corporation that has guaranteed negotiable bonds of another railroad corporation to have such guaranty canceled and suits upon the guaranty restrained, because of facts not appearing upon the face thereof and because otherwise the bonds may pass into *bona fide* hands.²

A railroad cannot guarantee certain receipts to another corporation in a different line of business.³ A different question arises where a railroad legally comes into possession of bonds or notes and upon selling them places its indorsement or guaranty upon such bonds or

v. Indianapolis, etc. R. R., 11 Ind. 104 (1858). A person accepting a guaranty of a railroad, knowing that it could be given only on the petition of a majority in interest of the stockholders, and knowing that such petition had not been made, cannot enforce the guaranty. *Louisville Trust Co. v. Louisville, etc. Ry.* 75 Fed. Rep. 433 (1896); *aff'd*, 174 U. S. 552. In general, see *Macon, etc. R. R. v. Georgia R. R.*, 63 Ga. 103 (1879), upholding a mortgage given by the guaranteed corporation to the guarantor corporation.

¹ *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established and has been constantly recognized by this court." To same effect *Zabriskie v. Cleveland, etc. R. R.*, 23 How. 381 (1859); *Conn., etc. Ins. Co.*, 41 Barb. 9 (1863).

² *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899).

³ *Davis v. Old Colony R. R.*, 131 Mass. 258 (1881), where the guaranty

by a corporation of the expenses of a musical festival was held *ultra vires*. A railroad subscription to a state fair was enforced in *State Board of Agriculture v. Citizens' Street Ry.*, 47 Ind. 407 (1874). *Cf.* §§ 64, 681, *supra*; § 909, *infra*. A stockholder may join a railway from donating its funds to an exhibition, even though it is claimed that thereby the corporate receipts will be increased. *Tomkinson v. South Eastern Ry.*, L. R. 35 Ch. D. 675 (1887). A stockholder who offsets against his statutory liability the corporate guaranty of bonds held by him must prove the consideration. *Briggs v. Cornwell*, 9 Daly, 436 (N. Y. 1881). A railroad cannot guarantee the dividends of an elevator corporation in consideration of the latter company subscribing for the stock of the former company. *Elevator Co. v. Memphis, etc. R. R.*, 85 Tenn. 703 (1887). A freight and transfer corporation has no power to guarantee the credit of a third person. *Lucas v. White Line Transfer Co.*, 70 Iowa, 541 (1886). A guaranty by a railroad company of dividends on the stock and interest on the bonds of a hotel company cannot be enforced by the hotel company. *West-*

notes. That is the same as endorsing commercial paper, which the company has received in due course of business.¹

ern, etc. *R. R. v. Blue Ridge, etc. Co.*, 102 Md. 307 (1905).

¹ *Arnot v. Erie Ry.*, 67 N. Y. 315 (1876); aff'g 5 Hun, 608, upholding a guaranty which the defendant had made on bonds sold by it; *Railroad Co. v. Howard*, 7 Wall. 392 (18 8), where the guaranty by a railroad of bonds given to it by a city was upheld. Where a railroad company purchases, through a third person, land which it needs for railway purposes and guarantees his note given in payment, it is liable on such guarantee. *Lake Street, etc. R. R. v. Carmichael*, 184 Ill. 348 (1900). A railroad company may guarantee a construction company's contract to pay an engineer for services rendered in constructing the road. *Mathesius v. Brooklyn, etc. R. R.*, 96 Fed. Rep. 792 (1899). In *DeGross v. American, etc. Co.*, 21 N. Y. 124 (1860), a corporation was held liable on its guaranty that the patronage of the employees of the corporation should continue to a store which the corporation sold with such guaranty. A railroad corporation may guarantee and sell the bonds of another railroad company which have been given by the latter to the former company in payment of a debt. *Rogers, etc. Works v. Southern R. R.*, 34 Fed. Rep. 278 (1888). Guarantors of bonds sold to a corporation are liable, though the corporation had no power to purchase. *State v. Woram*, 6 Hill, 33 (1843). Where the bonds are payable to the order of another railroad company or its assigns, and are indorsed by the latter and sold, the latter are liable as an indorser to a *bona fide* holder, even though the indorsement was *ultra vires*. *Madison, etc. R. R. v. Norwich, etc. Soc.*, 24 Ind. 457 (1865). Where a railroad company guarantees the bonds of an iron company and sells the bonds and receives the proceeds, it is liable on

such guarantee, even though it paid over the proceeds to the iron company for the construction of a blast furnace. *Roosevelt v. Nashville, etc. Ry.*, 128 Fed. Rep. 465 (1904). Where a municipal bond is payable to a railroad company or its assigns, and the company sells it with the indorsement, "The New Orleans, Jackson & Great Northern Railroad Company, for value received, hereby transfers the within bond to the New Orleans Savings Institution, or assigns," the company is liable as an indorser of the bond when it becomes due. *Bonner v. New Orleans*, 2 Woods, 135 (1875); s. c., 3 Fed. Cas. 853. A railroad company may accept the bills of exchange of another railroad company, the consideration being the altering the gauge of the latter company so as to enable the cars of the former to run over the tracks. *Smead v. Indianapolis, etc. R. R.*, 11 Ind. 104 (1858). Where a land company has power to purchase the bonds of a railway company, it may guarantee their payment upon selling them. *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893); aff'd on this point in 62 Fed. Rep. 335. Judge Taft in this case said (p. 345): "But why is it necessary to show that what was done in this case was in fact a complete consolidation within the statute, to make it lawful? It seems to us that the purchase of the stock and guaranties can be supported on the ground that, even if they did not constitute a consolidation, they were legitimate steps towards a consolidation. They involved the exercise of powers similar to, but less extensive than, that of consolidation, and may fairly be said to have been included in it, as the part is included in the whole. It would be strange, indeed, if the land company had power, in order to encourage the construction

Where various properties are transferred to a coal company for stock, on the further understanding that all moneys already expended on such properties should be repaid in bonds of a railway to be guaranteed by the coal company, but such distribution of bonds is never made on account of the impossibility of such a guaranty being legally made, one of the parties who turned in his property may hold the coal company liable in damages for the amount of money expended by him on the property before turning it in for stock.¹

A land and lumber company having power to consolidate with a railroad company may own the stock and guarantee the bonds and preferred stock of such railroad company, the railroad of which is beneficial to the land company in its mining, manufacturing, and lumbering business.² If the guaranty is within the power of the company, and no stockholder objects, it is not necessary to show that it was beneficial to the stockholders, nor to show any special consideration other than the money paid for the securities having the guaranty.³ Where a land company owns land and also bonds and shares of stock in a railroad company, it has power, upon selling such stock and bonds, to guarantee dividends and interest thereon.⁴ Where

of a railroad, to embark in the enterprise its total capital, with a railway company as a partner, and did not have power to accomplish the same purpose by risking only part of that capital." Where an insolvent corporation owns all the stock of the railroad and causes the railroad to give its note for a debt of the former, such note cannot be enforced in the hands of the payee. *Re Mills Co.*, 162 Fed. Rep. 42 (1908). A loan and trust company may guarantee the payment of bonds taken by it in the ordinary course of business. *Broadway, etc. Bank v. Baker*, 176 Mass. 294 (1900).

¹ *Crown, etc. Co. v. Thomas*, 177 Ill. 534 (1898).

² *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335 (1894), holding also that it is not necessary that an actual consolidation be made; aff'g on this point *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893). A mining company having power to build a railroad or to subscribe to stock in the railroad may guarantee bonds of a railroad and may give a mortgage to secure such guaranty.

Central Trust Co. v. Columbus, etc. Ry., 87 Fed. Rep. 815 (1898), holding also that under the Ohio statutes a coal company may guarantee the bonds of a railroad company and may give a mortgage to secure such a guaranty. A saw-mill and lumber company has implied power to guarantee the interest of bonds of a railroad constructed for the purpose of supplying the mill with logs, even though the railroad also serves the public. All the officers and stockholders of the former company assented to the guaranty. The aid in procuring logs was a sufficient consideration. *Mercantile Trust Co. v. Kiser*, 91 Ga. 636 (1893).

³ *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335 (1894). See also § 3, *supra*. A guaranty by one corporation of an obligation of another corporation by reason of the former employing an expert of the latter is legal if all the stockholders of both companies assent thereto. *Butterworth, etc. v. Kritzer, etc. Co.*, 115 Mich. 1 (1897).

⁴ *Marbury v. Kentucky Union Land*

a bank buys wall paper at a sheriff's sale, and organizes a corporation to sell the paper, all the stock of the corporation being owned by the bank, and the bank guaranties debts thereafter incurred by such corporation, the bank is liable on such debts.¹ A company organized to manufacture ironwork for mining plants cannot legally guarantee the performance of a person's contract for the erection of a mining plant, even though it thereby makes a sale of iron. The company is not liable, even though the contract was not performed.² Closely connected with this subject is that of accommodation paper made or endorsed by a corporation, and while such paper is not generally bind-

Co., 62 Fed. Rep. 335 (1894), the court saying: "The power of the land company to enter into such an obligation for such a purpose is completely established by the case of *Railroad Co. v. Howard*, 7 Wall. 392 (1868). In that case it was held that a railroad corporation, with power to issue bonds for the construction of its road, might guarantee the bonds of cities and counties, which had been lawfully issued for the purpose of aiding the railroad in the construction." A corporation having the charter power to purchase the stock of another corporation has power to guarantee dividends on such stock in selling it. *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903). A railroad that owns all the stock of another railroad, and builds the latter, may take the mortgage bonds of the latter in payment, and guarantee the principal and interest of the bonds and sell the same. Where the principal may be declared due on default in payment of interest, the guarantor is liable on the principal so declared due. *Dougan v. Evansville, etc. R. R.*, 15 N. Y. App. Div. 483 (1897). The fact that the charter of a gas company provides that it may issue bonds for \$500,000 and secure them by mortgage, does not prevent the company borrowing additional sums of money, nor from guaranteeing bonds in other companies which it has lawfully acquired. *Fidelity Trust Co. v. Louisville Gas. Co.*, 118 Ky. 588 (1904). Where without the knowledge of the board of directors the president pur-

chases from a corporation notes which it owns and endorses the corporate name thereon, the corporation cannot be held liable on such indorsement. *Smith v. Pacific, etc. Works*, 145 Cal. 352 (1904).

¹ *American Nat. Bank v. National Wall Paper Co.*, 77 Fed. Rep. 85 (1896). Where, in order to develop the property of a land company, its stockholders organize a railroad company and also a light, heat and power company, the respective interests of the various companies being practically the same, it is legal for the land company to indorse and guarantee the notes of the other companies, the court saying: "For purposes of equity, courts will look behind that artificial personality, and, if need be, ignore it altogether, and deal with the individuals who constitute the corporation, and that is what, in justice and fairness, must be done here, where practically the same persons were associated together for one common purpose under three or four different names, corresponding to the several branches of the single common enterprise, and acted together only formally as distinct organizations, each devoted to the corporate pursuit of its appropriate branch." *Kendall v. Klapperthal Co.*, 202 Pa. St. 596 (1902). A bank may guarantee the interest on the debentures of a company. *Ex parte Booker*, L. R. 14 Ch. D. 317 (1880).

² *Humboldt Min. Co. v. American Mfg. etc. Co.*, 62 Fed. Rep. 356 (1894).

ing on the corporation, it may be in the hands of *bona fide* holders, or when made with the knowledge and consent of all the directors and stockholders without injury to corporate creditors,¹ and such paper may also be legal where the relations between the parties are such that the paper is not really accommodation paper, but carries an incidental but valuable consideration to the corporation so making or endorsing the paper; as for instance, where one company owns a majority of the stock of another similar company and gives financial assistance to the latter.²

Many instances of guarantees by miscellaneous corporations are given in the notes below.³

1 See § 774, *supra*.

2 See § 774, *supra*.

3 A building association having statutory power to purchase land on which it has a lien has no power to purchase land upon which it has no lien, and hence the association cannot be held liable for a deficiency in the foreclosure of a mortgage which rested upon such property when purchased by the association and which the association *assumed*, it being shown also that the transaction had not been authorized by the board of directors, but that on the contrary they repudiated it. *National, etc. Assoc. v. Home, etc. Bank*, 181 Ill. 35 (1899). A New Jersey corporation, having corporate power so to do, may purchase stock in another corporation in a similar business, and as a part of the purchase price may guarantee and agree to pay dividends on certain outstanding preferred stock of the latter company. Such a contract is not illegal, immoral or against public policy. *Windmuller v. Standard, etc. Co.*, 106 N. Y. App. Div. 246 (1905); *aff'd*, 186 N. Y. 572. A town improvement company has no power to guarantee dividends on the stock of an investment company. *Greene v. Middleborough, etc. Co.*, 89 S. W. Rep. 228 (Ky. 1905). A manufacturing corporation may be liable on its guaranty of a third person's obligation to pay for materials which are to be manufactured into articles for the corporation, and which it could not otherwise obtain. *White-*

head v. American, etc. Co., 70 N. J. Eq. 581 (1905). The president and vice-president of a trust company have no authority to give its guarantee that certain outside stock and bonds will be sold at a certain price, the trust company having no interest therein. *Gause v. Commonwealth T. Co.*, 55 N. Y. Misc. Rep. 110 (1907). A brewing company may become surety on a liquor license bond to induce the licensee to lease a building from the company and deal in its product. *Horst v. Lewis*, 71 Neb. 365 (1904). A brewing company may guarantee a note in order to obtain a new customer. *Blue Island Brewing Co. v. Fraatz*, 123 Ill. App. Rep. 26 (1905). A construction company's contract to pay certain interest on bonds, which it received in payment in advance, does not obligate it to pay interest on bonds received by it in regular payment. *Foster v. Mansfield, etc. R. R.*, 36 Fed. Rep. 627 (1888); *aff'd*, 146 U. S. 88 (1892). A trading corporation may defend against its guarantee of a note on the ground that it received no consideration therefor. *Deaton, etc. Co. v. International, etc. Co.*, 105 S. W. Rep. 556 (Tex. 1907). A corporation which has taken an assignment from one of its debtors of the price of a product sold by the latter may guarantee to a third party the cost of finishing such product, in order to realize the price. *Flint, etc. Co. v. Kerr-Murray, etc. Co.*, 56 N. E. Rep. 858 (Ind. 1900). Where the

A lumber company may become surety on a building contractor's bond where it is customary for such companies so to do in order to

guarantor agrees to make good any deficiency in dividends "below ten per cent. per annum," any dividend in any year in excess of ten per cent. will be applied to make up the deficiency in any other year, there being no provision in the agreement that dividends shall be paid annually. *Fontana v. Pacific, etc. Co.*, 61 Pac. Rep. 580 (Cal. 1900). Although the entire capital stock of a corporation is issued for the equity of redemption in certain steamboats, it may be shown by parol evidence that the corporation assumed the payment of the mortgages on the boats. Such assumption of a debt is legal. *Farmers' Bank, etc. v. Ohio River, etc. Co.*, 108 Ky. 447 (1900). Where a person sells his business to a corporation for the stock of the latter, with the agreement of the latter to indorse the notes of the vendor, such indorsements are legal. *Nat. Bank of Commerce v. Allen*, 90 Fed. Rep. 545 (1898). A carpet and furniture company may indorse the note of a hotel company where the latter is being practically carried by the former. *Hess v. Sloane*, 66 N. Y. App. Div. 522 (1901); *aff'd*, 173 N. Y. 616. A corporation as a member of a copartnership may be liable on a note given by said copartnership and indorsed by the corporation. *Johnson v. Weed, etc. Co.*, 103 Wis. 291 (1899). A brewing company has power to guarantee a lease of premises occupied by one of its customers, and containing fixtures mortgaged to the company. *Fuld v. Burr Brewing Co.*, 18 N. Y. Supp. 456 (1892); *Holm v. Claus, etc. Co.*, 21 N. Y. App. Div. 204 (1897); *Koehler, etc. Co. v. Reinheimer*, 26 N. Y. App. Div. 1 (1898). A brewing company cannot become surety on an appeal bond, even though thereby it continues to sell beer to the appealing party. The company is not liable. *Best, etc. Co. v. Klassen*, 185 Ill. 37 (1900). The payee of a note given by one corporation in payment of a debt due from another corporation, there being no connection or consideration between the two corporations, cannot enforce the note. *Ehrgott v. Topeka Bridge Manufactory*, 16 Kan. 486 (1876); *Rahm v. King Bridge Manufactory*, 16 Kan. 277 (1876). A transfer company cannot guarantee the credit of another person. *Lucas v. White Line Transfer Co.*, 70 Iowa, 541 (1886). A contract between two companies by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contracts, and pay dividends on its stock) is illegal. *James v. Eve*, L. R. 6 H. L. 335 (1873). The amount of indebtedness which may be incurred by a national bank being limited to the amount of its capital stock, its guarantee of a debt, after it has already incurred liabilities to the extent allowed by law, cannot be enforced. *Weber v. Spokane Nat. Bank*, 50 Fed. Rep. 735 (1892). In a suit to enforce a guaranty by one company of dividends on the stock of another company, the charter authority for such guaranty must be set forth; and where the suit is against still another corporation on the ground that the latter had assumed such guaranty, the contract of such assumption must be set forth. Ordinarily such a guaranty is not enforceable. *Rhorer v. Middlesboro, etc. Co.*, 44 S. W. Rep. 448 (Ky. 1898). A corporation organized to deal in the stock of a stockyard corporation, and hold personal and real estate, may buy competing stockyards; also may buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stockyard company, and to bind stockyard men not to erect competing yards for a specified

obtain business.¹ A national bank cannot agree that a person becoming surety on an attachment bond will be protected by the bank, where the bond is not given for the benefit of the bank.² A national bank has no power to guarantee a draft in which it has no interest.³ Where a national bank in order to obtain payment of a debt due to it, guarantees a still larger sum, it is liable on the guaranty to the extent of the debt so paid to it.⁴ A receiver appointed in a foreclosure suit on a mortgage which is a lien prior to a guaranty may, within a reasonable time after taking possession, refuse to carry out

term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. *Ellerman v. Chicago Junction, etc. Co.*, 49 N. J. Eq. 217 (1891). Where a company is in financial distress, and its creditors agree to an extension of time provided the company assumes certain private debts of the directors, the company has power to do so, but bad faith may invalidate the transaction. *Stark Bank v. United States Pottery Co.*, 34 Vt. 144 (1861). Where the payment of the coupon is guaranteed, demand of payment at the place where the coupon is payable should be made within a reasonable time after it becomes due. *Arents v. Commonwealth*, 18 Gratt. (Va.) 750 (1868).

1 *Central Lumber Co. v. Kelter*, 201 Ill. 503 (1903); *Wheeler, etc. Co. v. Everett Land Co.*, 14 Wash. 630 (1896). A contract of a lumber company organized to buy and sell lumber, by which it guarantees a building contract is *ultra vires* and cannot be enforced against the corporation upon its insolvency. *In re Smith Lumber Company*, 132 Fed. Rep. 620 (1904). Where a lumber company becomes surety on the bond of a contractor against mechanics' liens on a building which he is about to build and for which the company is to furnish the lumber, the defense of *ultra vires* is not good. *G. F. Wittmer, etc. Co. v. Rice*, 23 Ind. App. 586 (1900). A lumber selling company cannot claim a lien on a building where it has guaranteed the performance of the con-

tract by the builder. *Interior, etc. Co. v. Prasser*, 108 Wis. 557 (1901).

2 A bank is not bound by a guaranty which its cashier makes on a bond and mortgage in which the bank has no interest. *Farmers', etc. Nat. Bank v. Smith*, 77 Fed. Rep. 129 (1896). *Contra*, *Seeber v. Commercial Nat. Bank*, 77 Fed. Rep. 957 (1897). A national bank has no power to guarantee the payment of debts where the bank has no interest in the matter. Such a guaranty is not enforceable. *Commercial Nat. Bank v. Pirie*, 82 Fed. Rep. 799 (1897). An agreement of a national bank that it will pay all checks of a person is not enforceable by a party who cashes such checks relying on such agreement, it appearing that the bank had no funds of the former to meet such checks. This is an *ultra vires* contract of guaranty. *Bowen v. Needles, etc. Bank*, 94 Fed. Rep. 925 (1899); *First Nat. Bank v. Amer. Nat. Bank*, 173 Mo. 153 (1903). A national bank cannot certify a check payable if a building contract is not performed, there being no money to respond to the check. *Fidelity, etc. Co. v. National Bank, etc.*, 106 S. W. Rep. 782 (Tex. 1908). Even though a bank has no power to make a guaranty, yet the officer signing the bank's name to such guaranty is not personally liable thereon. *Thilmany v. Iowa, etc. Co.*, 108 Iowa, 357 (1899). *Cf.* note 3, p. 2683.

3 *National Bank, etc. v. Sixth Nat. Bank*, 212 Pa. St. 238 (1905).

4 *Appleton v. Citizens', etc. Bank*, 190 N. Y. 417 (1907).

the terms of a lease which the company had entered into, and may refuse to be bound by a guaranty of the bonds of the lessor.¹ Where a guaranty authorized by statute is to be by the company, it may be by the directors without any action of the stockholders.² A stockholder who assents to a guaranty cannot afterwards attack it on the ground that the corporation had no power to enter into it.³ A New Hampshire stockholder in a Kansas corporation may defend against a statutory liability on the stock on the ground that the plaintiff's claim against the corporation is an *ultra vires* guaranty, even though the state court may have decided such guaranty to be valid.⁴

It is a question of considerable doubt as to whether a guaranty on bonds is negotiable, the same as the bonds themselves. But the better opinion is that the negotiability of the instrument guaranteed extends also to the guaranty itself.⁵ Where a guaranty on

¹ Ames v. Union Pac. Ry., 60 Fed. Rep. 966 (1894).

² Louisville Trust Co. v. Louisville, etc. Ry., 75 Fed. Rep. 433 (1896).

³ If all the parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. Barr v. New York, etc. R. R., 125 N. Y. 263 (1891). Where an agricultural society guarantees the bonds of a street railway, a participating stockholder in such society cannot afterwards object. Thompson v. Lambert, 44 Iowa, 239 (1876). See also Martin v. Niagara, etc. Co., 122 N. Y. 165 (1890), and §§ 3, 735, *supra*. A guaranty by a paving company that the pavement will be good for ten years cannot be enjoined at the instance of a stockholder where the pavement has been completed. Fisher v. Georgia, etc. Co., 121 Ga. 621 (1905).

⁴ Ward v. Joslin, 186 U. S. 142 (1902), aff'g 100 Fed. Rep. 676.

⁵ Louisville Trust Co. v. Louisville, etc. Ry., 75 Fed. Rep. 433 (1896); Louisville, etc. Ry. v. Louisville T. Co., 174 U. S. 552, 573 (1899); Toppan v. Cleveland, etc. R. R., 1 Flap. 74 (1862); s. c., 24 Fed. Cas. 56. See also § 768, *supra*. Not only the bonds, but the state's indorsement or guar-

anty on them, are negotiable, and a *bona fide* purchaser of them from a contractor to whom they were fraudulently issued may enforce them. Gilman v. New Orleans, etc. R. R., 72 Ala. 566 (1882). The state's indorsement or guaranty of bonds is negotiable. State v. Cobb, 64 Ala. 127 (1879). "Where the statute confers express authority upon the company to guarantee the bonds of another company a mere failure on the part of the guaranteeing company to pursue the mode specified in the statute will not invalidate such guaranty in the hands of the *bona fide* holder." Atchison, etc. R. R. v. Fletcher, 35 Kan. 236, 248 (1886). For a full statement of the law relative to the negotiability of a guaranty of a note, see Daniels on Negotiable Instruments (4th ed.), §§ 1774-1784. A guaranty indorsed on a negotiable note is generally not negotiable. 1 Am. Lead. Cas. (ed. 1871), 410. *Quære*, whether this is the same as to guaranties of railroad bonds. Arents v. Commonwealth, 18 Gratt. (Va.), 750, 767 (1868). In Codman v. Vermont, etc. R. R., 16 Blatchf. 165 (1879); s. c., 5 Fed. Cas. 1157, where two companies joined in making notes, and then one of these companies indorsed the same and also guaranteed payment, the court, per Wheeler, J., said: "This guaranty is

negotiable bonds is in terms payable to the holder thereof, such guaranty itself is negotiable with the bonds.¹ A *bona fide* purchaser of guaranteed bonds is protected where the corporation had power to give it, even though the power was used improvidently or in bad faith, and even though the proceeds of the bonds were wilfully misapplied.²

A guaranty of stock, without specifying the length of time for which the guaranty is to run, continues so long as the stock is outstanding. In case of the insolvency of the guarantor, the guaranty constitutes a claim against it, and the amount of the claim is measured by the par value of the stock if the guarantor had remained solvent.³ A guaranty on a bond is transferable, but at common law a suit to enforce it should be brought in the name of the payee of the bond, even though the bond runs to a certain person or bearer.⁴

A guaranty of the bonds or dividends on the stock of a corporation should be written on the bonds or certificates of stock and signed by the guaranteeing party.⁵ If the guaranty rests merely on a contract between the two corporations, it may be modified by

not, in terms, negotiable. By it the defendant guarantees the payment of the note principal and interest, 'according to its tenor.' The note being negotiable, perhaps these words draw that quality into the guaranty. If they do, the guaranty would seem to be negotiable. Story, Prom. Notes, § 484. If not, in *Partridge v. Davis*, 20 Vt. 499 (1848), Davis, J., seems to have thought such a guaranty would, in effect, be negotiable; while in *Sandford v. Norton*, 14 Vt. 228 (1842), and in *Sylvester v. Downer*, 20 Vt. 355 (1848), the late Chief Justice Redfield was clearly of the opinion that, like ordinary simple contracts, such guaranties would not be negotiable." If a railroad may lease another road, it may guarantee interest on the latter's bonds, such interest being the rent. Though the bonds are negotiable the guaranty is not. If bonds are issued for construction work which is not done, a *bona fide* purchaser of the bonds cannot enforce a guaranty thereof by another corporation. *Eastern, etc. Bank v. St. Johnsbury, etc. R. R.*, 40 Fed. Rep. 423 (1889). As to the negotiability of a

guaranty of a note or bond, see also *Brandt on Suretyship*, §§ 48, 49.

¹ *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 573 (1899).

² *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898).

³ *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47 (1893); rev'd on another point in *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335 (1894). Cf. § 642, *supra*. Where the guarantor becomes insolvent, the maker of the bonds being solvent and continuing to pay the coupons, the distribution of the assets of the guarantor will not be delayed or restricted by the possibility of future liability on the guaranty. *Gay Mfg. Co. v. Gittings*, 53 Fed. Rep. 45 (1892).

⁴ *Owen v. Potter*, 115 Mich. 556 (1898).

⁵ A holder of stock of a railroad corporation, the dividends on which are legally guaranteed by another railroad corporation, such guaranty being endorsed upon the certificate of stock, may sell the same and is entitled to a new certificate running to the purchaser and containing the same guarantee executed afresh.

the corporations;¹ or it may be beyond the power of the bondholder to enforce the guaranty,² or the guaranteed company may have difficulty in enforcing the contract.³ An additional obligation

Marklove v. Utica, etc. R. R., 48 N. Y. Misc. Rep. 258 (1905).

1 If the guaranty is to the corporation, and not to the stockholders severally, the board of directors may reduce the amount of the guaranty. *Beveridge v. New York, etc. R. R.*, 112 N. Y. 1 (1889). Where by the terms of a lease of all the corporate property the rent is to be paid directly to the stockholders as dividends, and a prior mortgage of the lessee is foreclosed, and the lease is not assumed by the receiver, a stockholder of the lessor cannot object to a subsequent arrangement between the lessor and the reorganized company of the lessee by which a certain sum is paid to the lessor to be used for other purposes than dividends. *Central, etc. Co. v. Farmers', etc. Co.*, 112 Fed. Rep. 81 (1901). Where one corporation has taken a lease of the property of another and guarantees dividends on the stock of the latter, and then acquires a majority of the stock of the latter and proposes to rescind such an agreement, a minority stockholder may enjoin such action. *McLeary v. Erie, etc. Co.*, 38 N. Y. Misc. Rep. 3 (1902).

2 The agreement of a railroad company to pay the bonds of another railroad company is not enforceable by the bondholders. The court said: "A mere valid promise or undertaking, taken by the company to give it support financially by enabling it to escape default for the non-payment of interest, evidently is not the property which the mortgagee took by force of this indenture, although it was obtained by the mortgagor for its financial relief and support, and its performance would have had the effect to enable it to operate its road." There is no privity of contract between the contracting company and the bondholders in such a case as this. The

contract is between the two companies alone. The outside company owed no debt and held no fund in trust for the other company nor for the latter's bondholders. *Metropolitan Trust Co. v. New York, etc. R. R.*, 45 Hun, 84 (1887), holding, however, that a different case is presented where the contract is executed, as where a lease has been made. See also § 831, *infra*. A guaranty that certain construction work will be free from any lien ahead of a specified mortgage does not render the guarantor liable to parties who have furnished materials to the contractor. *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. Rep. 879 (1891). Even though a person turns over his merchandise business for stock of a corporation and agrees that the latter will guarantee a certain debt, yet if in the transaction nothing is said about the debt the corporation is not thereafter liable on it. *Evans v. Johnson*, 149 Fed. Rep. 978 (1906). A creditor of a railway company which has sold all its property to another company for a specified price, the former company agreeing to pay its own debts and such agreement being guaranteed by outside parties, cannot hold such outside parties liable on such guaranty. *Randall v. Detroit, etc. Ry.*, 134 Mich. 493 (1903).

3 Where one railroad, by contract with another, guarantees the interest on the bonds of the latter, but fails to fulfill its contract, the latter railroad itself cannot enforce the guaranty. The liability to repay attaches at once. In any case, the remedy is not in equity. *Bradford, etc. R. R. v. New York, etc. R. R.*, 123 N. Y. 316 (1890). A guaranty by one company of dividends on the stock of another company is a collateral undertaking. *Miller v. Ratterman*, 47 Ohio St. 141 (1890). A corporation cannot enforce

in the bond, making it payable in gold, and added after the guaranty was made, binds the company, but not the guarantor.¹ The agreement of a railroad company with another company to pay the interest on the bonds of the latter cannot be enforced by a contractor with the former, who was to build the road for the bonds.² The holder of coupons, representing interest upon railroad bonds, has no right of action on an agreement by the lessee of the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them, such holder of coupons being a stranger to the contract and the consideration.³ A guaranty of the principal and interest of a bond does not follow a coupon which has been detached from the bond.⁴ A guaranty of coupons set forth in the bonds themselves may be enforced by the holder, even though the trustee of the mortgage also has power to enforce the guaranty, and even though the mortgage provides that in case the security becomes insufficient the guarantor shall pay certain of the obligations until it becomes sufficient.⁵ Where a railroad is leased to another railroad and bonds of the former are issued and sold on the strength of an existing guaranty by the latter, and the latter passes into a receiver's hands, any bondholder may intervene in the receivership proceedings and cause the receiver to pay such interest, even though the contract of guaranty was contained in the lease only, and was not directly with the bondholders, and even though the bondholders had not applied to the trustee of the mortgage to enforce such guaranty.⁶ Where the guar-

a contract by which the seller of its stock agrees with the purchaser that the corporate accounts will be collected and that the debts do not exceed a certain amount. *Rochester, etc. Co. v. Fahy*, 111 N. Y. App. Div. 748 (1906); *aff'd*, 188 N. Y. 629. A lessor of a railroad, the lease providing for dividends on the lessor's capital stock, may enjoin the lessee from discontinuing the operation of the railroad where such discontinuance would subject the charter of the former to forfeiture. Such injunction may also run against the purchaser of the lease from the lessee who has agreed to abide by the terms thereof. *Southern Ry. v. Franklin, etc. R. R.*, 96 Va. 693 (1899). As to whether the trustee can in the foreclosure suit enforce to the extent of the deficiency a guar-

antee of the bonds, see *Central Trust Co. v. Indiana, etc. R. R.*, 98 Fed. Rep. 666 (1900).

¹ *Wallace v. Loomis*, 97 U. S. 146 (1877).

² *Reynolds v. Louisville, etc. Ry.*, 143 Ind. 579 (1895).

³ *Freeman v. Pennsylvania R. R.*, 173 Pa. St. 274 (1896). See § 831, *infra*.

⁴ *Clokey v. Evansville, etc. R. R.*, 16 N. Y. App. Div. 304 (1897).

⁵ *Townsend v. Colorado Fuel, etc. Co.*, 16 N. Y. App. Div. 314 (1897).

⁶ *Mercantile T. Co. v. Baltimore, etc. R. R.*, 94 Fed. Rep. 722 (1899). Where one corporation purchases all the assets of another corporation and assumes the latter's liabilities and guarantees certain dividends on its stock, a holder of such stock may sue the

anty is not for the yearly payment of a sum equal to a specified percentage on the stock held by the guaranteed party in the corporation, nor on the nominal amount of his stock, but is that the dividends of the corporation shall annually equal that sum, the dissolution of the corporation puts an end to the guaranty. The dissolution in this case was due to acts of the corporation for which all parties were equally responsible.¹ A guaranty of dividends on stocks, so long as

purchasing corporation for such dividends. *Greene v. Middlesborough, etc. Co.*, 61 S. W. Rep. 288 (Ky. 1901). A railroad company that has guaranteed bonds of another company cannot enjoin suits at law on such guaranties on the ground of a multiplicity of suits. *French v. Union Pac. Ry.*, 92 Fed. Rep. 28 (1899). In the case of *Kurtz v. Philadelphia & R. R. R.*, 187 Pa. St. 59 (1898), the reorganization of the Reading railroad was attacked by a holder of bonds which had been guaranteed by the insolvent company, there having been a default made in the interest on such bonds. The bondholder claimed that he was entitled to participate in a certain part of the reorganization fund which had been set aside to adjust claims of various outstanding bondholders, creditors and stockholders, and of commissioners, etc. The court held that the suit would not lie.

Where the guarantor agrees to make good any deficiency in dividends "below ten per cent. per annum," any dividend in any year in excess of ten per cent. will be applied to make up the deficiency in any other year, there being no provision in the agreement that dividends shall be paid annually. *Fontana v. Pacific, etc. Co.*, 129 Cal. 51 (1900). In the case of *Central of Georgia Ry. v. Paul*, 93 Fed. Rep. 878 (1899), a general creditor of an insolvent railroad which had been foreclosed was held to have a valid claim against the reorganized company, it being shown that the stockholders of the old company received in exchange for their stock the stock of the new company. The general creditor in this case was the unregistered holder of

the stock of another company, dividends upon which had been guaranteed by the insolvent company and had not been paid. It also appears in this case that a portion of the property of the insolvent corporation was not covered by the mortgage, but was included in the property that was turned over to the reorganized company.

Where one street railway company takes a lease of the street railways of three other companies on an agreement whereby the stock of the latter companies is deposited with a trustee, and the lessee issues "stock trust certificates" therefor, being its obligation to pay a fixed rate of interest per year with an option on its part to pay the principal sum or not, at its option, at a specified time, the stock being security therefor, to be sold by the trustee in case the principal and interest are not paid, this mode of financing does not create a debt, and hence such certificates are not subject to taxation as a bond and mortgage, the transaction being really a guaranteed dividend or rental. *Commonwealth v. Union, etc. Co.*, 192 Pa. St. 507 (1899). Where a railroad is leased, the lessee agreeing to pay certain dividends on the stock of the lessor, and the lessee becomes insolvent, and afterwards the rental, by order of the court, is paid to the lessor itself, it does not belong to the stockholders of the lessor, but may be used for other purposes of the lessor. *Farrar v. Southwestern R. R.*, 116 Ga. 337 (1902).

¹ *Lorillard v. Clyde*, 142 N. Y. 456 (1894), rev'g 15 N. Y. Supp. 809, and 20 N. Y. Supp. 433.

the certificates are outstanding, but not to exceed the period for which the company was incorporated, ceases upon the dissolution of the company, even though the guarantor owns a majority of the stock of the company and brings about the dissolution, unless the dissolution was for the purpose of escaping this liability.¹ Where one railroad leases another and guarantees dividends to the stockholders of the latter, but for several years fails to meet the guaranty, a stockholder, who in the meantime disposes of his stock, but retains the "dividends and profits" arising within a certain time, is entitled to the arrears of dividends, even though the same are paid after the time specified in the reservation, and even though by compromise they are only paid in part.² Even though the bondholders buy the property at foreclosure sale and afterwards sell it at a profit, the guarantor of the bonds is entitled to credit for only the price realized at the foreclosure sale.³ Where bondholders of a lessor railroad are entitled to the rent in payment of their coupons, they may enforce the obligation.⁴ Even though a railroad company has guaranteed the bonds of another railroad company, and then sells all its property to a third railroad company, yet the guaranteed bondholders cannot have a receiver appointed of the price received on such sale, nor can they prevent a distribution of the price among the stockholders of the selling company, unless it is shown that thereby

1 *Mason v. Standard, etc. Co.*, 85 N. Y. App. Div. 520 (1903). A guaranty of dividends for ten years ceases upon the dissolution of the corporation inasmuch as "dividends" are no longer possible. *Columbus T. Co. v. Moshier*, 51 N. Y. Misc. Rep. 270 (1906).

2 *Meldrim v. Trustees, etc.*, 100 Ga. 479 (1897). A guaranty by an outside party that upon the winding up of a corporation the stock should receive so much, passes to a purchaser of the stock, the transfer having been made subject to the agreement. *Bacon v. Grossmann*, 71 N. Y. App. Div. 574 (1902).

3 *Owen v. Potter*, 115 Mich. 556 (1898).

4 *Schmidt v. Louisville, etc. R. R.*, 101 Ky. 441 (1897); *aff'd*, 177 U. S. 230. Where by the terms of a lease the rent is to be used to pay the interest on bonds, the contract may be enforced by the bondholders. *Welden Nat. Bank v. Smith*, 86 Fed. Rep. 398

(1898). Where by the terms of a lease of all the corporate property the rent is to be paid directly to the stockholders as dividends, and a prior mortgage of the lessee is foreclosed, and the lease is not assumed by the receiver, a stockholder of the lessor cannot object to a subsequent arrangement between the lessor and the reorganized company of the lessee by which a certain sum is paid to the lessor to be used for other purposes than dividends. *Central, etc. Co. v. Farmers', etc. Co.*, 112 Fed. Rep. 81 (1901). Where a lease gives to the lessor thirty per cent. of the gross earnings, this thirty per cent. is not a rental or a mere obligation to pay, but is impressed with the trust, and having been made payable to the bondholders of the lessor they may collect it from the receiver of the lessee. *Terre Haute, etc. R. R. v. Cox*, 102 Fed. Rep. 825 (1900).

the guarantor is made insolvent.¹ An owner of guaranteed bonds cannot pursue the property of the guarantor into the hands of another corporation, before he has exhausted his remedy against the principal debtor.² Where a railroad company leases all its property to another company, and by the terms of the lease the lessee is to pay dividends on the stock of the lessor directly to the holders thereof, and the lessee is also to be allowed to place a mortgage upon the property of the lessor, the lessor corporation, which has passed into the hands of a receiver by reason of such mortgage, may file a bill in equity to compel the lessee to account for the funds realized on the sale of the mortgage bonds, and also to compel payment of the guaranteed dividends.³ After the filing of such a bill a stockholder cannot bring suit to enforce the payment of the guaranteed dividend on his stock.⁴ Even though a railroad lease is perpetual and provides that the lessee shall pay certain interest and dividends, yet any saving by reason of a refunding of the bonds of the lessor belongs to the stockholders of the lessor and they may recover such saving as has been made within the time of the statute of limitations, especially where it has directors in common, and the fact that the guaranty of dividends was endorsed on the stock certificates is immaterial.⁵ The guarantor of bonds secured by a mortgage of a waterworks company may bring suit to enjoin the city from violating the contract between the city and the company.⁶ The statute of limitations does not begin to run against a guaranty until it ripens into an actual debt.⁷

A few forms of guaranties of bonds and dividends on stock are given in the notes below.⁸

¹ *Guilmartin v. Middle G. & A. Ry.*, 101 Ga. 565 (1897).

² *Sawyer v. Atchison*, 129 Fed. Rep. 100 (1904).

³ *Pacific R. R. v. Atlantic & P. R. R.*, 20 Fed. Rep. 277 (1884). See also § 787, *infra*. An owner of bonds which were guaranteed by another company, which latter company has been foreclosed and reorganized, cannot maintain a suit in equity to compel the reorganized company to pay the bonds. His remedy, if he has any, is at law. *Sawyer v. Atchison, etc. R. R.*, 119 Fed. Rep. 252 (1902); *aff'd*, 129 Fed. Rep. 100.

⁴ *Reed v. Atlantic & P. R. R.*, 85 Fed. Rep. 692 (1884).

⁵ *Ætna Ins. Co. v. Albany, etc. Co.*, 156 Fed. Rep. 132 (1907). See also

Continental Ins. Co. v. N. Y., etc. R. R., 187 N. Y. 225 (1907).

⁶ *American, etc. Co. v. Home, etc. Co.*, 115 Fed. Rep. 171 (1902).

⁷ *Anglo-American, etc. Co. v. Lombard*, 132 Fed. Rep. 721 (1904).

⁸ Form of guaranty on West Shore Railroad bonds:

GUARANTY.

For value received the New York Central and Hudson River Railroad Company hereby guarantees the punctual payment of the principal and interest of the within bond at the time and in the manner therein specified, and covenants, in default of payment of any part thereof by the obligor, to pay the said principal and interest of the within bond as the same shall become due, upon the demand of the holder thereof.

In witness whereof the said company has caused its corporate seal to be hereto affixed and attested by its secretary, and this

If the guarantor takes up the securities he may enforce their payment as against the company liable thereon, but his rights are second to those of any of the guaranteed bonds not so taken up.¹

instrument to be signed by its president or one of its vice-presidents.

The proposed guaranty by the United States government of the Nicaragua Canal Company bonds was as follows:

The United States of America guarantees to the lawful holder of this bond the payment by the Maritime Canal Company of Nicaragua of the principal of said bonds and the interest accruing thereon, and as it accrues.

Form of guaranty of dividends on Rome, Watertown, etc., Railroad stock:

The New York Central and Hudson River Railroad Company hereby guarantees to the holder, for the time being, of this certificate the payment of 1½ per cent. on the par value of the stock represented thereby, on the 15th days of May, August, November, and February in each year, during the continuance of a certain lease, dated the 14th day of March, 1891, by the Rome, Watertown, and Ogdensburg Railroad Company to the said New York Central and Hudson River Railroad Company.

In witness whereof the corporate seal of the said New York Central and Hudson River Railroad Company has been hereto affixed, attested by an officer thereof, the — day of —, A. D. 18—.

NEW YORK CENTRAL AND HUDSON RIVER
RAILROAD COMPANY,

By — — —, Treasurer.

Form of guaranty on bonds of New York and New England Railroad Company issued in 1897:

For value received the New York, New Haven, and Hartford Railroad Company guarantees the payment of the principal and interest of the bond according to the terms of the bond and coupons annexed; but, if any payment be demanded on this guaranty, this bond shall, at the option of said guarantor, or of the then holder thereof, be exchanged for a debenture of the guarantor for the same amount, and at the same rate of interest, both payable in like gold coin, for the then unexpired term of this bond.

A guaranty signed by an individual

in his own name, followed by the letters "Pt.," may be shown to be the obligation of the corporation only, provided the corporation might execute a guaranty and authorized the president to execute it. *Small v. Elliott*, 12 S. D. 570 (1900). See also § 724, *supra*.

¹ Where, the bonds being in default, the trustee foreclosed by taking and retaining possession, and conveyed the property to a new corporation, the bondholders taking stock for their bonds, a guarantor of the bonds who paid some of the old coupons as they became due gets nothing, inasmuch as the whole property was used to pay the guaranteed bonds. *Child v. New York, etc. R. R.*, 129 Mass. 170 (1880). The guaranty was as follows: "In consideration of the provisions of a contract of even date for the use of the Boston, Hartford & Erie Railroad by the Erie Railway Company, the Erie Railway Company hereby agrees with the holder of this bond that the several interest warrants hereto attached shall be paid as they respectively mature. Witness the seal of the Erie Railway Company and the signature of its secretary, at the city of New York, the 8th day of October, A. D. 1867." The contract by which the guaranty was agreed upon contained the following clause: "And it is further agreed that any interest warrants which the said party of the second part shall be obliged to take up under the provisions of this contract, or the indorsement which may be put on any of said bonds, shall be and remain a valid lien on all the franchises and property named in or secured by said mortgage." A guarantor of bonds which have become due cannot participate in the assets along with the bondholders on coupons which have been paid by the guarantor. The bond-

Where one company agrees on the face of the bonds of another company to purchase the coupons and bonds as they become due, the former company cannot foreclose until it has fully completed the contract of purchase.¹ A guarantor of the interest on mortgage bonds is not a necessary party to a foreclosure suit, since he is not entitled to subrogation until the whole debt for which he is liable is paid. Otherwise the guaranty would be useless.²

Where a company insures to an individual the payment of a debenture held by such individual in case of default on the debenture becoming due, the insuring company is liable, even though, under a clause in the debenture, the other debenture-holders postpone payment.³

Where a state guarantees bonds, the guaranty is construed and enforced the same as where the guaranty is by a corporation.⁴

A guaranty by one individual of certain dividends on stock held by another individual is legal and enforceable.⁵ An agent employed

holders are to be paid first, since the guarantor is liable to pay them. But where the principal is not due, the guarantor's coupons are to be paid after other outstanding coupons are paid. *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501, 540 (1870), holding also that where the guarantor has paid a part of the securities which were guaranteed, the remaining part is to be paid first, and thus the guarantor is to be repaid and then other creditors come in. The lessees of the guarantor, having taken up coupons which were guaranteed, are "entitled to the same remedies for the collection thereof to which the creditors themselves would have been entitled," and may apply for a receiver under the New Jersey statute. *Pennsylvania R. R. v. Pemberton, etc. R. R.*, 28 N. J. Eq. 338 (1877). As to the guarantor company's right to institute suit to protect its interests, see also *Florida v. Anderson*, 91 U. S. 667 (1875). The guarantor may enforce a mortgage given to protect it. *Macon, etc. R. R. v. Georgia, etc. R. R.*, 63 Ga. 103 (1879). Where railroad bonds are secured by a mortgage on the railroad, and also a mortgage on the property of another corporation, the latter may

be foreclosed before the former where the former would realize nothing. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885).

¹ *Pennsylvania R. R. v. Allegheny, etc. R. R.*, 48 Fed. Rep. 139 (1891); *Pennsylvania R. R. v. Allegheny, etc. R. R.*, 42 Fed. Rep. 82 (1890).

² *Columbia, etc. Trust Co. v. Kentucky Union Ry.*, 60 Fed. Rep. 794 (1894). The guarantor of mortgage bonds is not a necessary party to a foreclosure suit. "If the guarantor would be subrogated to the rights of the creditor or purchaser, he should pay the debt or offer to redeem." *Owen v. Potter*, 115 Mich. 556 (1898).

³ *Finlay v. Mexican Inv. Corp.*, [1897] 1 Q. B. 517.

⁴ *Commonwealth v. Chesapeake, etc. Co.*, 32 Md. 501 (1870); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885); *Gilman v. New Orleans, etc. R. R.*, 72 Ala. 566 (1882); *State v. Cobb*, 64 Ala. 127 (1879); *Florida v. Anderson*, 91 U. S. 667 (1875).

⁵ See §§ 334, note, 339, *supra*. In a celebrated litigation in New York state it was adjudicated:

First. That such a guaranty is valid and enforceable. *Lorillard v. Clyde*, 86 N. Y. 384 (1881).

to sell stock has no inherent power, however, to guarantee dividends thereon.¹ A guaranty by the vendor of stock that six per cent. dividends will be paid on the stock will be construed as continuing for a

Second. That the defendants were liable upon it, during the time the corporation subsisted *de facto*, although there existed cause for its dissolution. *Lorillard v. Clyde*, 48 N. Y. Super. Ct. 409 (1882); affirmed, 99 N. Y. 196.

Third. That separate actions may be brought on the contract as the instalments fall due, and separate recoveries had in each. *Lorillard v. Clyde*, 122 N. Y. 41 (1890).

Fourth. That the plaintiff was in no legal sense a party to an action by the people of the state, and not concluded by the findings therein. *Lorillard v. Clyde*, 48 N. Y. Super. Ct. 409 (1882); affirmed, 99 N. Y. 196.

Fifth. That the dissolution of the corporation put an end to the guaranty. *Lorillard v. Clyde*, 142 N. Y. 456 (1894), rev'g 15 N. Y. Supp. 809, and 20 N. Y. Supp. 433, this decision being due to the peculiar wording of the contract. A guaranty by certain persons that a subscriber for stock would receive eight per cent. dividends thereon for three years may be enforced, even though the stock was not fully paid up during the three years. *Rogers v. Chambers*, 112 Ga. 258 (1900). Stockholders who endorse a bond of a corporation may set up the five years' statute of limitations although the bond was a sealed instrument. Facts connected with the stockholders endorsing the bond may be explained by parol. *Somers v. Florida, etc. Co.*, 50 Fla. 275 (1905). A guarantor of a note cannot defend on the ground that the note is secured by collateral which should first be sold. *Knickerbocker T. Co. v. Coyle*, 139 Fed. Rep. 792 (1905). In general, see *Sheffield Nickel Co. v. Unwin*, L. R. 2 Q. B. D. 214 (1877), where a release by a corporation of a guaranty of certain profits made to it by a per-

son who had sold property to it was upheld. Where the profits are properly used to pay debts, a guarantor of dividends cannot question the propriety of such use of the profits. *Pratte v. Enslow*, 46 W. Va. 527 (1899). The joint guaranty by several parties of a specified dividend for a specified time on certain stock in order to bring about its sale, together with their agreement to purchase the stock at par at the end of the time, and if they fail to do so to continue to pay the guaranteed dividends, is enforceable against all for the guaranteed dividends for the specified time, but as to the purchase is enforceable against those only upon whom a demand is made that they purchase the stock in accordance with the agreement. *Rogers v. Burr*, 105 Ga. 432 (1898). Even though a corporation becomes insolvent, yet a person who has guaranteed certain dividends on its stock for a specified period cannot be held liable on such guaranty for the whole remaining period before the time for the payment of such dividends has been reached. *Green v. Hart*, 52 La. Ann. 213 (1899). A guaranty by two individuals that ten per cent. dividends shall be paid on all stock of the corporation for the period of ten years does not, at the expiration of two years, become due for the whole ten years, even though the corporation becomes insolvent at the end of the two years. *Hornor v. McDonald*, 52 La. Ann. 396 (1899). A guaranty by the vendor of stock to pay a certain dividend thereon for ten years if the company did not pay such dividend, and also reserving the right to buy back the stock at the end of the five years, may be enforced by the vendee, but the latter can collect the dividends only year by year, even though the

¹ *Smith v. Tracey*, 36 N. Y. 78 (1867).

reasonable time only, and ceases upon the death of the vendee, unless the guaranty ran to him and his representatives.¹

The provision of the statute of frauds relative to answering for the debts, defaults, or miscarriages of another does not apply to a guaranty that there will be a certain dividend on stock purchased.²

Various instances of guaranties by individuals are given in the notes below.³

A corporation that owns stock in another corporation may vote

company becomes insolvent during the first year. *Hawks v. Bright*, 51 La. Ann. 79 (1898). A contract guaranteeing a certain dividend over and above certain corporate expenses does not include payment of salaries, etc. *Central, etc. Assoc. v. James*, 81 Ga. 762 (1888). A guaranty upon the sale of stock that certain dividends will be declared is enforceable against the guaranteeing firm, even though they acted as agents for an undisclosed principal. Their obligation is primary, and not that of guarantors for the company. *Kernochan v. Murray*, 111 N. Y. 306 (1888). Where certain stockholders agree with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. *Rogers v. Burr*, 97 Ga. 10 (1895); s. c., 105 Ga. 432. An agreement of a party to pay to a stockholder a sum of money equal to ten per cent. on the par value of certain stock held by the latter, the stockholder agreeing to turn over to the former all dividends received on the stock during the time specified, is valid and may be enforced, although no dividends are declared, and although no certificates of stock are actually issued. *Guy v. Craighead*, 6 N. Y. App. Div. 463 (1896). Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds stock to secure the performance of the guaranty, he cannot afterwards claim that he has a prior

lien as pledgee of the stock. *Mercantile Trust Co. v. Atlantic Trust Co.*, 86 Hun, 213 (1895). For subsequent phases of this litigation see *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510 (1901). See 96 Pac. Rep. 303.

¹ *Rotch v. French*, 176 Mass. 1 (1900).

² *Moorehouse v. Crangle*, 36 Ohio St. 130 (1880). An oral promise by a stockholder that he would repay at any time after one year the amount paid by an individual to the corporation for stock, if the latter did not receive a profit of twenty per cent., is void under the statute of frauds. *Moore v. Vosburgh*, 66 N. Y. App. Div. 223 (1901). The promise of the directors of a corporation, inducing a person to purchase stock from the corporation, that they will pay enough to make the dividend eight per cent. as long as the corporation exists, is not void, under the statute of frauds, and is enforceable. *People, etc. v. Most* 36 N. Y. Misc. Rep. 139 (1901). Cf. §§ 339, 340, *supra*.

³ Where a stockholder has guaranteed the bonds of a corporation and allowed the mortgage to cover some of his own property and the corporation becomes insolvent, other stockholders, when sued on their statutory liability, cannot set up that this guaranty and mortgage should first be exhausted before they are held liable. *Winthrop, etc. Bank v. Minneapolis, etc. Co.*, 77 Minn. 329 (1899). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation

such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists.¹ A corporation which guarantees to the owners of farms a fixed income per acre therefrom is an insurance company.² Under the statute authorizing corporations for any lawful "business" or "pursuit," a corporation may be formed to guarantee the bonds of an educational institution, and in any event the stockholders in such corporation cannot question the power of the corporation to make such guaranty.³

§ 776. *Debentures*.—In England the securities which are issued by corporations are generally called "debentures." An English debenture is a term which in its widest application includes any instrument issued by a corporation which creates a debt or acknowledges it.⁴ But generally it means a bond⁵ secured by a mort-

for two years is enforceable against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. *Kinsman v. Fisk*, 37 N. Y. App. Div. 443 (1899). Where the vendor guarantees that the vendee can sell the stock within a year at a certain price, and the vendee sells it after the year at a less price, he may recover the difference from the vendor. *Lobeck v. Duke*, 50 Neb. 568 (1897). The agreement of a person with a subscriber for stock that he will pay to the latter one hundred cents on the dollar for the stock within ninety days is not enforceable unless the subscriber tenders the stock and demands the money within that time, and a guaranty to save the subscriber harmless from any loss as a stockholder does not guarantee against loss by a decline in the value of the stock itself. *Morris v. Veach*, 111 Ga. 435 (1900). Where an insolvent insurance company buys out a solvent company, and certain individuals guarantee that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. *Mason v. Cronk*, 125 N. Y. 496 (1891). Where one railroad company agrees to expend certain money on another rail-

road, and the repayment of the money is guaranteed by a third person, such third person cannot repudiate the guaranty after the money has been expended, on the ground that the act was *ultra vires*. *Alexandria, etc. R. R. v. Johnson*, 58 Kan. 175 (1897). In *U. S. Trust Co. v. Western Contract Co.*, 81 Fed. Rep. 454 (1897), bonds and stock were deposited with a railroad corporation to pay the principal and interest on certain other bonds and floating debts of another corporation. After the contract had been partially performed the former corporation became insolvent, and the court passed upon the various rights of the parties.

¹ *Windmuller v. Standard, etc. Co.*, 114 Fed. Rep. 491 (1902); also 115 Fed. Rep. 748. *Cf.* note 1, p. 1775, *supra*.

² *In re Hogan*, 8 N. Dak. 301 (1899).

³ *Maxwell v. Akin*, 89 Fed. Rep. 178 (1898).

⁴ *Levy v. Abercorris, etc. Co.*, L. R. 37 Ch. D. 260 (1887). See also *British, etc. Co. v. Inland Rev. Comm'rs*, L. R. 7 Q. B. D. 165 (1881); *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887). *Cf.* *Topham v. Green-side, etc. Co.*, L. R. 37 Ch. D. 281 (1887); 2 Ry. & Corp. L. J. 529.

⁵ It is applied to evidences of indebtedness such as a deed under seal.

gage,¹ or by a clause equivalent to a mortgage inserted in the bond itself.² An English debenture, when it is a bond and mortgage com-

Ex parte Bradshaw, L. R. 15 Ch. D. 465 (1879), where the form was that of a bond binding the company "and their successors and their real and personal estate," which was held to be a charge upon the real and personal estate of the company as it existed at the date of winding-up proceedings, but not including unpaid capital; *Re City Bank*, L. R. 3 Ch. 758 (1868), where, however, a deed under seal, payable to order, but purporting to be a debenture, was treated as a mere promissory note; *Ex parte* Grissell, L. R. 3 Ch. D. 411 (1875). Also to a simple promise to pay, with a clause subjecting certain property as security. *Re Marine Mansions Co.*, L. R. 4 Eq. 601 (1867). See also note *infra*. A Lloyd bond is a due-bill or acknowledgment of indebtedness issued under seal by a corporation to the constructors, supply men, etc. Rapalje, Law Dict. And see *Re Cork, etc. Ry.*, L. R. 4 Ch. App. 748 (1869). Cavanagh, Money Securities (2d ed., p. 355), defines a debenture as "an instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property in favor of a given person, or of a given person and his order or bearer, and constituting a member in a series of instruments, each entitling the original holder thereof to similar rights. Hence a debenture is distinguished (1) from a mortgage, which is an actual transfer of property; (2) from a bond, which does not directly affect property; and (3) from a mere charge on property, which is individualized and does not form part in a series of similar charges. [Citing cases.] Debentures may be issued by a single person, by a partnership, or by a corporation." Debenture stock differs from a pure debenture in that the title of each original holder appears in a registry instead of being

represented by an instrument complete in itself, and the stock is capable of being transferred in any amounts, unless limited by corporate regulations. See *Attree v. Hawe*, L. R. 9 Ch. D. 337 (1878).

¹ *Re Hamilton's Windsor Ironworks*, L. R. 12 Ch. D. 707 (1879); *Wildy v. Mid-Hants Ry.*, 16 W. R. 409 (1868).

² *Re Marine Mansions Co.*, L. R. 4 Eq. 601 (1867); *Re Panama, etc. Co.*, L. R. 5 Ch. 318 (1870); *Re New Clydach, etc. Co.*, L. R. 6 Eq. 514 (1868). A debenture not making a charge upon property has been held to be a promissory note. *Ex parte Colborne*, L. R. 11 Eq. 478 (1870). But security upon property is not a necessary feature. *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887), holding also that it is not necessary that they be issued and numbered *seriatim*; a single debenture may be issued to one man. "In the ordinary acceptance of the term a debenture means any document, binding on an incorporated company, by which it acknowledges a debt to be due and undertakes to pay it." *Romer, Q. C.*, in *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887), where, also, Chitty, J., said: "I find that generally, if not always, the instrument imports an obligation or covenant to pay." The same learned judge in *Levy v. Abercorris, etc. Co.*, L. R. 37 Ch. D. 260 (1888), said that "debenture" is not a term of art, but means a document which acknowledges or creates a debt. In the former case the instrument was a memorandum of agreement acknowledging loans in various amounts set opposite the names of nine persons, covenanting with each of them to pay the same, with interest, at a fixed date, and to pay them ratably in case the whole was not then paid, and pledging as security the "undertaking, property, and effects of every

bined, and covers land, is an interest in land, and hence a contract for the sale of such a debenture must comply with the statute of frauds applicable to a sale of land.¹

The power to issue debentures is generally conferred by the charter. Where it is not so conferred it is implied from a general power to borrow money and create debts.² Where three companies join in the execution of debentures creating a lien on their property, each will be required to pay such part as it received, although such debentures are *ultra vires*.³

In England statutory provisions regulating the issue of debentures must be carefully observed.⁴ Debentures in England, covering all the property, etc., of the corporation, are specifically excepted from the bill of sales or chattel mortgage act, requiring registration of bills of sale.⁵ A debenture is to be construed according to the lan-

kind," subject to prior charges, and with liberty to the company to sell or pledge the things manufactured by the company in the ordinary course of business until default made.

¹ *Driver v. Broad*, [1893] 1 Q. B. 539, 744. *Cf. Re Hollon*, 69 L. T. Rep. 425 (1893), as to mortmain.

² *Re Inns, etc. Co.*, L. R. 6 Eq. 82 (1868); *Bank of South Australia v. Abrahams*, L. R. 6 P. C. 265 (1875), holding that a power to issue debentures after all calls have been fully paid does not warrant making them upon future calls.

³ *Re Johnston, etc. Co., Ltd.*, [1904] 2 Ch. 234.

⁴ Where the required assent of stockholders is not obtained, the debentures are void. *Fontaine v. Carmathen Ry.*, L. R. 5 Eq. 316 (1868). Where the issue is made before the whole capital is subscribed, and the statute forbids such issue, the debenture is void. *Chambers v. Manchester, etc. Ry.*, 5 B. & S. 588 (1864). Where the issue is made when the corporate debts are greater than the statute allows, then the debentures are void, and the holders come in as unsecured creditors. *Re Pooley Hall, etc. Co.*, 18 W. R. 201 (1869).

⁵ The bills of sale act in England relieves corporations from the necessity of recording debentures. *Read v.*

Joannon, L. R. 25 Q. B. D. 300 (1890). Debentures have precedence over a *fl. fa. Re Opera*, [1891] 3 Ch. 260. The debentures of none of the incorporated companies in England need be recorded as a chattel mortgage. *Re Standard Mfg. Co.*, [1891] 1 Ch. 627; *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887). A debenture is a document which creates or acknowledges a debt. It need not be recorded in the register's office under the bill of sales act. *Levy v. Abercorris, etc. Co.*, L. R. 37 Ch. D. 260 (1887). *Cf. Topham v. Greenside, etc. Co.*, L. R. 37 Ch. D. 281 (1887). For a review of the long litigation in England as to whether a debenture had to be recorded as a bill of sale (*i. e.*, in America as a chattel mortgage), see 8 Ry. & Corp. L. J. 222. This question was finally settled in England by act of parliament declaring that debentures of corporations need not be recorded under the bill of sales act. A debenture on the whole property, with a clause that no prior mortgage or charge should be made, is not good as against an assignment by the company of money due from an insurance company, where such assignee gave notice to the insurance company before that company had notice of the debenture. *English, etc. Trust v. Brunton*, [1892] 2 Q. B. 1.

guage used in it. There are no arbitrary rules of construction peculiar to it alone.¹

¹ *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. D. 215 (1887); *Ex parte Cox*, 13 L. R. Ir. 174 (1884), and *Re Panama, etc. Ry.*, L. R. 5 Ch. 318 (1870), holding that debentures secured by the "undertaking and all sums arising therefrom" are a charge upon all the property of the corporation, past and future, and are entitled to be paid before the general creditors. The former case gives the form of the indenture. *Re Marine Mansions Co.*, L. R. 4 Eq. 601 (1867), to same effect, but not a charge on the capital stock; also *Re Colonial, etc. Corp.*, L. R. 15 Ch. D. 465 (1879); *Re New Clydach, etc. Co.*, L. R. 6 Eq. 514 (1868), where debentures purporting to be an assignment of the undertaking, and charging all the real and personal property, were held valid upon all personal properties existing at the date of the debentures, but not upon property subsequently acquired. A debenture on all the property does not necessarily cover uncalled subscriptions. *Re Streatham, etc. Co.*, [1897] 1 Ch. 15; *Bloomer v. Union, etc. Co.*, L. R. 16 Eq. 383 (1873), holding that book debts were charged; *Ex parte Grissell*, L. R. 3 Ch. D. 411 (1875), where a charge upon all the funds, property, and effects which the company held or possessed, or should hold or be possessed of, was held valid; *Hodson v. Tea Co.*, L. R. 14 Ch. D. 859 (1880), where debentures containing an assignment of chattels, with a provision that the corporation shall retain possession until twenty-one days after default, were held a lien, though winding-up proceedings had been begun before they became due; *Re Herne Bay Water Works Co.*, L. R. 10 Ch. D. 42 (1878), holding that debentureholders, not being in the position of ordinary mortgagees, may have a receiver appointed, but cannot institute winding-up proceedings; *Wildy v. Mid-*

Hants Ry., 16 W. R. 409 (1868), holding that the holder of a debenture secured by mortgage has a title prior to that of a subsequent judgment creditor, and may file a bill to protect his security, though his claim is not due; *Ex parte Pitman*, L. R. 12 Ch. D. 707 (1879), holding that the debenture does not prevent the company from selling property and dealing with it without regard to the debenture. To same effect, *Wheatley v. Silkstone, etc. Co.*, L. R. 29 Ch. D. 715 (1885), where a mortgage given subsequent to the indentures took precedence over them; *Re Florence, etc. Co.*, L. R. 10 Ch. D. 530 (1878); *Moor v. Anglo-Italian Bank*, L. R. 10 Ch. D. 681 (1879). But as soon as winding-up proceedings are commenced, then the lien of the debentureholders attaches, and the unsecured holders are paid after the debentureholders. *Re Panama, etc. Mail Co.*, L. R. 5 Ch. App. 318 (1870). To same effect, *Re Horne*, L. R. 29 Ch. D. 736 (1885); *Hodson v. Tea Co.*, L. R. 14 Ch. D. 859 (1880). A purchaser of land from the company may, before taking title, require proof of no default as to the debentures. *Re Horne*, L. R. 29 Ch. D. 736 (1885). A floating debenture does not prevent the company from paying a debt to a director just before a winding-up is commenced. *Wilmott v. London Celluloid Co.*, L. R. 34 Ch. D. 147 (1886). A pledge or mortgage of a specific piece of corporate property to obtain new money takes precedence of a general debenture lien, although the debenture was prior in time. *Ward v. Royal Exchange, etc. Co.*, 58 L. T. Rep. 174 (1887). A debenture is not a lien on the proceeds from superfluous land sold by the company. *Re Hull, etc. Ry.*, L. R. 40 Ch. D. 119 (1888). In England any loan by a corporation in excess of the amount expressly authorized by its charter

Many of the rules of law applicable to other evidences of corporate indebtedness apply also to this class of obligations.¹ A pro-

is void, but the company may be held liable for such part of the money as they properly used to pay other debts. *Wenlock v. River Dee Co.*, L. R. 38 Ch. D. 534 (1888).

1 *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642 (1870), holding that a defense of illegal issue cannot be made by a corporation against the suit of an innocent holder of assignable debentures; *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868), holding that when issued for an insufficient consideration they are still good to the extent of the value of the consideration; *Re Northern Assam Tea Co.*, L. R. 10 Eq. 458 (1870), to the effect that, when held by a member of a corporation subject to a lien for money due to it, the lien is released by a transfer to which the company has consented; *Agar v. Athenæum Life, etc. Co.*, 3 C. B. (N. S.) 725 (1858), holding that the fact that due formality was not observed in borrowing the money for which debentures are issued is no defense to a suit upon them; *Crouch v. Credit Foncier, etc.* L. R. 8 Q. B. 374 (1873), holding that debentures under seal, though payable to bearer, are not negotiable; *Re Brunton's Claim*, L. R. 19 Eq. 302 (1874), holding that a company cannot set up equities against a debenture bond after accepting notice of its assignment; *Potteries, etc. Ry. v. Minor*, L. R. 6 Ch. 621 (1871), holding that obtaining judgment upon debentures does not change the status of the holder; he is still bound by the acts of a majority of his fellow-holders under the Railway Companies Act of 1867; *Price v. Great Western Ry.*, 16 M. & W. 244 (1847), holding that if the principal of debentures remains unpaid after maturity it bears interest though all coupons have been promptly paid.

A debenture-holder may apply for

a receiver whenever the company ceases to be a going concern. *Hubbuck v. Helms*, 56 L. T. Rep. 232 (1887). See *Blaker v. Herts, etc. Co.*, L. R. 41 Ch. D. 399 (1889). A debenture-holder cannot have a receiver of all the railway property appointed merely because there is a default. He must first get judgment and execution at law. He differs from a mortgagee. *Imperial, etc. Assoc. v. Newry, etc. Ry.*, 2 Ir. Rep. Eq. 524 (1868). A debenture which in effect is a mortgage on the tolls and income of a pier company cannot enjoin a general creditor from selling out the land by levy of execution. *Perkins v. Deptford, etc. Co.*, 13 Sim. 277 (1843). The court will appoint a receiver at the instance of debenture-holders if the corporation is insolvent, even though neither the principal nor interest is due. *McMahon v. North Kent Ironworks*, [1891] 2 Ch. 148. Debentures in excess of the amount authorized by statute are void. *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868). Where some debentures have been paid, new ones may be issued to that amount and not be in excess of the statutory limit. *Fountaine v. Carmarthen Ry.*, L. R. 5 Eq. 316 (1868). After a receiver has taken possession, a debenture-holder cannot obtain priority over other holders by getting a judgment at law and issuing execution thereon. *Bowen v. Brecon Ry.*, L. R. 3 Eq. 541 (1867). Nor can a general creditor interfere by execution on property in the receiver's possession. *Russell v. East Anglian Ry.*, 3 Macn. & G. 104 (1850). A debenture is more of a bond than a mortgage. Subsequent mortgagees may obtain a priority on lands in Italy, where the law of notice of prior liens does not prevail. *Norton v. Florence, etc. Co.*, 26 W. R. 123 (1877). "All that debenture-holders can claim is the

vision in an English debenture that a majority of the holders of debentures may "sanction any modification or compromise of the rights of the debenture-holders against the company or against the property" is valid, and such a compromise is binding on the minority.¹ A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of a *bona fide* mortgagee without notice of such debentures and such contract.² Thus a pledge may have priority over a debenture, even though the latter provides no charge shall be made having priority over the debentures.³ Under some debentures the debenture does not become a lien until a receiver is applied for.⁴ A mortgage may be prior in right to debentures outstanding at the time of the mortgage.⁵ An English debenture attaches to the debts

actual fruit resulting from the carrying on of the business of the company—namely, the tolls, rates, and duties which may be earned by the company through their availing themselves of their privilege of becoming carriers, and the rent which may be paid by other companies for the use of their lines." *Norton v. Florence, etc. Co.*, 26 W. R. 123 (1877); also *Gardner v. London, etc. Ry.*, L. R. 2 Ch. 201. (1867). A mortgage on the undertaking does not cover the property belonging to the company as common carriers of passengers or goods for hire, nor the soil of the railway itself. "The railway acts have been prepared on the model of the canal acts, in which the principal object of the company was the proprietorship of the canal, and the profits derived from the use of it by the public in general." *Hart v. Eastern, etc. Ry.*, 7 Exch. 246 (1852). A debenture covering the undertaking "is a lien similar to an income mortgage." *Gardner v. London, etc. Ry.*, L. R. 2 Ch. App. 201 (1867). In *Re Panama, etc. Co.*, L. R. 5 Ch. 318 (1870), the court held that the debenture in that case was a mortgage security and came in ahead of general creditors. The word "undertaking" does not cover and include land so as to sustain ejectment. *Myatt v. St. Helens, etc. Ry.*, 2 Q. B. 364 (1841). Con-

cerning a receiver under debentures, see *Gardner v. London, etc. Ry.*, L. R. 2 Ch. 201 (1867). Debenture-holders may be given power to appoint a receiver to take possession of everything whenever certain things happen. *Re Pound*, 62 L. T. Rep. 137 (1889). A mortgage on the "undertaking" covers after-acquired personality. *Re Panama, etc. Co.*, L. R. 5 Ch. 318 (1870). See also, in general, *Jones, Corp. Bonds, etc.*, §§ 381-425. An English mortgage covers only the tolls and income. *Bowen v. Brecon, etc. Ry.*, L. R. 3 Eq. 541 (1867).

1 *Sneath v. Valley Gold*, [1893] 1 Ch. 477.

2 *Re Castell, etc. Lim.*, [1898] 1 Ch. 315.

3 *Re Valletort, etc. Co.*, [1903] 2 Ch. 654.

4 *Governments, etc. Co. v. Manila, etc. Ry.*, [1895] 2 Ch. 551; *aff'd*, [1897] A. C. 81.

5 *Government, etc. Co. v. Manila Ry.*, [1897] A. C. 81. Where the sheriff levies on the property, a debenture-holder may pay the amount claimed by the sheriff in order to dispose of the execution, and then apply to the court to require the sheriff to return the money, the debenture in this case being what is called a floating security, although the court said that there was no clear definition of such a security. *Taunton v. Sheriff*

owing to the company at the time of the appointment of a receiver.¹ A floating debenture may not have precedence over remittances which have been pledged in advance.² A floating charge in England must be recorded.³ An ordinary debenture does not prevent a corporation selling its entire assets to another company in exchange for securities of the latter.⁴ The right to transfer debentures on the books of the company is not stopped by a judgment by a debenture holder in behalf of all or by a winding-up order, and a *bona fide* purchaser of the debentures is protected, even where he purchased after such judgment.⁵ Under a debenture the company may sell a part of its business free from the debenture, if the debenture does not provide against it.⁶ A debenture may have priority over an execution.⁷ But money paid to the sheriff while in possession of the property, belongs to the judgment creditor, and not to the debenture holders.⁸ First debentures have priority over second debentures, although some of the

of Warwickshire, [1895] 1 Ch. 734; aff'd, [1895] 2 Ch. 319.

1 *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93. Debentures whereby a charge in the nature of what is called a floating security over all a company's property is given to the debenture-holders allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture-holders; or, in other words, such debentures constitute a charge, but give a license to the company to carry on its business. So long as the debentures remain a mere floating security, that is to say, so long as the license to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security; the court holding that, so long as the company continues its business and no steps are taken to wind it up or to get a receiver appointed, a debenture-holder cannot require a particular

debtor to apply his debt on the debentures, nor can he prevent a garnishment from coming in ahead of the debentures. *Robson v. Smith*, [1895] 2 Ch. 118. Even though a judgment for salary has been used to garnishee funds belonging to the company, yet the debenture as a floating charge may be given a preference. *Cairney and Davies v. Back*, 96 L. T. Rep. 111 (1906).

2 *Re Arauco Co.*, 79 L. T. Rep. 336 (1898).

3 *Illingworth v. Houldsworth* [1904] A. C. 355. In this case the court in its opinion described the difference between a floating charge and a specific charge. A "floating charge" is explained in *Yorkshire, etc. Ass'n*, [1903] 2 Ch. 284.

4 *Re Borax Co.*, [1901] 1 Ch. 326.

5 *Re Goy & Co.*, [1900] 2 Ch. 149.

6 *Re Vivian & Co.*, [1900] 2 Ch. 654. In England it is legal to allow the trustees of debentures to concur in selling or otherwise dealing with the mortgaged property. *Dawson v. Braime's, etc. Ltd.*, 97 L. T. Rep. 83 (1907).

7 *Davey & Co. v. Williamson, etc. Ltd.*, [1898] 2 Q. B. 194.

8 *Robinson v. Burnell's, etc. Bakery, Ltd.*, [1904] 2 K. B. 624.

first are issued after the second are out.¹ In England a receiver and manager will be appointed in behalf of debenture-holders when the company is insolvent and executions are about to be levied.²

The power of the corporation to pledge or mortgage unissued debentures as collateral security for money advanced has been conceded.³ It has been held legal to issue them at a discount.⁴

The English debentures are negotiable or non-negotiable according to the language used in them.⁵

In the United States, as in England, a debenture is "a writing

¹ *Lister v. Lister & Son*, 68 L. T. Rep. 826 (1893). Cf. § 762, *supra*.

² *Edwards v. Standard, etc. Syndicate*, [1893] 1 Ch. 574. In England a receiver may be appointed before default in the interest on debentures where the company is clearly insolvent. *Re Victoria Steamboats*, [1897] 1 Ch. 158. In England a receiver and manager may be appointed at the instance of a debenture holder on the ground that the company's assets are not sufficient to pay the debentures and executions are about to be levied, even though there has been no default on the debentures. *Re London, etc. Co.*, [1905] 1 Ch. 576.

³ *Re Regents' Canal, etc. Co.*, L. R. 3 Ch. D. 43 (1876).

⁴ See § 766, *supra*; *Campbell's Case*, L. R. 4 Ch. D. 470 (1876).

⁵ For instances of negotiable debentures, see *Re Imperial Land Co.*, L. R. 11 Eq. 478 (1870); *Re Blakely, etc. Co.*, L. R. 3 Ch. 154 (1867); *Higgs v. Northern Assam Tea Co.*, L. R. 4 Exch. 387 (1869); *Re General Estates Co.*, L. R. 3 Ch. 758 (1868). For instances of non-negotiability see *Re Natal, etc. Co.*, L. R. 3 Ch. 355 (1868); *Athenæum, etc. Soc. v. Pooley*, 3 De G. & J. 294 (1858); *Crouch v. Credit Foncier, etc.*, L. R. 8 Q. B. 374 (1873). Debentures may be negotiable as to the company, but not as against other debenture-holders. So held where debentures were issued after a winding-up was commenced. *Mowatt v. Castle, etc. Co.*, L. R. 34 Ch. D. 58 (1886). If the debentures are not negotiable,

the company may of course set up defenses against any holder. *Athenæum, etc. Soc. v. Pooley*, 3 De G. & J. 294 (1858). Debentures in England, corresponding in form to bonds here, are not negotiable instruments. *Crouch v. Credit Foncier, etc.*, L. R. 8 Q. B. 374 (1873); *Re Imperial Land Co.*, L. R. 11 Eq. 478 (1870); *Re Natal, etc. Co.*, L. R. 3 Ch. 355 (1868); *Re Rhos, etc. Co.*, 17 W. R. 343 (1868). Where debentures run to a person or his assigns, and he assigns them with the concurrence of the company, the company cannot then set off against them a debt owed by him to it. *Higgs v. Northern Assam Tea Co.*, L. R. 4 Exch. 387 (1869). Debentures payable to bearer are negotiable, and in the winding up may be enforced by the holders free from equities between the company and the original purchasers. Purchasers after the winding up commenced, but in ignorance of it, are also protected. *Re Imperial Land Co.*, L. R. 11 Eq. 478 (1870). But they may be made negotiable by being payable "to the order of," etc. *Re General Estates, etc. Co.*, L. R. 3 Ch. 758 (1868). Although debenture bonds payable to certain persons or bearer, or to bearer alone, are not negotiable and cannot be sued upon at law by bearer, yet he may enforce them in equity on the winding up. *Re Blakely, etc. Co.*, L. R. 3 Ch. 154 (1867). Debentures under seal have been held in England to be merely notes. *Re General Estates, etc. Co.*, L. R. 3 Ch. 758 (1868).

acknowledging a debt.”¹ A bequest of stocks does not carry debentures, even though the debentures after a period were to be convertible into stock.² A so-called debenture was quite common before the business reverses of 1893. Its character was usually as follows: Certain corporate assets, generally railroad bonds or stock, or real-estate mortgages or municipal bonds, or water-works bonds, are deposited with trustees to secure the debenture-holders. The debenture itself is a bond or note of the corporation, reciting on its face that it, with other similar debentures, is secured by the property so deposited in the hands of the trustees. Such a debenture as this is practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities. This form of securities has been quite extensively issued by railroads, where the parent company owns the stock or bonds of many branch or leased lines and wishes to raise money on them on long time. Such debentures are legal. They are substantially a borrowing of money and delivering of bonds or stock as collateral security.³

¹ *People v. Miller*, 180 N. Y. 16 (1904).

² *Connecticut, etc. Co. v. Chase*, 75 Conn. 683 (1903).

³ See §§ 317, 464, *supra*, and § 852, *infra*. For a case involving the rights and duties of a trustee holding mortgages as security for debentures, the corporation itself having become insolvent, see *Girard Trust Co. v. McKinley, etc. Co.*, 135 Fed. Rep. 180 (1905). The character of such a transaction is well shown in the case of *Ward v. Johnson*, 95 Ill. 215 (1880). Here a bank in the course of its business, and out of moneys received from depositors, loaned large sums of money, taking promissory notes from the borrowers secured by first mortgages upon real estate in Chicago. In pursuance of a resolution of the board of directors of the bank creating an “investment department” of the business, these notes and collateral mortgages were assigned to one Chandler in trust for the purpose of conducting the business of said “investment department.” Said trustee was authorized to countersign and issue certificates in sums

of \$100 or over to all applicants applying therefor, but in an amount not exceeding the face value of the notes held by him as trustee. Said certificates bore interest at the rate of seven and three-tenths per cent., payable quarterly, and were redeemable by said trustee upon the application of the bearer, either in notes secured by mortgage of equal face value with such certificates, or in cash, at the option of the trustee. The certificates recited that they were secured by bond and mortgage collaterals held in trust, secured upon real estate. The money received by the trustee from the sale of the certificates was by him turned over to the officers of the bank, and by them used to pay depositors and for all the other purposes for which the bank used money. *Held*, that the trust fund in the hands of the receiver should be applied to the payment of the investment certificates; and that the bank, after receiving large sums of money on the “investment certificates,” which money went into its general business, and after having had the full benefit of the contract with the certificate-

Questions relative to the rights, duties, powers, and liabilities of a trustee, or third person holding securities as collateral for the payment of other securities, are considered elsewhere.¹

holders, will not be allowed to interpose the defense of *ultra vires* to defeat the execution of the trust. A subscription for debenture bonds to be paid for in assessments as the company might require cannot be enforced for the benefit of corporate creditors, the bonds not having been delivered. *Pettibone v. Toledo, etc. R. R.*, 148 Mass. 411 (1889). A trust agreement securing debentures based upon mortgages and notes deposited was construed in *Smith v. New Hampshire T. Co.*, 68 N. H. 424 (1896). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings all claims are allowed as of the same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall purchase such securities at a price named. *Bank Com'rs v. New Hampshire, etc. Co.*, 69 N. H. 621 (1899). Where mortgages are deposited as security for debentures and the corporation issuing the debentures passes into the hands of a receiver, the interest received on the mortgages will be applied to the debentures, even though the corporation might have had a right to use the same if it had remained solvent. *Real Estate Trust Co. etc. v. New England L. & T. Co.*, 93 Fed. Rep. 701 (1899). A debenture is not necessarily a secured claim. It may be merely a writing acknowledging a debt. *Barton, etc. Bank v. Atkins*, 72 Vt. 33 (1899). Bonds issued on shares of stock were involved in *Clarke v. Central R. R. etc. Co.*, 50 Fed. Rep. 338 (1892). In this case, on the final hearing, the bill was dis-

missed. See *Clarke v. Richmond, etc. Co.*, 62 Fed. Rep. 328 (1894). A third mortgage may be secured by such prior bonds as are delivered up by the parties in exchange for the third-mortgage bonds, under an agreement that such prior bonds are not to be considered paid. *Poland v. Lamoille, etc. R. R.*, 52 Vt. 144 (1879). For a case involving the priority of one class of debentures as against another, see *American, etc. Co. v. Northwestern, etc. Co.*, 166 Mass. 337 (1896).

An example of the new form of debentures secured by a trust deed is that of Chicago Great Western Ry. Co. There the company secures payment of interest on the debenture stock, and a fair accounting for the preferred, by executing a deed of trust to a trust company.

Another form of debenture is what is known as a "collateral trust indenture." The form adopted by the Northern Pacific R. R. Co. was briefly as follows:

This indenture, dated May 1, 1893, between the Northern Pacific Railroad and the Farmers' Loan and Trust Company, is to pay off a floating debt of about \$11,000,000 and for other requirements; the railroad company sells its 5-year 6 per cent. gold notes to an aggregate amount of \$15,000,000. The following collateral is deposited with the trust company:

\$10,000,000	par value Northern Pacific consol. 5 per cent. bonds.
3,000,000	par value Chicago and Northern Pacific 5 per cent. bonds.
6,000,000	par value Chicago and Calumet 5 per cent. bonds.
7,000,000	par value St. Paul and Northern Pacific capital stock.
15,010,000	par value Chicago and Northern Pacific stock beneficial certificates.
343,000	par value Northern Pacific Express Company's stock.

¹ See § 317, ch. XIX, *supra*.

The simon-pure English debenture—the debenture which is in itself both bond and mortgage combined, without any recording under the mortgage acts, and without any delivery of the property—has not been adopted in America. Under the statutes of some of the states such a mortgage lien would be good against the company itself, even though it was not recorded, and even though possession was not taken.¹ But in most states it would, under the statutes, be held to be illegal and void as against the rights of other corporate creditors.²

Article I. Notes shall be \$1,000 each, payable in gold, and may be registered.

Article II. The railroad company binds itself to make up deficiency, if any, after sale of collateral.

Article III. The railroad company may deliver the collateral from time to time and receive from trust company a proportion of the notes.

Article IV. The railroad company will not, without first obtaining the consent of the Committee, or until all the notes are paid, construct new lines or purchase or lease any, or guarantee bonds of other companies, or issue its own bonds against such.

Article V. A committee is formed consisting of Messrs. R. G. Rolston, John A. Stewart, James Stillman, J. D. Probst, and F. T. Gates. Committee shall organize and appoint a secretary. Members may vote in person or by letter or telegram, and shall receive twenty dollars for attendance at each meeting. Majority shall be a quorum.

Article VI. Committee may sell the bonds deposited as collateral from time to time, but without consent of the railroad company cannot dispose of Northern Pacific 5s at less than 90, or Chicago and Northern Pacific 5s at less than 95, or Calumet 5s at less than 85. The Committee has power to sell all other collateral at times and prices such as the railroad company shall direct and the Committee approve. With the money received from such sales the trust company shall purchase the notes in the open market. After May, 1896, the notes can be called for payment by lot. If railroad company shall default in the interest for ninety days the Committee shall sell part of the collateral to realize such interest, or at its option shall have power to declare the principal due, whereupon the trust company shall dispose of underlying securities as determined by the Committee. In such case Committee may fix a minimum price.

Article VII. Upon any purchase or sale of any coupons belonging to these notes, or upon loans made after date of maturity

of said coupons, such coupons shall not be within this indenture.

Article VIII. All the notes may be called and paid by the railroad company at any time after May 1, 1896, at par and accrued interest.

Article IX. The Committee shall vote all the stock among the collateral. Interest on the bonds shall belong to the railroad company.

Article X. The Calumet Terminal Railway Company, without consent of the Committee, shall not issue any more bonds, but upon payment to the trust company of \$1,500,000 the railroad company shall have the right of withdrawing these Calumet bonds, money to be used to purchase notes in open market.

Article XI. Railroad company and trust company shall have access to papers and accounts of Committee, and Committee shall have like access to books, papers, and accounts of railroad company.

Article XII. Provides for continuance of a trustee.

Article XIII. When notes are paid they shall be canceled and delivered to the railroad company.

Article XIV. The railroad company will do all necessary acts to carry the intent of the parties into effect.

Article XV. Marginal notes in the indenture not to affect the text.

A supplementary agreement provides that the railroad company shall not sell any of the Northern Pacific 5s which it may have in its treasury at less than 90, or pledge the same except under existing contracts without the consent of the Committee.

1 Such a security was enforced as against the company in *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858).

2 The danger and insufficiency of the English debenture as regards corporate property located in America appears in *Re Empire Min. Co.*, L. R. 44 Ch. D. 402 (1890), where the precedence of attachments over the de-

A debenture which is a mortgage on everything, but which expressly allows the company to sell any part until the mortgagee should take possession, may be void as to other creditors.¹ Stock issued as "preferred debenture shares of the capital stock" under the New York statute is a legal contradiction on its face, and in regard to taxation will be construed as being preferred stock.²

§ 777. *Debenture stock secured by an American mortgage*.—"Debenture stock" is an English term. It does not mean shares of stock as in America, but means a debt, an absolute obligation to pay principal and interest at fixed times. English debenture stock is somewhat similar to a registered United States bond. It sometimes is and sometimes is not secured by a mortgage.³ An American mortgage may be so drawn as to secure American bonds and also English debenture stock. The Commercial Cable Company mortgage executed in 1897 accomplished that result.⁴ Moreover,

bentures was admitted. A corporation is bound by its president's agreement borrowing money and turning over to the lender the accounts receivable and giving the lender a lien upon present and future assets, such agreement having been carried out for a year, but such agreement may be void under the bankruptcy act, where possession is taken within four months prior to the bankruptcy. *Mathews v. Hardt*, 79 N. Y. App. Div. 570 (1903).

¹ *Orman v. English*, etc. Inv. Trust, 61 Fed. Rep. 38 (1894). Cf. §§ 811, 852, *infra*.

² *People v. Miller*, 180 N. Y. 16 (1904).

³ See § 14, *supra*, for a definition of debenture stock.

⁴ This Commercial Cable Company mortgage is on all the company's telegraph and cable lines in America and Europe, including the telegraph lines of the Postal Telegraph Company. The mortgage runs for five hundred years, thereby making it practically a perpetual investment. It secures \$20,000,000 of bonds and debenture stock, all bearing the same rate of interest,—four per cent. The bonds may at any time be returned to the company and debenture stock obtained in place thereof, at the rate of

£206 for every \$1,000 of bonds. The bonds are listed on the New York Stock Exchange; the debenture stock on the London Stock Exchange. The aggregate amount of bonds and debenture stock combined is always exactly \$20,000,000. The debenture stock is drawn in accordance with English forms; is issued in amounts of one pound sterling and upwards; is intended solely for the English market, and contains the necessary English features of being practically a perpetual investment, issued in small or large denominations to suit the investor, and having an English place of issue and transfer. A copy of the certificate issued to represent the debenture stock is as follows:

FIVE HUNDRED YEAR FOUR PER CENT. DEBENTURE STOCK.

THE COMMERCIAL CABLE COMPANY.
No. £

THIS IS TO CERTIFY THAT is the registered holder of pounds sterling of the Debenture Stock of The Commercial Cable Company issued under the provisions of a mortgage deed of trust, and bearing interest at the rate of four per centum per annum, payable quarterly, free of all United States taxes, on the first days of January, April, July, and October in each year, in London, England. The payment of the principal and interest of this Debenture Stock is secured by said mortgage deed of trust, dated the first day

it is possible to provide in such a mortgage that the bonds and debenture stock shall be interchangeable, so that the whole mass of debt may flow from the bonds into debenture stock, or from debenture stock into bonds, according as England or America furnishes the best market.

§ 778. *Mode of authorizing, drafting, signing, sealing, and acknowledging corporate obligations to pay money—Liability of the corporation and the corporate officers on irregularly executed instruments—Charter provisions as to authorizing the instruments.*—These subjects are considered elsewhere.¹

of January, 1897, and made by the said The Commercial Cable Company to The Farmers' Loan and Trust Company (of the City of New York), as Trustee, by which mortgage deed of trust all the franchises, property, and assets of The Commercial Cable Company (including the property, franchises, and assets of the Postal Telegraph-Cable Company heretofore acquired by said The Commercial Cable Company) are assigned to said The Farmers' Loan and Trust Company upon trusts for securing twenty million dollars (\$20,000,000) bonds or their equivalent, £4,120,000 sterling debenture stock of this issue.

Instalments of interest on this Debenture Stock are to be paid by cheques or warrants mailed to proprietors at their addresses registered in the books of said Cable Company.

The stock represented by this certificate is transferable on common transfer forms, to be subsequently registered on the books of the Company in London or New York or at the office of such financial agents in London as said Cable Company may from time to time appoint, and in conformity

with the provisions of the by-laws in that behalf upon the surrender of this certificate. No transfer for any sum less than one pound or for other than multiples of one pound will be registered.

This certificate shall not be valid unless signed by such official of said The Commercial Cable Company as the Board may from time to time appoint for that purpose, and countersigned by the registrar.

Given under the common seal of the company this day of 1 .
[L. S.] THE COMMERCIAL CABLE COMPANY.

By ————, .
Countersigned in London this day of 1 .
 Registrar.

NO TRANSFER OF ANY PORTION OF THIS STOCK WILL BE REGISTERED WITHOUT THE SURRENDER OF THIS CERTIFICATE.

¹ See §§ 721-725, *supra*. As to requirements that the stockholders shall authorize the issue of bonds, see also § 808, *infra*, and § 725, *supra*.

CHAPTER XLVII.

MORTGAGES—POWER TO ISSUE AND FORM THEREOF.

A. POWER TO MAKE MORTGAGES.

- § 779. Mortgages may be executed and given by corporations—Mortgages by insolvent corporations.
780. A railroad corporation has no implied power to mortgage its railroad.
781. Mortgage on the superfluous land and on the personal property of a railroad corporation.
782. Express authority to mortgage and ratification by the legislature of unauthorized mortgages.
783. Construction of various provisions authorizing mortgages—The mortgagee takes title subject to charter provisions.
784. Purchase-money mortgages need not be expressly authorized.
785. Power to again mortgage after a mortgage has been given.
786. Power to mortgage the whole gives power to mortgage a part.
787. Mortgage to secure future advances, contracts, dividends, etc.—After-acquired property.
788. Who may attack the validity of a mortgage.
789. Purchase-money mortgage issued to an insolvent vendor.
790. The franchise to be a corporation cannot be mortgaged, but the right to operate the road and collect toll may be mortgaged.
791. Mortgages to directors.
792. Forfeiture of the charter—Effect upon a mortgage.
793. Waiver of a part or all of a mortgage and bonds—Mortgages to a state.

B. FORM AND PROVISIONS OF THE MORTGAGE DEED OF TRUST.

794. The mortgage may be a deed of trust—Mortgages created by a statute—Equitable mortgages.
795. Character of the various provisions in a corporate mort-

gage deed of trust—The granting clause.

- § 796. Provision that the mortgagor may retain possession until default.
797. Provision that the mortgagor will pay the bonds and coupons, and waiver of statutory provisions as to redemption, stays, valuation, etc.
798. Provision giving power to the corporation to sell old material and parts of the property free from the mortgage.
799. Provisions relative to taxes, insurance, liens, and maintenance.
800. Provisions for declaring the principal sum due upon a default in interest—Provision that the trustee shall foreclose upon the request of a certain proportion of the bondholders.
801. Provision for a waiver of default.
802. Provision for the remedy of entry by the trustee or of a receivership upon default.
803. Provision giving power of sale to the trustee upon default—This is a cumulative remedy and does not prevent foreclosure instead.
804. Provisions unreasonably limiting the right to foreclose.
805. Provision exempting the trustee from liability.
806. Provision for appointing a new trustee.
807. Miscellaneous provisions.

C. AUTHORIZING, EXECUTING, AND RECORDING MORTGAGES.

808. The board of directors authorize the execution of mortgages—A stockholders' meeting is not necessary—Statutes requiring stockholders' consent—Waiver of such consent or ratification without formal consent—Estoppel, by recitations in mortgage, of formalities of authorization.

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| § 809. Ratification of an unauthorized mortgage—The resolutions authorizing the mortgage.
810. Signing, sealing, acknowledging and delivering the mortgage. | § 811. Recording of a mortgage—Release and discharge of mortgage—Decree canceling mortgage. |
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The corporation of the eighteenth century was carried on by capital furnished by the stockholders. The corporation of the nineteenth century was more often carried on by capital furnished by mortgage bondholders. Prior to the year 1830, when the era of steam railroads began, corporation bonds secured by a mortgage deed of trust were unknown. After that date, however, the vast capital required for the development of the American continent led the American mind to invent the modern corporation mortgage and bond. European investors could be induced to purchase American railroad bonds bearing a high rate of interest and secured by a mortgage, but European investors could not be induced to purchase American stock. The American, on the contrary, ready as usual to take desperate risks in the hope of great gains, was quick to hazard his slender capital in the stock itself, especially of railroads in the undeveloped west and on to the Pacific coast. Great captains of industry arose, such as Vanderbilt and Huntington, who had no capital, but had force and daring, coupled with a genius for building, consolidating, stocking, and bonding great systems of railroads. The power to mortgage gave them the power to raise money, and the power to raise money gave them the power to make America what it is to-day. It is said that Napoleon asked Talleyrand the question "What is America?" and Talleyrand replied "A body without bones." An American has remarked that since that time the bones have been formed and they are bones of steel. They are the railroads of the country, built chiefly from railroad bonds, secured by a mortgage.

In England railroad mortgage bonds of the American type are unknown. The English railroad builder had no occasion to seek far and wide for his capital. Hence he had no occasion to give a mortgage on his railroad, his franchises, and his own future. An English railroad debenture cannot be foreclosed. It is a mortgage, not on the railroads, but on the income only. A receivership may be granted, but not a foreclosure of the property.

American railroad mortgage bonds, being a lien on the property itself, have been the subject of a bewildering maze of litigation in the American courts during the past thirty years. The character of such bonds has already been considered in the preceding chapter. The character of the mortgage securing the bonds is the subject of this chapter.

A. POWER TO MAKE MORTGAGES.

§ 779. *Mortgages may be executed and given by corporations—Mortgages by insolvent corporations.*—A corporation, other than a railroad corporation, may mortgage its real estate and personal property for the purpose of securing its bonds or other evidences of indebtedness, unless there is some provision in its charter expressly prohibiting or regulating this right. The right to mortgage is a natural result of the right to incur an indebtedness.¹

1 *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280 (1844), where mortgages designed to secure future advances expected to be made upon bonds, such advances being intended for use in the erection of an exchange building at a cost of twice the amount of the capital stock of the company, was held to be valid; *Thompson v. Lambert*, 44 Iowa, 239 (1876), where it was said that corporate powers in this respect are as extensive as those of an individual; *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136 (1895); *Bell, etc. Co. v. Kentucky, etc. Co.*, 50 S. W. Rep. 2 (Ky. 1899); *Curtis v. Leavitt*, 15 N. Y. 9 (1857); *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858), a canal company; *Aurora, etc. Soc. v. Paddock*, 80 Ill. 263 (1875); *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620 (1863), holding that, if not upon its face beyond the corporate authority, a contract will be presumed to be valid; *Dimpfell v. Ohio, etc. Ry.*, 9 Biss. 127 (1879); s. c., 7 Fed. Cas. 722; aff'd, 110 U. S. 209, holding that the laches of stockholders may render valid a mortgage executed by a corporation without due authority when the bonds secured by it are in the hands of *bona fide* purchasers; *Third Avenue Sav. Bank v. Dimock*, 24 N. J. Eq. 26 (1873), in which the court said that a defense to a bill of foreclosure that a corporation in making the loan was acting *ultra vires* was "unconscionable"; *Darst v. Gale*, 83 Ill. 136 (1876); *Craven County Com'rs v. Atlantic, etc. R. R.*, 77 N. C. 289 (1877);

Pierce v. Emery, 32 N. H. 484 (1856); *Shaw v. Norfolk R. R.*, 71 Mass. 162 (1855); *Burt v. Rattle*, 31 Ohio St. 116 (1876), a manufacturing company; *Pennock v. Coe*, 23 How. 117 (1859); *Richards v. Merrimack, etc. R. R.*, 44 N. H. 127 (1862); *Miller v. Chance*, 3 Edw. Ch. 399 (1840), holding also that a mortgage executed by a majority of a board of trustees excluding the members *ex officio* is valid; *Farmers' Loan, etc. Co. v. Hendrickson*, 25 Barb. 484 (1857); *King v. Merchants' Exch. Co.*, 5 N. Y. 547 (1851); *Leavitt v. Blatchford*, 17 N. Y. 521 (1858); *Parish v. Wheeler*, 22 N. Y. 494 (1860), where a mortgage including property purchased in excess of the powers of the corporation was held binding upon such property. A private corporation may borrow money and give a mortgage to secure its payment. *Eastman v. Parkinson*, 113 N. W. Rep. 649 (Wis. 1907). A mining company may give a mortgage. *Copper, etc. Co. v. Costello*, 95 Pac. Rep. 94 (Ariz. 1908).

A mortgage on real estate may be given by a corporation to secure past-due debts. *Martin v. Niagara, etc. Mfg. Co.*, 44 Hun, 130 (1887); aff'd, 122 N. Y. 165, 171, criticising *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). In general see also *Re Patent File Co.*, L. R. 6 Ch. App. 83 (1870); *Re General, etc. Assur. Co.*, L. R. 14 Eq. 507 (1872), an insurance company; *Re General South Amer. Co.*, L. R. 2 Ch. D. 337 (1876); *Wood v. Whelen*, 93 Ill. 153 (1879), where a gas company was, however, given

The power of the ordinary business corporation to give a mortgage is a most necessary power. A denial of this power would re-

express authority; *Lehman v. Tallassee, etc. Co.*, 64 Ala. 567 (1879), where express authority was given; *West v. Madison County Agric. Board*, 82 Ill. 205 (1876), a county fair company; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883), a water company; *Australian, etc. Co. v. Mounsey*, 4 K. & J. 733 (1858), a navigation company; *Thomas v. Citizens' Ry.*, 104 Ill. 462 (1882), holding that where a corporation has power to borrow money (after complying with certain conditions) and secure the same by mortgage upon its property, such corporation, after having received the loan on security of its mortgage, will not be allowed to avoid liability by questioning its own power to make the mortgage, or by showing an irregular or defective execution of the power. Nor will a subsequent judgment creditor or a purchaser at execution sale on a judgment subsequent to the mortgage stand in any other or better position than the company. *Susquehanna, etc. Co. v. General Ins. Co.*, 3 Md. 305 (1852); *Bardstown, etc. R. R. v. Metcalfe*, 4 Metc. (Ky.) 199 (1862); *Coe v. Johnson*, 18 Ind. 218 (1862); *Jones v. Guaranty, etc. Co.*, 101 U. S. 622 (1879), holding that power to mortgage to carry on business implies power to mortgage to secure money to be advanced; *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884). See also 120 U. S. 287, 300 (1887), holding that lawful power to purchase a franchise implies the power to mortgage it to secure the purchase-money; *Hopson v. Aetna Axle, etc. Co.*, 50 Conn. 597 (1883), where a mortgage given to directors to secure them for their guaranty of corporation paper was held valid; *Scott v. Colburn*, 26 Beav. 276 (1858), holding that power to borrow on mortgage includes power to mortgage to secure a bill given for an existing

debt; *Talladega Ins. Co. v. Peacock*, 67 Ala. 253 (1880); *Commonwealth v. Smith*, 92 Mass. 448 (1865). In this case a statute was held to have taken away the power to mortgage. To same effect, *Richardson v. Sibley*, 93 Mass. 65 (1865). *Contra*, *Steiner's Appeal*, 27 Pa. St. 313 (1856), holding that special authority from the legislature is necessary.

A corporation may give a mortgage to raise an attachment which was levied on land prior to its purchase by the corporation. *Leonard, etc. Co. v. Bank of America*, 86 Fed. Rep. 502 (1898). The mortgage may be given in order to secure the carrying out of a contract. *Mason v. York, etc. R. R.*, 52 Me. 82 (1861). A mortgage is valid as against the corporation giving it, although the officers give to the mortgagee their individual notes as additional security and cause the corporation to issue stock to themselves without payment, which they deposit also as collateral with the mortgagee. The giving of a mortgage is not an increase of indebtedness such as is prohibited by the Pennsylvania constitution. *Powell v. Blair*, 133 Pa. St. 550 (1890). Bonds secured by a mortgage on land of a turnpike company are valid and the mortgage may be foreclosed. The defense that the mortgage was unauthorized by statute is not good. Moreover, delay is fatal. *Browning v. Mullins*, 13 S. W. Rep. 427 (Ky. 1890). A trading corporation has implied power to borrow money and give a mortgage therefor. *Wood v. Meyer*, 7 S. Rep. 359 (Miss. 1890). "Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money or their debts." *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43, 48 (1875). "By the common law the power to alien and mortgage lands

strict the operations of corporations to such an extent as to discourage the transaction of business by or through corporations. It is a power dangerous but necessary. It often leads to insolvency, and often it saves an enterprise from insolvency. It is a power that exists by implication of law, and it is also held to arise from the right to purchase or sell land.¹ A corporation may of course mortgage or pledge personal property for the payment of loans.² But inasmuch as an

in the course of its business inhered in corporations capable of acquiring and holding them, as in natural persons, as an incident of ownership." *Rochester Sav. Bank v. Averell*, 96 N. Y. 467, 472 (1884); *Re Nash Brick, etc. Co.*, 3 Nova Scotia Dec. 254 (1873). Where all the directors and all the stock except one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. *Witter v. Grand Rapids, etc. Co.*, 78 Wis. 543 (1891). Concerning questions relative to mortgages made to secure the payment of preferred dividends, see ch. XVI, *supra*. The directors of a trading company have implied power to borrow money and give mortgages upon the property of the company in furtherance of its objects. *General Auction, etc. Co. v. Smith*, [1891] 3 Ch. 432. A gas company may borrow money and give a mortgage. *Hays v. Gallion Gas, etc. Co.*, 29 Ohio St. 330 (1876); *Detroit v. Mutual Gas Light Co.*, 43 Mich. 594 (1880). A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of a *bona fide* mortgagee without notice of such debentures and such contract. *Re Castell, etc. Lim.*, [1898] 1 Ch. 315. It is no defense to a mortgage that it was given by a trust or combination in restraint of trade. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). A private corporation as mortgagor cannot question its power to mortgage nor the power of the lender to take the mortgage where the money has been paid and is still held by the mort-

gagor. *Savings & T. Co. v. Bear Valley, etc. Co.*, 112 Fed. Rep. 693 (1902). Where the property of an irrigation company, by the terms of its organization, belongs to the owners of land who participate in taking the water therefrom, a mortgage on such property by the company is not valid. *New La. Junta, etc. Co. v. Kreybill*, 17 Colo. App. 26 (1901). A pledge or mortgage by a manufacturing company of all its assets to secure depositors in a savings bank branch of its business, in accordance with a statute, was involved in *Newton v. Eagle, etc. Co.*, 101 Fed. Rep. 149 (1897). An electric light and power company may mortgage its property without express authority from the legislature so to do, especially where it is organized under the act authorizing incorporation for any lawful business, even though it is using streets under licenses granted by municipalities. *American, etc. Co. v. General Electric Co.*, 71 N. H. 192 (1901). *Ultra vires* as a defense to a mortgage must be pleaded. *United States, etc. Co. v. McClure*, 42 Ore. 190 (1902).

¹ *Jackson v. Brown*, 5 Wend. 590 (1830); *Gordon v. Preston*, 1 Watts (Pa.) 385 (1833); *Watts's Appeal*, 78 Pa. St. 370 (1875); *Taber v. Cincinnati, etc. R. R.*, 15 Ind. 459 (1860); *McAllister v. Plant*, 54 Miss. 106 (1876); *West v. Madison County Agric. Board*, 82 Ill. 205 (1876). A purchaser at a judicial sale with notice of a prior incumbrance, who is neither a stockholder nor creditor, cannot question the power of the corporation to make the prior mortgage. *Darst v. Gale*, 83 Ill. 136 (1876).

² *Curtis v. Leavitt*, 15 N. Y. 9

iron and steel manufacturing company has no power to operate a public or private warehouse, warehouse receipts issued by such a corporation on its own property are not protected like the ordinary warehouse receipts, and corporate creditors who hold such receipts are not protected thereby, and the transaction may not amount to a pledge.¹

The power of an insolvent corporation to give a mortgage to some of its creditors and thereby prefer them to others is denied in some of the states, but at common law this power undoubtedly exists.²

If a mortgage is prohibited it is void.³ Sometimes mortgages by corporations are prohibited by statute, unless a part or all the stockholders assent to the giving of the mortgage.⁴ Where the statutes authorize a religious corporation to mortgage its property upon an order of the court, this prohibits a mortgage unless such order is made.⁵

Although the statutes limit the amount of debt to secure which a mortgage may be given, yet a mortgage may be valid although

(1857); *Garrett v. May*, 19 Md. 177 (1862), where the income of a railroad was pledged to secure bonds; *Clark v. Titcomb*, 42 Barb. 122 (1864); *Shears v. Jacob*, L. R. 1 C. P. 513 (1866); *Leo v. Union Pac. Ry.*, 17 Fed. Rep. 273 (1883), holding that power to pledge securities is included in the power to sell them; *Clark v. Titcomb*, 42 Barb. 122 (1864); *Nelson v. Eaton*, 26 N. Y. 410 (1863), cases of a pledge by an insurance company; *Combination Trust Co. v. Weed*, 2 Fed. Rep. 24 (1880), where a pledge of unissued stock to secure a loan was held lawful. See also § 465, *supra*; *Duncomb v. New York, etc. R. R.*, 84 N. Y. 190 (1881), holding lawful a pledge of the bonds of the corporation to secure a corporate debt; *Castle v. Lewis*, 78 N. Y. 131 (1879), in which property was assigned to secure a loan previously advanced to the corporation. A corporation may lease its property for one hundred years and then give a mortgage on its interest. The lessee had agreed in advance to pay the interest on the bonds. *First Nat. Bank v. Sioux City, etc. Co.*, 69 Fed. Rep. 441 (1895); *aff'd*, 173 U. S. 99. A railroad mortgage on all real and personal property may be valid

though not in conformity with the general chattel mortgage act in respect to acknowledgment. *Cooper v. Corbin*, 105 Ill. 224 (1883).

¹ *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560 (1898).

² See § 691, *supra*. Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration. *Grant v. Lowe*, 89 Fed. Rep. 881 (1898).

³ *Union Trust Co. v. New York, etc. R. R.*, 17 Weekly L. Bull. 176, holding that a mortgage in which the directors are interested contrary to statute is void where the statute so prescribes. Where by statute mortgages on land in more than one county are void, a railroad mortgage is void, and the bondholders are merely unsecured creditors. *Farmers' L. & T. Co. v. Oregon, etc. Ry.*, 24 Fed. Rep. 407 (1885).

⁴ See § 808, *infra*.

⁵ *Dudley v. Congregation, etc. St. Francis*, 138 N. Y. 451 (1893).

it exceeds the amount specified in the statute.¹ A mortgage by a corporation to secure its own debts and debts of one of its stockholders may be legal as to the former, and illegal as to the latter.² A mortgage may be for a period of time extending beyond the corporate existence of the mortgagor.³

§ 780. *A railroad corporation has no implied power to mortgage its railroad.*—Unless the charter or the statutes of the state expressly give this power, such a mortgage is void.⁴

¹ See § 760, *supra*.

² *Hatch v. Johnson L. & T. Co.*, 79 Fed. Rep. 828 (1895). Where a railroad company contracts to give a mortgage to secure bonds to be given to the contractor, the bonds and mortgage are enforceable, although the bonds were issued by another company, and were secured by a mortgage on the property of the company which made the contract. It was an equitable mortgage if nothing more, and prior in right to other liens. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). A street-railway company and a land company cannot legally join in the execution and issue of bonds and mortgages on the property of both, even though the proceeds are used to pay the debts of the latter and to construct the railway of the former. But each is liable on the bonds to the extent of the proportion of the money received by it. *Northside Ry. v. Worthington*, 88 Tex. 562 (1895). Even though a corporation, as the owner of an undivided interest in land, mortgages it to secure the debt of an individual, the owner of the remaining interest in the land cannot question the title of a purchaser at foreclosure sale on the ground that the mortgage was *ultra vires*. *Collins v. Rea*, 127 Mich. 273 (1901). See also § 775, *infra*.

³ See § 641, *supra*. A city may grant to a street railway the right to construct and operate its lines of railway for a period longer than the duration of the charter of the corporation. *Detroit v. Detroit, etc. Ry.*, 184 U. S. 368 (1902).

⁴ "A railroad corporation cannot mortgage its franchise and railroad without the authority of the legislature, as shown by previous leave or subsequent ratification." *Daniels v. Hart*, 118 Mass. 543 (1875). See also dictum in *Platt v. Union Pac. R. R.*, 99 U. S. 48, 57 (1878); *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130, 399 (1871), and English cases cited; *Susquehanna, etc. Co. v. Bonham*, 9 Watts & S. (Pa.) 27 (1845); *Steiner's Appeal*, 27 Pa. St. 313 (1856); *Wood v. Bedford, etc. R. R.*, 8 Phila. 94 (1871); *Winchester, etc. Turnp. Co. v. Vimont*, 5 B. Mon. (Ky.) 1 (1844); *State v. Morgan*, 28 La. Ann. 482 (1876). Substantially the same question arises and the same reasoning applies in the sale, lease, or consolidation of railroads, concerning which see ch. LIII, *infra*. A statute prescribing that no mortgage shall be executed unless it secures existing debts invalidates a mortgage which does not include such debts. If the bonds are invalid the mortgage falls with them. *Commonwealth v. Smith*, 92 Mass. 448 (1865). The statutes of Massachusetts prohibit mortgages by street railways unless especially allowed by their charters. *Richardson v. Sibley*, 93 Mass. 65 (1865). A cemetery corporation in Minnesota is a quasi-public corporation and cannot mortgage its land except by express authority. The mortgage is void. *Wolford v. Crystal Lake Cem. Assoc.*, 54 Minn. 440 (1893). In England there can be no foreclosure of a street-railway mortgage, the court holding that the mortgage can cover only the

This is the rule laid down in a few cases and in the *obiter dicta* of many cases, and it is the law. Nevertheless there are many decisions which question it and some which declare that it is not the law.¹

An injunction will be granted at the instance of a stockholder to

"undertaking," *i. e.*, the right to continue the business and take the profits, and that consequently there can be no foreclosure of the *corpus* of the property. This is the established policy of England, not only as to street railways, but as to steam railroads and water-works. *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36, applying to street railways the cases of *Gardner v. London, etc. Ry.*, L. R. 2 Ch. App. 201 (1867); *Blaker v. Herts, etc. Water-works Co.*, L. R. 41 Ch. D. 399 (1889); and overruling *Bartlett v. West, etc. Tramways Co.*, [1894] 2 Ch. 286. See also § 892, notes, *infra*.

¹ See *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388, 391 (1884). In *New Hampshire*, in 1857, the United States circuit court, after stating that in England a railway, and the right to own and operate a railway, could not be sold or mortgaged unless the party owning and operating it was expressly authorized to sell or mortgage it, proceeded to say: "The franchises to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable." The court said there was great doubt about the inherent power to mortgage or sell, but in this case the mortgage had been recognized by the legislature, and hence was valid. *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857). The franchise to be a corporation cannot be mortgaged. But the "franchises to build, own, and manage a railroad and to take tolls thereon are not necessarily corporate rights" and may be mortgaged. *New*

Orleans, etc. R. R. v. Delamore, 114 U. S. 501 (1885), a street-railway case. A railroad corporation has implied power to mortgage its property and franchises to secure bonds given in payment for rails. *Miller v. Rutland, etc. R. R.*, 36 Vt. 452, 488 (1863). A railroad corporation has implied power to mortgage its property and franchises, excepting the franchise to be a corporation. *Bardstown, etc. R. R. v. Metcalfe*, 4 Met. (Ky.) 199 (1862); *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878). See also *Pollard v. Maddox*, 28 Ala. 321 (1856); *McAlister v. Plant*, 54 Miss. 106 (1876). In Alabama it has been held that "corporations created for the construction of railroads, in the absence of limitation or restraint by statute, have power to borrow money and make bonds, bills, or promissory notes for its repayment; and also power to mortgage its property, real or personal, as a security for such evidence of debt," and that it has these powers incidentally and without express enactment. *Kelly v. Alabama, etc. R. R.*, 58 Ala. 489 (1877). See also *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 729 (1877) (rev'g court below), a dictum, the court saying: "It cannot be successfully contended, in the face of many decisions to the contrary, both in England and America, of courts of the highest authority, that a statutory corporation is incapable of mortgaging its property, unless its incapacity to do so is either expressly declared or is to be gathered by implication from the terms of the act of incorporation. In other words, no enabling power is requisite to confer the authority to mortgage, but *prima facie* every corporation must be taken to

prevent the corporation from giving a mortgage which would be *ultra vires*.¹

§ 781. *Mortgage on the superfluous land and on the personal property of a railroad corporation.*—A railroad corporation may, without express authority so to do, mortgage such of its land and property as is not necessary to the operation of the road.² Hence

possess it." In *Arthur v. Commercial, etc. Bank*, 17 Miss. 394 (1848), an assignment of a railroad for the benefit of creditors was held to be valid except as objected to by the state.

In *Shepley v. Atlantic, etc. R. R.*, 55 Me. 395, 407 (1867), the court said in regard to this doctrine as follows:

"The whole argument seems to have no greater force than this: that it is dangerous to the public interests to have the powers and privileges conferred by a railroad franchise transferred from the original corporators to a new body. But when we consider how little importance is attached to the persons of the original corporators, how soon death must, and other circumstances may, remove them from all participation in the affairs of the road, how constantly those who have the active management of it are in fact being changed, we shall see how little practical merit this argument has. At the beginning the corporators undoubtedly have a controlling influence, but afterwards the directors are elected by the stockholders and are often changed. Is there any reason to suppose that if a mortgage should, by foreclosure, transfer the franchise to new hands, that as capable men would not be appointed to manage the road as before? Would not the bondholders be as interested and as capable of appointing suitable managers as the stockholders? Does any one fear that the public interest would not be as safe with the former as the latter? Why, then, is it dangerous to the public interests to allow such a transfer?

"We confess that, after giving the matter much thought, the doctrine

that all railroad mortgages made without the consent of the legislature are illegal and void because they may operate as a permanent transfer of the corporate powers from the original corporators to another body seems to us to have little to commend it and much to condemn it."

And in Maine it is held that the general policy of the state in allowing mortgages by railroads is sufficient. *Kennebec, etc. R. R. v. Portland, etc. R. R.*, 59 Me. 9 (1871). See also *Morrill v. Noyes*, 56 Me. 458 (1863).

¹ *McCalmont v. Philadelphia, etc. R. R.*, 7 Fed. Rep. 386 (1881).

² *Platt v. Union Pac. R. R.*, 99 U. S. 48, 57 (1878). A railroad company may, without express authority, mortgage lands which "were not acquired to enable the corporation to carry on the business which it was chartered to do for the benefit of the public, nor needed or used for that purpose. Their alienation in no wise impaired or affected the usefulness of the company as a railroad, or its ability to exercise any of its corporate franchises." A railroad company having power to acquire land for depots and warehouses, and to sell or lease them to other companies, may mortgage them. *Hendee v. Pinkerton*, 96 Mass. 381 (1867). A mortgage may be made on lands not used for permanent way, station-houses, and station grounds, without express authority. *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 735 (1877), citing *Tucker v. Ferguson*, 22 Wall. 527, 572 (1874); *Farnsworth v. Minnesota, etc. R. R.*, 92 U. S. 49 (1875). The company may, without express authority, mortgage ordinary real estate not used in

the mortgage may be valid as to the property which the corporation is authorized to mortgage, and invalid as to the rest.¹ The question of what personal property a mortgage covers is considered elsewhere.²

§ 782. *Express authority to mortgage and ratification by the legislature of unauthorized mortgages.*—Generally the charters of the corporations or the statutes of the state authorize railroad corporations to mortgage their railroads, property, and franchises. Where a railroad company has given a mortgage without authority so to do, the legislature may subsequently ratify and validate the mortgage.³

§ 783. *Construction of various provisions authorizing mortgages—The mortgagee takes title subject to charter provisions.*—If the charter authorizes the corporation to sell, this is sufficient authority to mortgage. Power to sell implies the power to mortgage,⁴ and

the business, but received in payment for subscriptions to stock. *Taber v. Cincinnati, etc. Ry.*, 15 Ind. 459 (1860). A railroad may mortgage its personal property not affixed to the road, though used in the operation of it. *Pierce v. Emery*, 32 N. H. 484 (1856). Express power to mortgage the lots and such property as a dock company acquires under a statute does not prevent the company's giving a mortgage on other property owned by the company. *McCormick v. Parry*, 7 Ex. 355 (1852).

¹ If the mortgage is authorized and valid on any part of the property which it purports to cover, it is not wholly void, but is void only as to the remaining property. *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 734 (1877), reversing the court below. See also *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). A lessor railroad may give a mortgage on the cash rental to which it is entitled, and may take the bonds secured by such mortgage. *Hazard v. Vermont, etc. R. R.*, 17 Fed. Rep. 753 (1883). If the mortgage covers property which the company is authorized to mortgage, and also property which it is not authorized to mortgage, it is good as to the former.

Hendee v. Pinkerton, 96 Mass. 381 (1867).

² See § 852, *infra*.

³ A mortgage which is prohibited by statute may subsequently be validated by statute. *Gross v. U. S. Mortgage Co.*, 108 U. S. 477 (1883); *White Water, etc. Co. v. Vaillette*, 21 How. 414 (1858); *Howe v. Freeman*, 80 Mass. 566 (1860). The power to mortgage may be given after the mortgage is executed, and such mortgage may be validated. *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870); *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857); *Kennebec, etc. R. R. v. Portland, etc. R. R.*, 59 Me. 9 (1871); *Shepley v. Atlantic, etc. R. R.*, 55 Me. 395 (1867); *Shaw v. Norfolk, etc. R. R.*, 71 Mass. 162 (1855); *Richards v. Merrimack, etc. R. R.*, 44 N. H. 127 (1862), where the ratification was by authorizing the trustees in the mortgage to sell the road. The ratification cannot cure the defect that the vendor of the property to the corporation objects to the deed, the vendor being a corporation, and there being dissenting stockholders. *Mayor, etc. v. Knoxville, etc. R. R.*, 22 Fed. Rep. 758 (1884). See also § 808, *infra*.

⁴ Express power given to sell gives also power to mortgage. *Willamette*,

power to "pledge" the property gives power to mortgage.¹ But power to mortgage the real estate does not give power to mortgage the franchises.² Power to give "such securities in amount and kind" as the company sees fit gives power to mortgage.³

The general power of a corporation to mortgage its property is not abridged or destroyed by a special authority to make a mortgage for a particular purpose.⁴

Power to mortgage in order to carry out the purposes of the incorporation authorizes a mortgage to buy rolling-stock and build branch lines.⁵

etc. *Co. v. Bank, etc.*, 119 U. S. 191 (1886); *McAllister v. Plant*, 54 Miss. 106 (1876); *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696, 736 (1877); *Branch v. Atlantic, etc. R. R.*, 3 Woods, 481 (1879); s. c., 4 Fed. Cas. 12, and 106 U. S. 468. Power to "transfer" the property gives power to mortgage it. *Dunham v. Isett*, 15 Iowa, 284 (1863). Power to "transfer all its property, rights, privileges, and franchises" gives power to mortgage. *East Boston, etc. R. R. v. Eastern R. R.*, 95 Mass. 422 (1866). Power to mortgage gives power to sell at foreclosure sale the right of way, franchises, etc. *New Orleans, etc. R. R. v. Delamore*, 114 U. S. 501 (1885). Under the general statutes authorizing every corporation to mortgage its real and personal property, a street-railway company may mortgage its street railway. *Hovelman v. Kansas City H. R. R.*, 79 Mo. 632 (1883).

1 "The power to pledge the franchises and rights of the corporation implies as incident thereto the power to pledge everything that may be necessary to the enjoyment of the franchise and upon which its real value depends." *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857); *Mobile, etc. R. R. v. Talman*, 15 Ala. 472 (1849).

2 *Randolph v. Wilmington, etc. R. R.*, 11 Phila. 502 (1876); s. c., 20 Fed. Cas. 264.

3 *Pierce v. Milwaukee, etc. R. R.*, 24 Wis. 551 (1869). See *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857), holding that power to mort-

gage the franchise implies the power to pledge everything that may be necessary to the enjoyment of it.

4 *Allen v. Montgomery R. R.*, 11 Ala. 437, 454 (1847); *Mobile, etc. R. R. v. Talman*, 15 Ala. 472 (1849). *Of. Alta, etc. Co. v. Alta, etc. Co.*, 78 Cal. 629 (1889); *Bickford v. Grand Junction, etc. Ry.*, 1 Can. Sup. Ct. 696 (1877), reversing the court below (*Grand Junction, etc. Ry. v. Bickford*); *Uncas Nat. Bank v. Rith*, 23 Wis. 339 (1868), holding that power to mortgage the franchise does not exclude other forms of security. Where statutory power is given to a railroad corporation to issue bonds to aid in the construction and equipment of the road, and to secure the same by mortgage, the corporation is not limited in the amount of its mortgage, but only as to the purposes thereof. A second mortgage may also be made. A reorganized company may succeed to these same powers. *Du Pont v. Northern Pac. R. R.*, 18 Fed. Rep. 467 (1883). A corporation may give a mortgage to secure an ordinary debt, even though the charter expressly authorizes it to give a mortgage to secure bonds. *Brown v. Citizens', etc. Co.*, 66 Atl. Rep. 181 (N. J. 1907).

5 *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). Power to mortgage the entire property and franchise has been held not to give power to mortgage the income, rents, and profits. *Georgia S. & F. Ry. v. Barton*, 101 Ga. 466 (1897), the court holding

Although the statutes authorize a mortgage for certain purposes only, yet, if the bonds are used for other purposes, *bona fide* purchasers are protected.¹ The general rule is that the negotiability of the bonds gives negotiability to the mortgage securing the bonds.² A provision in an act of congress authorizing a bridge that all railroads shall have the right to run their trains over such bridge, is binding on prior and subsequent mortgages given by the company which constructed the bridge and is also binding on purchasers at the foreclosure sale under any such mortgage.³

§ 784. *Purchase-money mortgages need not be expressly authorized.*—A railroad corporation having power to purchase a railroad has implied power to give a purchase-money mortgage in the transaction.⁴ A purchase-money mortgage may be created by the provisions of the deed of conveyance requiring further payments from the vendee.⁵ Under a statutory power to execute a mortgage to secure money borrowed, a purchase-money mortgage may be executed.⁶

§ 785. *Power to again mortgage after a mortgage has been given.*—Where power is given to make a mortgage to complete a

also that power to one corporation to enjoy all the rights and privileges granted to another does not give to the former a power of mortgage which was given to the latter.

¹ See §§ 764, 767, *supra*.

² See § 768, *supra*, for the decisions *pro* and *con* on this subject.

³ *Mason City, etc. R. R. v. Union Pacific R. R.*, 124 Fed. Rep. 409 (1903); *aff'd*, 199 U. S. 160.

⁴ *Memphis, etc. R. R. v. Dow*, 19 Fed. Rep. 388 (1884), a case arising in the New York circuit. In the same case from the Arkansas circuit, 120 U. S. 287 (1887), the supreme court sustained the same doctrine by sustaining the mortgage as given, not under the statutory authority to secure "money borrowed," but as a common-law mortgage. See p. 300. Where one road has been leased to another, the two roads may subsequently be consolidated, and consolidated mortgage bonds issued, of which a part shall go to the former lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor the court will

not disturb it. *Hazard v. Vermont, etc. R. R.*, 17 Fed. Rep. 753 (1883). The priority of purchase-money mortgages over other liens is considered in ch. L, *infra*.

⁵ A purchase-money mortgage may be contained in the deed, by which the vendor is to be paid a certain sum or shares of stock in lieu thereof. *Pinch v. Anthony*, 90 Mass. 536 (1864). A purchase-money mortgage may be contained in the deed, by which mortgage the vendee and mortgagor must complete the road and issue certain stock to the vendor. *Tennessee, etc. R. R. v. East Alabama, etc. Ry.*, 73 Ala. 426 (1882). A purchase-money mortgage based on an old contract may be given, even though the corporation is insolvent when the mortgage is given. *Stokes v. Detrick*, 75 Md. 256 (1892). Where a purchase-money mortgage is given as security for bonds, but the vendor rejects the bonds and they are used for other purposes, the vendor loses his lien. *Rice's Appeal*, 79 Pa. St. 168 (1875). See also in general, § 855, *infra*.

⁶ *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904).

railroad and such mortgage is not given, and the railroad is completed, the power is no longer available.¹ But where a corporation has power to give mortgages, a consolidated company made up of the former and of other companies succeeds to that power.²

§ 786. *Power to mortgage the whole gives power to mortgage a part.*—If a railroad company has power to mortgage its whole road, this gives it power to mortgage a part of the road.³

§ 787. *Mortgage to secure future advances, contracts, dividends, etc.—After-acquired property.*—A mortgage may be given to secure future sums to be paid by the mortgagee to the corporation.⁴ Where a mortgage secures bonds, only a part of which are issued at the time of the execution of the mortgage, it seems that the amount of bonds issued or to be issued should be fixed.⁵ The mortgage need not necessarily be to secure the payment of money. It may be to secure the performance of a contract,⁶ or the payment of preferred dividends,⁷

¹ East Tennessee, etc. Ry. v. Frazier, 139 U. S. 288 (1891).

² Mead v. New York, etc. R. R., 45 Conn. 199 (1877); Du Pont v. Northern Pac. R. R., 18 Fed. Rep. 467 (1883).

³ Pullan v. Cincinnati, etc. R. R., 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32; Bickford v. Grand Junction, etc. Ry., 1 Can. Sup. Ct. Rep. 696 (1877), reversing the court below. But see *quare* in East Boston, etc. R. R. v. Eastern R. R., 95 Mass. 422 (1866), and a dictum to the contrary in East Boston, etc. R. R. v. Hubbard, 92 Mass. 459, note (1865). See also ch. LIII, *infra*, concerning the sale of part of a railroad under a power to sell the whole. "If they could mortgage the whole they could mortgage a part." Chartiers Ry. v. Hodgins, 85 Pa. St. 501, 506 (1877). Where a railroad company mortgages such part of its road as is completed, and the mort-

gage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an action on a subscription. Chartiers Ry. v. Hodgins, 85 Pa. St. 501 (1877). See also Jones, Corp. Bonds, § 13.

⁴ Jones v. Guaranty, etc. Co., 101 U. S. 622 (1879); Sabin v. Columbia Fuel Co., 25 Oreg. 15 (1893). Where the mortgagee has the option to make future advances or not, each advance is as upon a new mortgage; but where the mortgagee is bound to make the advances, the lien therefor relates back to the date of the mortgage and is superior to liens or conveyances subsequent to that mortgage. Tompkins v. Little Rock, etc. Ry., 15 Fed. Rep. 6 (1882).

⁵ In the case of Flynn v. Coney Island, etc. R. R., 26 N. Y. App. Div. 416 (1898), the court in a dictum said that in a mortgage securing

⁶ Vaupell v. Woodward, 2 Sand. Ch. 143 (1844). The mortgage may be to secure not only the bonds, but also the performance by the corporation of a construction contract which it has let. But the terms of the mortgage may make the bonds a prior lien to the contract, so that the mortgage secures first the bonds and then

the contract. Mason v. York, etc. R. R., 52 Me. 82 (1861). A mortgage may be given by a corporation to become due when the corporation ceases to carry on the purpose for which it was incorporated. Canandarqua Academy v. McKechnie, 90 N. Y. 618 (1882).

⁷ See § 271, *supra*.

or ordinary dividends on a sale of the corporate property.¹ A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guarantee certain debts of the company.²

The power of a corporation to give a mortgage to secure bonds issued by another corporation would seem to exist where the power exists to guarantee the payment of such bonds.³

A mortgage may cover property subsequently acquired by the company.⁴

The question of whether the priority of liens may be tried in the foreclosure suit is considered elsewhere.⁵

§ 788. *Who may attack the validity of a mortgage.*—This subject is considered elsewhere.⁶

§ 789. *Purchase-money mortgage issued to an insolvent vendor.*—Where a corporation sells all its property to another corporation without authority so to do, or where an insolvent copartnership sells all its property to a corporation, and in either case the vendor takes its pay in the stock and bonds of the vendee, the tendency of the law is to set aside the transaction, except where the rights of *bona fide* parties have intervened.⁷

bonds, a part of which bonds were to be issued in the future, it is necessary that the mortgage fix a limit on the amount of bonds to be issued, "for otherwise no bondholder could know the extent or sufficiency of his security." It is of course familiar law that a mortgage running to a single creditor may secure future advances, even though the amount of such future advances is not specified. *Brown v. Keifer*, 71 N. Y. 610 (1877); *Robinson v. Williams*, 22 N. Y. 380 (1860); *Ackerman v. Hunsicker*, 85 N. Y. 43 (1881).

¹ Where, under special charter power, the company constructs a new road, and by a trust deed sets aside a certain proportion of the entire gross receipts of the company for dividends on the stock issued on the new line, a receiver of the company will be compelled to pay the amount called for by such a trust deed. *Re Eastern*, etc. Ry., L. R. 45 Ch. D. 367 (1890); *Proffitt v. Wye Valley Ry.*, 64 L. T. Rep. 669 (1891). See also § 775, *supra*. Where a mortgage is con-

nected with a lease of property in such a manner as to obligate the lessee to apply the income to the interest and a sinking fund, but a foreclosure takes place, the lessee cannot stop the foreclosure, even though the lessee owns all the bonds, inasmuch as the stockholders of the mortgagor company have an interest in the suit. A stockholder will not be allowed to intervene so long as the trustee continues to prosecute the suit. *Phillips v. Southern*, etc. R. R., 110 Ky. 33 (1901).

² *Re Pyle Works*, [1891] 1 Ch. 173. See also §§ 692, 693, *supra*.

³ Concerning the power to guarantee, see § 775, *supra*. Under the Ohio statutes a coal company may guarantee the bonds of a railroad company and may give a mortgage to secure such a guaranty. *Central Trust Co. v. Columbus*, etc. Ry., 87 Fed. Rep. 815 (1898).

⁴ See ch. L, *infra*.

⁵ See § 842, *infra*.

⁶ See § 848, *infra*.

⁷ See ch. XL, *supra*, on this subject.

A consolidated road may make a mortgage which will take precedence over the unsecured debts of one of the consolidating companies.¹

§ 790. *The franchise to be a corporation cannot be mortgaged, but the right to operate the road and collect toll may be covered by an authorized mortgage.*—The usual power to mortgage the property and franchises does not include the franchise to be a corporation. It refers to the franchise and right to operate the road and collect freight and fares.²

¹ *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). This is no more than any one of the old companies might have done. *Tysen v. Wabash Ry.*, 11 Biss. 510 (1883); s. c., 15 Fed. Rep. 763. But where the unsecured debts consist of bonds which the consolidated company agrees to "protect," these constitute an equitable lien on the property of the old company. *Tysen v. Wabash Ry.*, 11 Biss. 510 (1883). The case of *Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien on the property of the old company, and were prior in right to the mortgage bonds of the consolidated company; refusing to follow *Wabash, etc. Ry. v. Ham*, 114 U. S. 587 (1885). Then see *Compton v. Jesup*, 167 U. S. 1 (1897). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert Col-*

lege, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895).

² *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32. A mortgage authorized on the "means, property, and effects" covers the franchise or privilege, enabling the mortgagee to have the same use and beneficial enjoyment of the property which the company had, but does not cover the franchise to be a corporation. *Meyer v. Johnston*, 53 Ala. 237 (1875); s. c., 64 Ala. 603; *Arthur v. Commercial, etc. Bank*, 17 Miss. 394 (1848); *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875), holding that including this franchise, without authority does not invalidate the mortgage as to the other property. In *Pierce v. Emery*, 32 N. H. 484, 512 (1856), the view is taken that the franchise to be a corporation passed also under the mortgage, but this certainly is not the law. The attempt to cover the franchise to be a corporation is nugatory, but does not invalidate the mortgage. *Butler v. Rahm*, 46 Md. 541 (1877). The right to mortgage the road carries with it the right to mortgage the use of the road, although the latter is a franchise. The franchises to be a corporation and to exercise the power of eminent domain do not pass, however. *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372, 386, 390 (1859). The legislature may of course authorize a mortgage on the franchise to be a corporation. *St. Paul, etc. R. R. v. Parcher*, 14 Minn. 297 (1869). *Atkinson*

"The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment."¹ Hence, the purchasers of a road on foreclosure sale succeed, not to the right to be a corporation, but to the right to maintain and operate the road.² A judicial sale of the fran-

v. Marietta, etc. R. R., 15 Ohio St. 21 (1864), holds that a judicial sale under a mortgage which includes the franchise without authority does not invest purchasers with any corporate capacity whatever. The mortgage does not cover the power to exercise the right of eminent domain. *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372 (1859). Power to mortgage the property makes the mortgage of a railroad company valid, although the mortgage also seeks to cover the franchise. *Gloninger v. Pittsburgh, etc. R. R.*, 139 Pa. St. 13 (1891). The mortgage on the franchises covers them "so far as necessary to make the other property and effects conveyed by it productive and profitable." *Meyer v. Johnston*, 53 Ala. 237, 324, 327 (1875); s. c., 64 Ala. 603. The word "property" includes also the franchises. *Wilmington R. R. v. Reid*, 13 Wall. 264 (1871). At an early day a dictum by Lord Coleridge was to the effect that a mortgagee, even if he took possession, could not operate the road; but this is now clearly not the law. *Myatt v. St. Helen's, etc. Ry.*, 2 Q. B. 364 (1841). An irrigation company has two franchises; one the franchise to be a corporation and the other the franchise exercised in operating the plant, and the latter franchise is located where the plant is located. *San Joaquin, etc. Co. v. Merced County*, 2 Cal. App. 593 (1906).

¹"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as such;

and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the incorporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises." The court held that the purchasers at a foreclosure sale of a railroad might organize a corporation to operate the railroad, but that such new corporation did not succeed to an exemption from taxation which the old corporation possessed. *Memphis, etc. R. R. v. Railroad Com'rs*, 112 U. S. 609, 619 (1884). The purchasers of a road at foreclosure sale do not succeed to the corporate capacity and franchise of the old corporation. *Metz v. Buffalo, etc. R. R.*, 58 N. Y. 61 (1874); *Wellsborough, etc. Co. v. Griffin*, 57 Pa. St. 417 (1868). See also an able article on Foreclosure of Railway Mortgages by R. Mason Lisle, in *Am. L. Rev.*, Dec. 1886; *People v. Cook*, 110 N. Y. 443 (1888). A mortgage does not cover the corporate franchise. *City Water Co. v. State*, 88 Tex. 600 (1895).

² A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railway; the latter may be mortgaged without the former and may pass to

chise of a bank does not transfer to the purchaser an exemption of the bank from taxation.¹ And the words "franchises, rights and privileges" do not necessarily include an exemption from taxation.² A mortgage of a railroad covers the right to operate the road, even though the statute authorizing the mortgage does not mention the franchises.³ Power to mortgage gives power to have a foreclosure sale,

a purchaser at a foreclosure sale. *Memphis, etc. R. R. v. Railroad Com'rs*, 112 U. S. 609, 619 (1884); *Bruffett v. Great Western R. R.*, 25 Ill. 353 (1861); *Commonwealth v. Tenth etc. Turnp. Co.*, 59 Mass. 509 (1850); *State v. Bank of Maryland*, 6 Gill & J. (Md.) 205 (1834); *Vilas v. Milwaukee, etc. Ry.*, 17 Wis. 497 (1863); *Smith v. Chicago, etc. Ry.*, 18 Wis. 17 (1864); *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857); *Commonwealth v. Central, etc. Ry.*, 52 Pa. St. 506 (1866); *State v. Sherman*, 22 Ohio St. 411 (1872); *Commonwealth v. Smith*, 92 Mass. 448 (1865). See also cases in ch. LII, *infra*, to the effect that the purchaser at foreclosure sale is not liable for the debts of the old company. A purchaser of a railroad at foreclosure sale does not succeed to any corporate franchise, but succeeds to the right to operate the road and collect tolls. *Rogers v. Nashville, etc. Ry.*, 91 Fed. Rep. 299 (1898). Where a water-works contract between the company and the city is mortgaged, and the mortgage is foreclosed, a purchaser at the sale may transfer the same to a foreign corporation, and the latter may own the property and enforce the contract. *State v. Topeka, etc. Co.*, 61 Kan. 547 (1900). Purchasers at the sale succeed to all the rights of the company in the deeds of the right of way from property owners. *Polard v. Maddox*, 28 Ala. 321 (1856). The purchasers at a foreclosure sale are "invested with the franchise of maintaining, operating, and making profit from the use of the road, according to the grant made," but they do not succeed to the corporate ex-

istence of the foreclosed company, and hence they operate the road as individuals. *Atkinson v. Marietta, etc. R. R.*, 15 Ohio St. 21 (1864). Upon the foreclosure sale of a railroad an individual may purchase it, but unless a statute authorizes him to operate or sell it he is "in the awkward predicament of owning a property which it was not certain he could use or sell." *People v. Brooklyn, etc. R. R.*, 89 N. Y. 75, 84 (1882). A mortgage on a gas plant carries with it to the purchaser at foreclosure sale the right to operate the plant. *Pumphrey v. Threadgill*, 9 Tex. Civ. App. 184 (1894). On an execution sale of a street railroad franchise, as authorized by statute, an individual may purchase and then operate the road. "There is no more difficulty in allowing individuals to exercise these powers than corporations, and the use of them for a brief period in no way interferes with the protection of the franchise in perpetuity. There might be difficulties in managing larger enterprises, and different rules have been applied to them. But there are no difficulties in the way of private management of a street railway, and there is no reason why the statute which by its language includes them should be made to exclude them." *McKee v. Grand Rapids, etc. Ry.*, 41 Mich. 274 (1879). See also §§ 892, 913, *infra*.

¹ *Mercantile Bank v. Tennessee*, 161 U. S. 161 (1896).

² *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174 (1896). See also § 572b, *supra*.

³ *Chadwick v. Old Colony R. R.*, 171 Mass. 239 (1898).

and such mortgage may cover municipal grants and all franchises, excepting the franchise to be the corporation.¹

§ 791. *Mortgages to directors.*—Under certain circumstances and certain restrictions the mortgage may be given to a director of the corporation to secure a debt due to him,² but not to a director if the corporation is insolvent.³

§ 792. *Forfeiture of the charter—Effect upon a mortgage.*—A forfeiture of the charter of a company at the instance of the state does not invalidate or affect an existing mortgage on the company's property;⁴ but a lapse of the charter by reason of a failure to do certain work within a certain time may destroy the franchises, even as covered by the mortgage.⁵

¹ *Vicksburg v. Waterworks Co.*, 202 U. S. 453 (1906). Where a city made a grant to a waterworks company, the prices to be as agreed between the company and the consumers, but not to exceed certain rates, the city cannot thereafter reduce the rates below such specified rates, and a purchaser of the plant at foreclosure sale is entitled to equal protection. *Omaha Water Co. v. City of Omaha*, 147 Fed. Rep. 1 (1906).

² See § 692, *supra*.

³ See § 692, *supra*.

⁴ *People v. O'Brien*, 111 N. Y. 1 (1888). See also § 641, *supra*. A purchaser at a mortgage sale of lands mortgaged by a railroad is protected, although the lands were to be forfeited if the road was not completed within a certain time, and the road was not completed. No forfeiture had been declared in this case. *Mower v. Kemp*, 42 La. Ann. 1007 (1890). A water-works company's charter will not be forfeited because another company has purchased a majority of its stock and illegally placed a mortgage upon its property. *Commonwealth v. Punxsutawney, etc. Co.*, 197 Pa. St. 569 (1901). Where in a charter granted by congress to a railroad corporation for a bridge the right is retained to congress to alter, amend or repeal, and thereafter another act of congress provides that such bridge shall be open for the use of other

railroads on a reasonable compensation, and thereafter a mortgage given by the corporation is foreclosed, the purchaser takes the bridge, subject to the obligation to allow other railroads to use the bridge, even though the mortgage was executed before the second statute was enacted. The court came to this conclusion without stopping to inquire whether the foreclosure and sale "was anything more than a reorganization under the form of a judicial proceeding," nor whether, if it were a *bona fide* sale to an independent third party, the sale took the property out of the jurisdiction of congress. *Union Pacific Co. v. Mason City Co.*, 199 U. S. 160 (1905).

⁵ Where by the charter all rights are to be forfeited unless the road is completed within a certain time, and it is not so completed, and the state forfeits all its rights and turns them over to another company, a mortgage of the old company falls also. *Silliman v. Fredericksburg, etc. R. R.*, 27 Gratt. (Va.) 119 (1876). See also *Farnsworth v. Minnesota, etc. R. R.*, 92 U. S. 49, 66 (1875), and § 638, *supra*. Where the company's charter limits the time within which it must complete the road, and it is liable not to do so, the trustee of the mortgage may have a receiver appointed for the purpose of completing the road. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316, (1878); s. c., 1 Fed. Cas. 465.

§ 793. *Waiver of a part or all of a mortgage and bonds—Mortgage to a state.*—A mortgage may be waived entirely, or may be waived so as to allow a later mortgage to take priority. This is sometimes done by a state which holds a first mortgage on a railroad and wishes to enable the company to borrow more money.¹

Although a state issues its bonds in aid of a railroad, and then takes a mortgage on the railroad as security for the state, yet a holder of the state bonds is not subrogated to the mortgage and cannot enforce it. The state may waive the mortgage.² Sometimes a part of the bondholders waive their priority of lien. This does not decrease or

¹ *Murdock v. Woodson*, 2 Dill. 188 (1873); s. c., 17 Fed. Cas. 1017; aff'd, 22 Wash. 351, *Woodson v. Murdock*, 22 Wall. 351 (1874); *Darby v. Wright*, 3 Blatchf. 170 (1854); s. c., 6 Fed. Cas. (1187). The waiver may be to take effect only upon a consolidation. *Gibbes v. Greenville*, etc. R. R., 13 S. C. 228 (1879). The state may, instead of waiving its mortgage, allow new investors to be subrogated to its security. Where the first-mortgage bondholders (the state in this instance) agree that the interest on new bonds to be issued shall be paid before the former take anything, this agreement constitutes an equitable mortgage on the property, and to that extent displaces the first mortgage. A foreclosure by a mortgagee second to the first mortgage, but prior to the new bonds mentioned above, must take this equitable mortgage into consideration. *Ketchum v. Pacific R. R.*, 4 Dill. 78 (1876); s. c., 14 Fed. Cas. 425; affirmed, *Ketchum v. St. Louis*, 101 U. S. 306 (1879). See also § 816, *infra*, and § 765, *supra*.

² State aid bonds secured by a lien on the railroads to the state give no right to holders to enforce that lien. The state may release the lien. *Tennessee Bond Cases*, 114 U. S. 663 (1885); *Cunningham v. Macon*, etc. R. R., 156 U. S. 400 (1895); *McKittrick v. Arkansas Cent. Ry.*, 152 U. S. 473 (1894). Although bonds issued by a state in order to pay its subscription to stock of a railroad recite

that the state holds the stock as security therefor, yet the state cannot be compelled by suit to apply its stock and dividends to the payment of such bonds. *Christian v. Atlantic*, etc. R. R., 133 U. S. 233 (1890), overruling *Swazey v. North Carolina R. R.*, 1 Hughes, 17 (1874); s. c., 23 Fed. Cas. 518. Concerning subrogation herein, see § 765, *supra*; also, *Railroad v. Schutte*, 103 U. S. 118 (1880); *Chamberlain v. St. Paul*, etc. R. R., 92 U. S. 299 (1875); *Stevens v. Louisville*, etc. R. R., 3 Fed. Rep. 673 (1880); aff'd, 114 U. S. 664; *Colt v. Barnes*, 64 Ala. 108 (1879); *Young v. Montgomery*, etc. R. R., 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850; *Gilman v. New Orleans*, etc. R. R., 72 Ala. 566 (1882); *Forrest v. Luddington*, 68 Ala. 1 (1880); *Morton v. New Orleans*, etc. Ry., 79 Ala. 590 (1885); *Branch v. Macon*, etc. R. R., 2 Woods, 385 (1875); s. c., 4 Fed. Cas. 15; *Clews v. Brunswick*, etc. R. R., 54 Ga. 315 (1875); *Western N. C. R. R. v. Drew*, 3 Woods, 692 (1879); s. c., 29 Fed. Cas. 744; *State v. Florida*, etc. R. R., 15 Fla. 690 (1876); *State v. Jacksonville*, etc. R. R., 16 Fla. 708 (1878); *Hand v. Savannah*, etc. R. R., 12 S. C. 314 (1879); s. c., 17 S. C. 219; *Gibbes v. Greenville*, etc. R. R., 13 S. C. 228 (1879). State bonds in aid of a railroad, to be repaid by the railroad by an annual tax, are not a lien on the railroad as against a purchaser thereof at a foreclosure sale. *Tompkins v. Little Rock*, etc. Ry., 125 U.

increase the rights of the other bondholders secured by the same mortgage.¹

B. FORM AND PROVISIONS OF THE MORTGAGE DEED OF TRUST.

§ 794. *The mortgage may be a deed of trust—Mortgages created by statute—Equitable mortgages.*—The mortgage of a corporation need not be in any particular form.² It may be in the form of a deed of trust to trustees for the benefit of the bondholders,³ or it may be a mortgage made directly to one or more bondholders.⁴ Sometimes a mortgage is created by the words of a statute, and no formal instrument of mortgage is necessary.⁵

S. 109 (1888); aff'd, 18 Fed. Rep. 344. See s. c., 15 Fed. Rep. 6; 120 U. S. 160, rev'g 21 Fed. Rep. 370.

¹ Such of the bondholders as desire may agree that their bonds shall be subject to a new lien that is later than their mortgage, but their agreement of course does not bind bondholders who do not assent thereto. The agreement is given in full in this case. But in such a case the non-assenting stockholders cannot claim that the other bonds are paid. The secondary lienholders succeed to the rights of the first-mortgage bondholders who have waived their rights. *Poland v. Lamoille, etc. R. R.*, 52 Vt. 144 (1879). By unanimous consent a judgment on a claim may be allowed to be paid in priority to the mortgage bondholders. *Central Trust Co. v. Wabash, etc. R. R.*, 24 Fed. Rep. 98 (1885). Construction work may be entitled to payment in preference to mortgage bonds, if the bondholders request, direct, or promise payment for the work. This would be by estoppel. But mere acquiescence does not raise an estoppel *in pais*. *Re Kelly*, 5 Fed. Rep. 846 (1881). See also § 765, *supra*, on subrogation. Although the holders of coupons waive default and agree to give time, yet, the agreement being without consideration, they may change their minds and insist upon payment or a foreclosure for non-payment of the interest. *Union Trust Co. v. St. Louis, etc. Ry.*, 5 Dill. 1

(1878); s. c., 24 Fed. Cas. 710. A proxy authorized to vote at a corporate meeting is not authorized to vote to discharge a mortgage, which secures the stockholder (who gave the proxy) as a creditor of the corporation. *Moore v. Ensley*, 112 Ala. 228 (1896).

² *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). "The mode in which the mortgage lien shall be created is left to the company." *Hubbell v. Syracuse Ironworks*, 14 N. Y. Supp. 345 (1891). A corporation may give a mortgage by conveying land to a person as trustee, without specifying the character of the trust. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). Warehouse receipts issued by a glass manufacturing company do not create a lien on the property mentioned in the receipts. *Bell, etc. Co. v. Kentucky, etc. Co.*, 48 S. W. Rep. 440 (Ky. 1898); s. c., 106 Ky. 7.

³ See ch. XLVIII, *infra*, concerning this form of mortgage.

⁴ See § 812, *infra*.

⁵ *Wilson v. Boyce*, 92 U. S. 320 (1875); *Tompkins v. Little Rock, etc. Ry.*, 15 Fed. Rep. 6 (1882); *U. S. v. Union Pac. R. R.*, 91 U. S. 72 (1875); *Cincinnati v. Morgan*, 3 Wall. 275 (1865), holding, however, that the lien does not exist where the statute does not clearly create it; *Woodson v. Murdock*, 22 Wall. 351 (1874); *Murdock v. Woodson*, 2 Dill. 188 (1873); s. c., 17 Fed. Cas. 1017; aff'd, 22 Wall.

An equitable mortgage exists where no formal mortgage has been executed, but a contract or the relations between the parties call for a mortgage.¹ Such a mortgage may exist where the bond and mortgage are both contained in one instrument and that instrument is not recorded as a mortgage.² A mortgage not under seal may still be a

351; *Spence v. Mobile, etc. Ry.*, 79 Ala. 576 (1885); *Whitehead v. Vineyard*, 50 Mo. 30 (1872); *Colt v. Barnes*, 64 Ala. 108 (1879). In this case the state indorsed railroad bonds and created a statutory mortgage to secure the indorsement. The court held that the holders of the bonds were entitled to the benefit of the mortgage. A statutory mortgage of a railroad to the state may entitle the state to control the income, although no foreclosure has been commenced. *Macalester v. Maryland*, 114 U. S. 598 (1885). A statutory mortgage not otherwise recorded was involved in *South Dakota v. North Carolina*, 192 U. S. 286 (1904). A mortgage by statute alone is valid. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. Where a large loan is made by a county to a railroad under a statute providing that the gross earnings of the railroad company should be received by a state officer and the interest on said loan be paid therefrom, an equitable assignment exists, and all subsequent mortgages are subject to such loan. *Ketchum v. St. Louis*, 101 U. S. 306 (1879). A statute giving a city power to loan money to a railroad, and to take a mortgage or other security for payment, and making such lien a first lien, does not render a pledge of stock which is made by the railroad to the city, to secure the debt, a first lien over mortgages given by the railroad company to others. *Cincinnati v. Morgan*, 3 Wall. 275 (1865). A mortgage created by statute and not evidenced by any corporate writing was involved in *Cunningham v. Macon, etc. R. R.* 156 U. S. 400 (1895). Concerning a waiver of such a mortgage by the state, see § 793, *supra*.

1 A contract to make a mortgage and issue bonds may be enforced where the company has received the consideration therefor, even though the statute requires the assent of two-thirds of the stockholders. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). An oral agreement to give a contractor a mortgage will be sustained only where it is clearly proven. *Waco, etc. R. R. v. Shirley*, 45 Tex. 355 (1876). An agent's agreement, based on a resolution authorizing a pledge of the real and personal estate of said company, is an equitable mortgage and may be enforced. *Mobile, etc. R. R. v. Talman*, 15 Ala. 472 (1849). See also *Ketchum v. St. Louis*, 101 U. S. 306 (1879). Although a contractor who is to take stock and bonds in payment assigns his contract to a trustee and issues debenture bonds against it, and also assigns scrip certificates of the company, exchangeable for mortgage bonds on completion of the work, yet no equitable lien on the property of the company is thereby created. *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896).

2 Bonds without a mortgage may be construed to be a mortgage under the terms of the bonds themselves, and a court of equity will so enforce them. *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858). A bond, though not directly providing for a lien, yet clearly intending it, was held to be a mortgage, the court saying that any writing showing the intent is sufficient. *Dundas v. Desjardins Canal Co.*, 17 Grant's Ch. (U. C.) 27 (1870). Where preferred stock is issued reciting that it is a lien on all the property of the corporation after the second mortgage, the lien will be upheld by the court as against subse-

good mortgage in equity.¹ A contract of a corporation to give a mortgage on its property is a lien in equity superior to other creditors of the corporation, where such contract has been performed by the party entitled to the mortgage, and especially where an attempted execution of the mortgage has been made.²

Where a mortgage covers bonds to be thereafter delivered, and instead of such delivery the mortgagor deposits the bonds as security with the United States government, and then makes another mortgage covering such bonds, the first mortgagee is entitled to the bonds upon their being released by the United States government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second mortgage have passed into *bona fide* hands.³ Where stock is issued to a city by a street railway company in payment for its street rights, a provision in the grant of the street rights, that in case the company became indebted the city should have a lien on the company's franchise and property, does not give the city a lien in preference to creditors of the company, but only in preference to other stockholders.⁴

§ 795. *Character of the various provisions in a corporate mortgage deed of trust—The granting clause.*—A railroad mortgage

quent mortgages and general creditors, although such lien was not secured by any mortgage. The trustees in the subsequent deed of trust knew of and acquiesced in the priority of the preferred stock lien, and the deed itself recognized it. This bound the stockholders. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 355 (1878); s. c., 22 Fed. Cas. 274. *Cf. ch. XVI, supra.* In *Holroyd v. Marshall*, 10 H. L. Cas. 191, 223 (1862), the court said: "Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgage over a judgment creditor, though without notice, may now be considered to be firmly established," and such priority is sustained. There need not be a formal deed of conveyance, provided the statute of frauds is satisfied. To same effect as regards an unrecorded charge upon the property, *Re General South Amer. Co.*, L. R. 2 Ch. D. 337 (1876). The English debentures are a common instance of a bond and mortgage con-

tained in one instrument. They, however, are expressly excepted from the recording acts. A combination of a bond and mortgage in one instrument by reason of a charter provision to that effect is found in the original Pacific Railroad bonds. See *United States v. Stanford*, 161 U. S. 412, 427 (1896). See also § 776, *supra*.

¹ *Pullis v. Pullis Bros. etc. Co.*, 157 Mo. 565 (1900). See also §§ 721, 722, *supra*.

² *Hamilton T. Co. v. Clemes*, 163 N. Y. 423 (1900). A contract calling for a mortgage, the money having been paid to the corporation therefor, will be considered a mortgage as against other creditors, especially where an informal mortgage has been executed. *Stiwell v. Webb, etc. Co.*, 79 Ark. 45 (1906).

³ *Central T. Co. v. West India, etc. Co.*, 169 N. Y. 314 (1901). *Cf. § 852, infra*, and § 317, *supra*.

⁴ *Guaranty, etc. Co. v. Galveston, etc. R. R.*, 107 Fed. Rep. 311 (1901).

generally contains many provisions which do not appear in the ordinary mortgage. Each of these provisions has a history, and each has grown out of emergencies, necessities, and difficulties in protecting the rights of both the corporation mortgagor and the bondholders who are secured by the mortgage. Some of the most important of these provisions are here referred to.

The deed of trust should convey a fee to the trustee, and should carefully specify all the property that it is intended to cover.

A formal and palpable omission of technical words in the mortgage, such as the words of inheritance, will be supplied by the court under its power to reform an instrument.¹

§ 796. *Provision that the mortgagor may retain possession until default.*—At common law a mortgagee was entitled to the immediate possession of the mortgaged premises, although there had been no default. Consequently a provision was usually inserted in the mortgage that until default the mortgagor might retain possession. The statutes of many of the states now give this right to the mortgagor. Nevertheless it is customary to insert such a provision in corporation mortgages.² A mortgage purporting to cover municipal bonds not yet delivered does not sustain a suit by the trustee to obtain such bonds upon foreclosure of the mortgage.³

¹ The lack of words of inheritance in the mortgage, it being to the trustees and their successors merely, is no bar to foreclosure. The court in the foreclosure suit will reform the instrument. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879); *Randolph v. New Jersey, etc. R. R.*, 28 N. J. Eq. 49 (1877). A deed to a corporation may convey a fee, though it does not use the words "successors and assigns." *Wilkes-Barre v. Wyoming, etc. Soc.*, 134 Pa. St. 616 (1890). Even a mortgage of real estate by an insolvent corporation may be reformed so as to include words of inheritance where such words are omitted by mistake. *Miller v. Savage*, 60 N. J. Eq. 204 (1900).

² At common law the mortgagee is entitled to possession at once. *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). The clause that the mortgagee has the right to possession, etc., until default in the payment of principal or interest adds nothing to the

rights of the mortgagor. It is merely declarative of the law. *Dow v. Memphis, etc. R. R.*, 20 Fed. Rep. 260 (1884). Where the clause providing for the retention of possession by the mortgagor is not broad enough to cover land not used for railroad purposes, the mortgagee may take possession of such land before default in the terms of the mortgage. *Youngman v. Elmira, etc. R. R.*, 65 Pa. St. 278 (1870). A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state. *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78 (1900). See also § 852, *infra*.

³ *Farmers' L. & T. Co. v. Board of Sup'rs, etc.*, 93 Fed. Rep. 579 (1899). See also § 852, *infra*.

§ 797. *Provision that the mortgagor will pay the bonds and coupons, and waiver of statutory provisions as to redemption, stays, valuation, etc.*—This is one of the common and elementary provisions in a railroad deed of trust. The effect of statutory provisions is considered elsewhere.¹ If there is no express covenant to pay the bonds, such a covenant cannot be read into the mortgage.²

§ 798. *Provision giving power to the corporation to sell old material and parts of the property free from the mortgage.*—This power is often reserved so that the company may sell old material the same as it would if the mortgage did not exist. Sometimes the power is reserved also to sell or take up any part of the line that proves to be valueless; also to sell portions of the plant and use the proceeds in replacing it.³ Even though there is no clause to that effect in a mort-

¹ See § 841, *infra*, as to redemption.

² United States v. Stanford, 69 Fed. Rep. 25 (1895); *aff'd*, 161 U. S. 412.

³ See cases in § 852, *infra*. A provision authorizing the mortgagor to sell out worn-out machinery and replace the same with the proceeds is legal, such a mortgage not being on ordinary goods. Wyly-Gabbett Co. v. Williams, 42 S. Rep. 910 (Fla. 1907). A release by the trustee of a portion of the property from the lien of the mortgage, in accordance with express authority given by the deed of trust, was involved in Fidelity Trust Co. v. National, etc. Co., 89 S. W. Rep. 718 (Ky. 1905). The broad provision in a mortgage that the company "may dispose of any property, real or personal, . . . and make and execute titles for the same," is construed to authorize the sale of only such property as is not needed for operating the road, such as surplus lands and property not in use or required for use on the road. Spence v. Mobile, etc. Ry., 79 Ala. 576 (1885).

In Butler v. Rahm, 46 Md. 541 (1877), the provision was as follows:

"Nothing herein contained shall prevent the said company, before default in the payment of any of the said bonds or the interest due thereon, from selling, hypothecating, or otherwise disposing of any of their said property, real or personal, not nec-

essary in their judgment for the use of the said road, nor from collecting and applying any money due to the said company from any source whatever, provided said application shall not be to the prejudice of any holder of any of the said bonds."

The court, in holding that this provision was not fraudulent, said:

"However suspicious the power here given might be in the case of a mortgage of ordinary goods, the very nature of this corporation, its business, the means and power necessary to keep it up, the wear and tear of its iron, ties, and rolling-stock, the constant necessity of replacing injured or worn-out appurtenances with new, forbids the inference of a fraudulent purpose which might arise from such a provision under other circumstances. The power retained is manifested in the interest of the mortgagees, and is restricted by express language to be exercised in such manner as not to prejudice in any manner the rights of the bondholders. If the provision is in the interest of the bondholders, as it transparently is, it is also for the same reasons in the interest of the other creditors and cannot be regarded as fraudulent."

Where a railroad mortgage covers lands also, and provides that the mortgagor may sell the lands and pay over the proceeds to the trustee of the deed

gage, a railroad company has implied power to sell old rolling-stock and replace it by new.¹ Even though an income mortgage does not authorize a release of property not needed, yet a court of equity may authorize it, and the bondholders need not be made a party to the proceeding.²

There is sometimes a provision for selling some of the property and applying the proceeds to the bonds.³ A mortgage of railroad property often contains a provision authorizing the trustee to release portions of the property from the mortgage, provided the proceeds from the sale of such portion so released is paid to the trustee or is reinvested in the property. This provision is strictly construed, and the trustee is not allowed to extend or vary its terms.⁴ Where a mortgage secured by stock as collateral expressly authorizes the trustee to release the collateral and accept other security in lieu thereof upon the consent of the majority in interest of the bondholders, a minority bondholder cannot complain of such substitution unless he proves that the bondholders as a whole will be injured.⁵ Where the trustee is given power to sell parts of the property and reinvest the proceeds, he may sell free from redemption rights. Such a provision is not a form of foreclosure.⁶ A mortgage covering land, but giving power to the mortgagor to sell the land free from the mortgage, may be illegal as to existing creditors, but legal as to subsequent creditors.⁷ A trust

in trust "after deducting the expenses of executing this trust," the mortgagor may deduct the expense of making the sales and also the taxes. *Nickerson v. Atchison, etc. R. R.*, 17 Fed. Rep. 408 (1881).

¹ *Union T. Co. v. Morrison*, 125 U. S. 609 (1888).

² *Mayor, etc. v. United Rys., etc. Co.*, 69 Atl. Rep. 436 (Md. 1908).

³ As to selling land, see *Little Rock, etc. Ry. v. Huntington*, 120 U. S. 160 (1887). For a provision that failed, see *Chicago, etc. R. R. v. Pyne*, 30 Fed. Rep. 86 (1887).

⁴ Where the mortgage is secured by land also, which the trustee is authorized to release upon the price thereof being paid to the trustee, the trustee must apply the fund in strict accordance with the terms of the mortgage, otherwise he will be liable; but even though the trustee has made a serious mistake in waiving rights under the mortgage and declining to pay a bond-

holder, yet, if he acted in good faith, judgment will be against him as trustee and not personally. *Hollister v. Stewart*, 111 N. Y. 644 (1889), holding also that the trustee will not be removed, but will be required to furnish indemnity for the past and security for the future.

A provision in a mortgage that the trustee shall release such part of the premises as the mortgagor may sell, a part of the purchase price to be paid to the trustee, does not require the trustee to release where the sale is not made in such manner as to insure to the trustee the part which goes to him. *Weir v. Iron, etc. Co.*, 27 Colo. 385 (1900).

⁵ *Ikelheimer v. Consolidated, etc. Co.*, 59 Atl. Rep. 363 (N. J. 1904).

⁶ *Thompson v. Ellenz*, 58 Minn. 301 (1894).

⁷ *Central Trust Co. v. East Tennessee Land Co.*, 71 Fed. Rep. 353 (1895). A provision in the mortgage

mortgage on personalty giving the mortgagor power to sell or dispose of the mortgaged property, and the income and proceeds thereof, without reinvesting them or redeeming the bonds or replacing the property or developing the business or management, gives him power to dispose of the property without restraint, and hence is illegal both as to present and future personal property, so far as creditors are concerned.¹ A debenture which is a mortgage on everything, but which expressly allows the company to sell any part until the mortgagee should take possession, may be void as to other creditors.²

§ 799. *Provision relative to taxes, insurance, liens, and maintenance.*—A clause is usually inserted that the company must pay all taxes levied on the property, and shall pay all liens and maintain the rolling stock and road.³ A foreclosure may be commenced and receiver appointed for non-payment of taxes, general insolvency being alleged.⁴ A default by the corporation in paying taxes on its capital stock may be a default under the mortgage, and payment of the taxes

that the company may sell its property free from the mortgage, if other property is substituted so as not to decrease the security, is valid. *Rawlings v. New Memphis, etc. Co.*, 60 S. W. Rep. 206 (Tenn. 1900). See also § 852, *infra*.

¹ *Zartman v. First, etc. Bank*, 109 N. Y. App. Div. 406 (1905); *aff'd*, 189 N. Y. 267. A chattel mortgage by a ship-building company on its ship-building materials with permission to use and replace the same is void. *In re Marine, etc. Co.*, 135 Fed. Rep. 921 (1905). A provision allowing a sale free from the mortgage of real estate not needed by the corporation, the proceeds to be invested in other property to be held subject to the mortgage, does not render the mortgage void as against creditors. The same rule is true also as to personal property. *Hasbrouck v. Rich*, 113 Mo. App. 389 (1905). The provision allowing the sale of old materials does not allow a sale of old rails as part payment for new rails to take their place, unless the new rails are actually substituted. *United States, etc. Co. v. Western, etc. Co.*, 109 S. W. Rep. 377 (Tex. 1908).

² *Orman v. English, etc. Inv. Trust*, 61 Fed. Rep. 38 (1894). See also § 798, *supra*.

³ A clause that the company shall pay the semi-annual interest "without any deduction . . . for or in respect of any taxes" is insufficient as regards the old government tax of five per cent. The company under such a provision was held not liable to pay that tax. *Haight v. Railroad*, 6 Wall. 15 (1867).

⁴ A bondholder may commence foreclosure before there is any default in interest, where there is a default in the payment of taxes and the company is insolvent. The trustees were made defendants, and a request to them to foreclose was alleged. A receiver was appointed. *Putnam v. Jacksonville, etc. Ry.*, 61 Fed. Rep. 440 (1893). See also § 836, *infra*. A provision in a mortgage by which the trustee is bound to release such part of the premises as the mortgagor may sell, a portion of the purchase price to be paid to the trustee, is not enforceable after a default by the mortgagor in paying taxes, as required by the mortgage. *Weir v. Iron, etc. Co.*, 27 Colo. 385 (1900).

after foreclosure is commenced does not stop the foreclosure.¹ Where the president of the mortgagor corporation allows the property to be sold for non-payment of taxes and buys in the property himself, the mortgagee may recover such property from him.²

Mortgage bondholders may have an equitable lien on the proceeds of insurance policies on corporate property by virtue of a stipulation in the mortgage to that effect.³ A mortgagee cannot claim insurance money collected by a receiver who was not appointed at its instance. The mortgagee's remedy is against the corporation for impairment of the security.⁴ A mortgagor is not bound to insure the property for the benefit of the bondholders, unless the mortgage expressly requires him to do so, and the trustee is not bound to obtain such insurance where the mortgage merely provides that the trustee should not be liable for not obtaining insurance, but authorizes the trustee to demand such insurance; hence, if the mortgagor sells the property, the purchaser may insure in his own name, and the mortgagee is not entitled to such insurance, even though the property is burned. Such also would be the case even if the mortgagor expressly obligated himself to insure.⁵

§ 800. *Provision for declaring the principal sum due upon a default in interest—Provision that the trustee shall foreclose upon the request of a certain proportion of the bondholders.*—The important provision that the principal sum may be declared due upon default in the payment of interest corresponds to a similar provision found in most real-estate mortgages. There are many ways in which this provision may be worded. The right to declare the principal sum due may be left to the discretion of the trustee, or to a special proportion of the bondholders, or to each bondholder for himself. It may provide that the right may be exercised only after a certain time has elapsed after default in the interest, or that it may be exercised at once. Or it may declare that upon default in the payment of the interest the principal shall at once become due. Various provisions and the decisions thereon are considered in the notes below.⁶ Where

1 Union T. Co. v. Thomas, 66 Atl. Rep. 450 (Md. 1907).

2 Appleton, etc. Co. v. Central Trust Co., etc., 93 Fed. Rep. 286 (1899).

3 Chicago, etc. Bank v. Bentz, 59 Fed. Rep. 645 (1893).

4 Nessler v. Industrial, etc. Co., 65 N. J. Eq. 491 (1903).

5 Farmers', etc. Co. v. Penn., etc. Co., 103 Fed. Rep. 132 (1900). Where the mortgagee sells the property subject to the mortgage, insurance taken out by the purchaser on the property

belongs to the purchaser in case of a fire, and not to the mortgagee. Farmers', etc. Co. v. Penn., etc. Co., 186 U. S. 434 (1902), aff'g 103 Fed. Rep. 132.

⁶ Where the mortgage provides that upon default "the principal of all the said bonds shall, at the election of the trustees, become immediately due and payable," and the trustees have not so elected, the court cannot, in a proceeding against the company as an insolvent corporation, order the railroad to be sold free from all incum-

the holders of the bonds have consented to extend the time of payment of interest, the trustee cannot foreclose the mortgage for non-payment

branches. Not even a statute passed after the mortgage was given can authorize such a sale. *Randolph v. Middleton*, 26 N. J. Eq. 543 (1875), reversing 25 N. J. Eq. 306. See also § 837, *infra*. In *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47, 74 (1882), the trustee was authorized to declare the principal sum due after six months after default. Such a provision is legal (p. 77), but is strictly construed, and, if the written request of a majority of the bondholders is necessary, it must be obtained. If the bond differ from the mortgage in regard to this provision the bond controls. *Railway Co. v. Sprague*, 103 U. S. 756 (1880). *Cf.* § 764, *supra*. In *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888), the provision was that the principal sum became due at the option of the holder where the interest was demanded and remained in default for ninety days. If the statute authorizing the mortgage says that the principal shall not become due for thirty years, a provision in the mortgage for its becoming due six months after default in the interest is void. *Howell v. Western R. R.*, 94 U. S. 463 (1876). Where the bond provides that the principal shall become due as provided in the mortgage, and the mortgage provides that upon default for six months after demand the principal sum shall become due, and that upon the written request of a majority in interest of the bondholders the trustee shall foreclose, the six months' default after demand is not sufficient to authorize a suit by a bondholder for the principal and interest of his bonds. The request of a majority is construed to apply to declaring the principal due as well as to foreclosing. *Batchelder v. Council, etc. Co.*, 131 N. Y. 42 (1892). "The terms of the deed of trust ought to be very clear to justify the court in holding that there could

be no sale, even for interest," until the bonds become due. *Wilmer v. Atlanta, etc. Ry.*, 2 Woods, 447, 455 (1875); s. c., 30 Fed. Cas. 80. Where one-fifth of the bondholders in interest may declare the whole sum due in thirty days after default, the trustee need not join with them in so declaring. *American, etc. Co. v. Kentucky, etc. Co.*, 51 Fed. Rep. 826 (1892). A provision in a bond that it shall become due after six months' default in interest applies to that bond and not to other bonds. An acceptance of interest subsequently waives the default. A decree of foreclosure should declare due only those bonds upon which default occurred. *Alabama, etc. Mfg. Co. v. Robinson*, 56 Fed. Rep. 690 (1893). A bondholder cannot declare his bond due for non-payment of interest, where the mortgage requires one-third of the bondholders in interest to so declare. *American Nat. Bank v. American, etc. Co.*, 19 R. I. 149 (1895). Where the mortgage bonds may be declared due by writing executed by the holders of one-third of the bonds, the signature of a bondholder by attorney is good, even though the power of attorney was not obtained until afterward. *Farmers' L. & T. Co. v. Memphis, etc. R. R.*, 83 Fed. Rep. 870 (1897). Where the principal sum may be declared due upon the trustee taking possession or upon a sale by him, it cannot be declared due except upon the occurrence of one of those events. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). Where, upon ninety days' default in interest, the holder may declare the whole sum due, a court will not relieve the corporation from payment. *Wood v. Consolidated, etc. Co.*, 36 Fed. Rep. 538 (1888). When a mortgage provides that the principal shall become due for the purposes of foreclosure upon a default in

of the interest, even though such foreclosure is based on the principal of the bonds which have been declared due in accordance with the terms of the mortgage by such holders.¹

A provision that the bond shall become due after thirty days in default in the payment of any coupon is self-executing.² But where

interest continuing for sixty days, the trustees in the mortgage may proceed for the collection of the whole amount of principal and interest by bill in equity, without a formal declaration of the maturity of such principal. *Morgan's, etc. Co. v. Texas, etc. Ry.*, 137 U. S. 171 (1890). The court will not sustain a declaration that the whole sum is made due, where there was trickery, or where the mortgagor was ready and willing to pay. *Union, etc. Ins. Co. v. Union, etc. Co.*, 37 Fed. Rep. 286 (1889). The bondholder may enforce the unpaid coupons without electing to declare the principal due. *Rutten v. Union Pac. Ry.*, 17 Fed. Rep. 480 (1883). A clause in the mortgage "that in case default shall be made for the space of four months in the payment of semi-annual interest due or to become due upon either of said bonds, then, and in that case, the whole principal sum mentioned in all and each of said bonds shall forthwith become due and payable," has the effect not to give the several bondholders action upon it for the principal of the bonds, but to give the trustees, with whom, in trust for the bondholders, the covenant was made, a right of action upon it so that through foreclosing the mortgage it might be a more complete security to the bondholders with such a clause than it would be without it. *Mallory v. West Shore, etc. R. R.*, 35 N. Y. Super. Ct. 174 (1873). A provision in the trustees' certificate to the effect that "the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months" does not enable a bondholder to sue for the principal where the terms of the mortgage are inconsistent with such a right to sue.

Mallory v. West Shore, etc. R. R., 35 N. Y. Super. Ct. 174 (1873). The provision authorizing the trustee to sell, and from the proceeds to pay principal and interest of the bonds, does not enable the bondholder to declare the principal due because of a default of the company on the interest. Nevertheless, the court will order the whole railroad to be sold, inasmuch as it would be disastrous to sell only a part of it. *McFadden v. May's Landing, etc. R. R.*, 49 N. J. Eq. 176 (1891). Where the mortgage provides that upon default in the interest for ninety days the principal may at the option of the holders of the bonds be declared due, such option when exercised by a majority in interest of the bondholders is effective. *Atlantic T. Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539 (1902). Where the principal is to become due thirty days after default in the payment of interest and after demand thereof, a written demand is sufficient, even though the coupons are not presented. *New Jersey, etc. Co. v. Security, etc. Co.*, 42 Atl. Rep. 746 (N. J. 1899). After the principal sum has been declared due interest continues thereon, until decree, at the rate specified in the bonds themselves, but the interest on past-due coupons is the legal rate of interest. All bondholders are bound by the decree in determining the amount of interest allowed. *Farmers' L. & T. Co. v. Northern, etc. Ry.*, 94 Fed. Rep. 454 (1899). Cf. § 771, *supra*.

¹ *Arnot v. Union Salt Co.*, 186 N. Y. 501 (1906).

² *Rumsey v. People's Ry.*, 154 Mo. 215 (1899). A provision in a mortgage for the principal sum becoming due on non-payment of interest applies to the bonds, even though such

after six months' default the principal is to become due by the terms of the bonds, it is doubtful whether at the end of the six months the bonds become past due so as to render the bonds non-negotiable. They certainly do not where the defaulted interest is afterwards paid.¹ Where the mortgage provides that the bonds shall become due in case of an execution issuing against the company and being unpaid, it is legal for a holder of coupons to obtain judgment and issue such execution, and the mortgage may thereby become due, even though the judgment on the coupons was obtained by consent for the purpose of having the mortgage become due.²

Although a trustee is given power to declare the principal sum due upon default in interest, yet he must not do so for the benefit of junior securities, or to aid a reorganization. The court will review his action.³ A provision that the trustee shall, after six months' default and after a request from one-fourth in interest of the bondholders, foreclose, does not prevent the trustee foreclosing at once upon default in interest, and a prohibition against a bondholder foreclosing before the six months does not apply to the trustee.⁴

provision is not contained in the bonds themselves. The two instruments are construed as one. *New Jersey, etc. Co. v. Security etc. Co.*, 42 Atl. Rep. 746 (N. J. 1899).

¹ *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896); *aff'd sub. nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899).

² *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900).

³ *Bound v. South Carolina Ry.*, 50 Fed. Rep. 853 (1892).

⁴ *Farmers' L. & T. Co. v. Chicago, etc. R. R.*, 61 Fed. Rep. 543 (1894). A provision that no foreclosure shall be had except by the trustee, unless he refuses to foreclose on a reasonable request of a bondholder, and a further provision that he must foreclose on the request of a certain proportion of the bondholders, does not prevent the trustee foreclosing without any request at all. *New York Security, etc. Co. v. Lincoln Street Ry.*, 74 Fed. Rep. 67 (1896). After default the trustee may foreclose for non-payment of interest, even though the mortgage provides that he may foreclose on demand of a certain number of bond-

holders after three months' default. *Guardian, etc. Co. v. White Cliffs, etc. Co.*, 109 Fed. Rep. 523 (1901). A provision in a mortgage authorizing trustees to sell without judicial proceedings and without appraisement, is valid, and no request of the bondholders need be had, even though the mortgage authorized such sale upon the request of a certain proportion of the bondholders or without such request. *Etna, etc. Co. v. Marting, etc. Co.*, 127 Fed. Rep. 32 (1904). A provision that only the trustee shall foreclose, unless he refuses to do so, does not limit his power to foreclose. *New York Security, etc. Co. v. Lincoln Street Ry.*, 77 Fed. Rep. 525 (1896). Where a trustee begins foreclosure by reason of a request, and the request was insufficient, it is doubtful whether the suit can be maintained as being brought under the inherent power of the trustee to commence the suit. *Farmers', etc. T. Co. v. New York, etc. Ry.*, 150 N. Y. 410, 438 (1896). Where the mortgage provides that, after six months' default, then, upon the request of one-third in amount of the bonds, the trustee shall proceed at

Where a request to the trustee to foreclose with indemnity is first required, a bondholder must show that he offered indemnity or that some excuse existed before he sues for foreclosure.¹ The right of a court to sell the whole property on a default in interest is considered elsewhere.²

§ 801. *Provision for a waiver of default.*—Occasionally a provision is found in a mortgage by which a specified proportion of the bondholders may waive the right to declare the principal sum due upon a default in the payment of the interest. The courts, however, do not favor this power, inasmuch as it puts the minority bondholders in the power of the majority.³ A provision in a mortgage that a certain portion of the bondholders in interest may modify the bond or mortgage, and postpone the payment of interest, will not be

law or in equity to enforce the security, this provision is construed to apply to taking possession or to a sale without foreclosure suit. It does not prevent a foreclosure suit at once. That right "cannot be absolutely abrogated," and it is doubtful as to how far it can even be restricted. *Mercantile Trust Co. v. Chicago, etc. Ry.*, 61 Fed. Rep. 372 (1893). In *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886), this clause giving the various remedies of the bondholders and trustees came before the court, and it was held that the right of the trustees to foreclose was in no wise restricted or affected by provisions for declaring the whole debt due after six months' default, and for foreclosure by the trustees at the request of a majority of the bondholders after six months' default, and for the control of the foreclosure proceedings by a majority of the bondholders. A provision in the mortgage that the trustee should not take possession until six months' default after written demand of payment applies only to the provision allowing the trustee to sell the property, and does not apply to his general right to file a bill for foreclosure. Such a bill will lie immediately upon default in payment of interest, without the necessity of giving notice and waiting six months. *Farmers' L. & T. Co. v. Winona, etc.*

Ry., 59 Fed. Rep. 957 (1893). See also *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882), to same effect, and §§ 803, 804, *infra*. Although the trustees foreclose without being requested so to do by one-third of the stockholders, as provided in the mortgage, yet, if more than one-third put their bonds in evidence in the suit, this cures the defect. Moreover, the foreclosure was good as to the unpaid interest in any event, and the amount claimed could be reduced if necessary. *Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882).

¹ *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896).

² See § 836, *infra*.

³ In regard to the provision authorizing a certain proportion of the bondholders to waive default, the court, in *Hollister v. Stewart*, 111 N. Y. 644, 655 (1889, affirming 37 Hun, 645), said: "It is easy to see that discretion to waive a default sustained by a majority in interest of the bondholders might prudently and safely be given to the trustees as to covenants for assurance, and to furnish an inventory, and the like, while it is scarcely possible to suppose that the enormous discretion of waiving every default of interest or principal was intended to be conferred. Stockholders of the company buying a trifling excess over half of the bonds could, with aid

sustained by the courts where such proportion of the bondholders modify the mortgage so as to compel the minority bondholders to sell their bonds.¹ The bonds and coupons of an unincorporated joint-stock association may be negotiable, even though they provide against personal liability of the stockholders, and even though the trustee of the mortgage securing their payment may with the consent of a majority of the bondholders in interest waive default in payment of the coupons.²

§ 802. *Provision for the remedy of entry by the trustee or of a receivership upon default.*—A receivership is often obtained in connection with a suit in equity for the foreclosure of the mortgage.³ The remedy of entry by the trustee is not often resorted to in these days on account of the danger of financial loss to the trustee.⁴ This subject is treated elsewhere.⁵

of the trustees, practically annul and cancel the whole debt, and take to themselves the entire net earnings of the company. We are confident that the language of the subdivision, taken exactly as it stands in the record, does not refer to a default in principal or interest, but relates wholly to the other covenants to be kept and performed by the mortgagor." The provision in a mortgage that a majority of the bondholders may waive a default in payment of interest does not authorize a waiver of payment before the default has occurred. *McClelland v. Norfolk, etc. R. R.*, 110 N. Y. 469 (1888), holding also that where the bonds and mortgage provided that a majority of the bondholders might postpone payment of the bonds and coupons, the bonds and coupons do not become due at a fixed time and are not negotiable. A provision that a majority may stop a proposed sale of the property by the trustees does not apply to a suit to foreclose. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). Where a mortgage provides that the bondholders, by a three-fourths vote of those present at a meeting called for that purpose, might compromise or adjust any claim or grant an extension of the debt or release property covered by the mortgage and the bonds are about to become due, and

by such three-fourths vote the bondholders extend the time of payment three years and also authorize the further issue of bonds to be equally secured by the mortgage, such acts are legal, being honest and *bona fide*, and with a view to preserving and improving the security. *Walker v. Elmore's etc. Co.*, 85 L. T. Rep. 767 (1902).

¹ *Hackettstown Nat. Bank v. Yuengling Brewing Co.*, 74 Fed. Rep. 110 (1896). See also, on this subject, § 807, *infra*.

² *Hibbs v. Brown*, 112 N. Y. App. Div. 214 (1906); *aff'd*, 190 N. Y. 167.

³ See ch. LI, *infra*. Where a railroad is leased and then the company makes a mortgage, a receiver thereafter appointed cannot take possession of the road as against the lessee, the latter's rights being prior to the mortgage, even though the lease gives the net earnings of the road to the lessor. *Louisville, etc. R. R. v. Eakin*, 100 Ky. 745 (1897).

⁴ Where the right of the trustee to take possession exists upon a vote of a majority of the bondholders declaring the whole debt due, such declaration must be made before the trustee can take possession by reason of this particular clause. *Union T. Co. v. Missouri, etc. Ry.*, 26 Fed. Rep. 485 (1880).

⁵ See §§ 822, 823, *infra*.

§ 803. *Provision giving power of sale to the trustee upon default—This is a cumulative remedy and does not prevent foreclosure instead.*—This is one of the most important provisions in the mortgage. It is one of the modes in which the mortgagee may foreclose the mortgage. It corresponds to the provision usually contained in the ordinary mortgage on real estate, and hence its history is bound up with the history of mortgages themselves. The mortgage may provide for any mode of sale, even without notice, unless the statutes of the state prescribe otherwise.¹ Sometimes it provides that the trustee shall take possession and operate the road or take possession and sell the property, as he thinks best.² All these provisions relative to the trustee's entering into possession of the property and holding it or selling it do not affect or take away the right of the trustee to foreclose the mortgage whenever there is a default in the payment of the principal or interest. The power of sale is an additional or alternative remedy. It is not an exclusive remedy. The trustee may foreclose, the same as though there were no provisions in the mortgage for the trustee's selling or taking possession.³

§ 804. *Provisions unreasonably limiting the right to foreclose.*—Occasionally such a provision is inserted. But it is illegal and void. It is an attempt to contract away the established legal remedies which every man is entitled to. A provision forbidding a foreclosure unless a certain proportion of the bondholders request it is illegal and void.⁴

¹ On this subject see § 824, *infra*.

² See § 824, *infra*.

³ See § 824, *infra*.

⁴ A provision in a mortgage that the trustee shall not foreclose, but shall take possession, etc., upon the request of a certain proportion of the bondholders, is void as "attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts." *Guaranty Trust Co. v. Green Cove R. R.*, 139 U. S. 137 (1891), distinguishing *Chicago, etc. R. R. v. Fostick*, 106 U. S. 47, 74 (1882), and following *Morgan's Steamship Co. v. Texas, etc. Ry.*, 137 U. S. 171 (1890). The right to foreclose cannot be absolutely abrogated. *Mercantile Trust Co. v. Chicago, etc. Ry.*, 61 Fed. Rep. 372 (1893). A provision that the trustee may sell, but shall not foreclose by suit, may be valid so far as property outside of the court's jurisdiction is concerned, but not as regards property

within the jurisdiction. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). A condition in a trust deed given to secure the bonds of a corporation, providing that the bondholders shall not bring suit without notice in writing to the trustee, nor without a request to the trustee to sue, made by the holders of one-fifth of the outstanding bonds, is binding upon the bondholders in the absence of proof showing fraud or mismanagement on the part of the corporation. *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262 (1893). A provision requiring a request on the part of one-fourth of the bondholders in interest before foreclosure is commenced will be disregarded by the court where a party charged with fraud owns more than three-fourths of the bonds. *Linder v. Hartwell R. R.*, 73 Fed. Rep. 320 (1896). The majority bondholders may be admitted to set up that there can be no foreclosure without the con-

Even a provision limiting the right to foreclose until a certain time elapses will be strictly construed by the court.¹ A provision that the only method of enforcing a mortgage shall be by a public sale by the trustee is void and does not prevent a suit in equity to foreclose.²

§ 805. *Provision exempting the trustee from liability.*—A provision is generally inserted exempting the trustee from any and all liability except for his own wilful misconduct or gross negligence.³ A provision in a mortgage that the trustee shall deliver the bonds only for certain purposes and upon certain written statements of

sent of the majority. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). Although the mortgage provides, before foreclosing, that the trustee must be requested to foreclose by a majority of the bondholders, yet, if the position of trustee is vacant, a holder of a majority of the bonds may begin foreclosure without any request. *Wheelwright v. St. Louis, etc. Transp. Co.*, 56 Fed. Rep. 164 (1893). But where the trustee is authorized, upon a default in the interest, to foreclose for the principal sum upon the written request of a majority of the bonds, he cannot foreclose for the *principal* except upon this written request being made. *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882). But he may foreclose for the interest. *Central T. Co. v. Texas, etc. Ry.*, 23 Fed. Rep. 846 (1885); *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886). So also a bondholder when the trustee refuses. *Beekman v. Hudson, etc. Ry.*, 35 Fed. Rep. 3 (1888). A provision that foreclosure shall only be on a request of a certain portion of the holders of the bonds is legal. *Hasbrouck v. Rich*, 113 Mo. App. 389 (1905).

¹ Where a mortgage authorizes entry by the trustee after six months' default in interest, and also sale by advertisement after a similar default, and also a foreclosure, "upon default being made as aforesaid," the court will hold that foreclosure may commence immediately upon default without waiting for six months to elapse. *Mercantile Trust Co. v. Missouri, etc.*

Ry., 36 Fed. Rep. 221 (1888). The case is within the rule laid down in *Railroad v. Fosdick*, 106 U. S. 47 (1882). The charter provision that "foreclosure" shall not take place until after ninety days' notice by publication applies not to the suit to foreclose, but to the subsequent foreclosure itself. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). See also § 800, *supra*, and §§ 825, 836, *infra*; *Seibert v. Minneapolis, etc. Ry.*, 52 Minn. 148 (1893); s. c., 58 Minn. 39. The provision that there shall be no foreclosure until six months after default is for the benefit of the corporation and cannot be raised by creditors. *Central T. Co. v. Worcester, etc. Co.*, 110 Fed. Rep. 491 (1901). Where a debenture contains a provision that the holder shall not commence any action to enforce the mortgage securing the debenture until six months after he had served notice on the trustee to commence such action, the courts will enforce such provision. *Stewart, etc. Co. v. British, etc. Assoc.*, 79 L. T. Rep. 494 (1898). Foreclosure cannot be commenced two months after default in the payment of interest where the mortgage provided for six months before such suit be commenced. *Union Trust Co. v. Chattanooga, etc. Ry.*, 101 Tenn. 297 (1898).

² *Reinhardt v. Interstate, etc. Co.*, 63 Atl. Rep. 1097 (N. J. 1906).

³ The decisions on this subject are given in § 815, *infra*. See also § 622*h*, *supra*.

such purposes, followed by a provision that the trustee shall not be bound to inquire into the actual application of the bonds or funds, prevents a bondholder from holding the trust company liable for failure of the mortgagor railroad company to apply the bonds to the purposes indicated, especially where suit is brought more than twenty years after the act, it being shown that the trust company did require written statements before issuing the bonds.¹

§ 806. *Provision for appointing a new trustee.*—The deed of trust should provide for the appointment of a new trustee in case of the death, resignation, or removal of the trustee named in the deed. The decisions on this subject are given elsewhere.²

§ 807. *Miscellaneous provisions.*—Any additional provision, which may be agreed upon by the parties, and which is not contrary to public policy or beyond the powers of the corporation, may be inserted in the mortgage. Thus, there may be provisions for converting the bonds into stock;³ for limiting the purposes for which the bonds may be issued;⁴ for allowing a subsequent mortgage to be prior

¹ *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), aff'g *Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App. Div. 473 (1901), involving the same mortgage that was passed upon in *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169. The lower federal court held that a bondholder may hold the trustee liable for certifying to bonds and delivering them to the mortgagor, where the mortgage restricted the purposes for which the mortgagor was to use such bonds, and the trustee knew that the mortgagor had not complied with this provision in regard to a part of the bonds already issued; that the general provision exempting the trust company from liability and also releasing it from any obligation to inquire into the application of the bonds is no defense, inasmuch as the mortgage provided that the trustee should issue the bonds only on orders declaring the purposes for which the mortgagor proposed to use them; that the trustee must use such care as a mortgagee would use in making such advances; that the mortgagee is not a necessary party to such a suit, but

the suit must be brought by a bondholder, not for himself alone, but in behalf of all bondholders; and that the statute of limitations may be a bar. *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5 (1899); s. c., on appeal, 107 Fed. Rep. 169 (1901).

² See § 819, *infra*.

³ See § 283, *supra*.

⁴ Even though a mortgage provides that the trustee shall certify and deliver the bonds or the proceeds thereof, only upon a written statement by the mortgagor declaring the purpose for which said bonds or proceeds are to be used, the trustee is not liable for failure to require such written statement, where the trustee has not expressly agreed to carry out that provision. Moreover, a suit by a bondholder against the trustee for failure to carry out that provision must be commenced within ten years from the time of the breach thereof. *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), aff'g *Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App. Div. 473; s. c., *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169. See also § 764, *supra*.

in right of payment;¹ that a sinking fund shall be established;² that personal liability of the stockholders is waived;³ that bonds may be paid and canceled by annual drawings;⁴ that the trustee may purchase the property for the bondholders at a foreclosure sale; a covenant for further assurance; for allowing bondholders to turn in their bonds in payment for the property purchased at the foreclosure sale;⁵ for the taking up, paying, and canceling bonds secured by underlying mortgages.⁶ The holders of mortgage bonds cannot claim

1 The mortgage may provide that thereafter another and new mortgage may be made prior in right of payment to the mortgage first mentioned. *Campbell v. Texas*, etc. R. R., 2 Woods, 263 (1872); s. c., 4 Fed. Cas. 1188.

2 Where the mortgage provides that a certain amount annually shall be paid by the company as a sinking fund to buy the bonds with at once, until the bonds are above 110, and then only the interest on the bonds already purchased is to be added to the sinking fund, the latter clause will be enforced, and a stockholder cannot enjoin it. *Wilds v. St. Louis*, etc. R. R., 102 N. Y. 410 (1886). It is no defense to an action by a bondholder to reach a sinking fund that the corporation holding the fund had no charter right to act as custodian, and that such custodian had illegally guaranteed the bonds. *Central*, etc. Co. v. *Farmers'*, etc. Co., 116 Fed. Rep. 700 (1901), holding also that where one railroad is custodian of the sinking fund of another railroad, and both become insolvent, the bondholders of the latter have a claim prior in right to deficiency judgments in foreclosure against the former; *aff'd*, 114 Fed. Rep. 263.

3 Coupons are negotiable, even though the trust deed securing them provides for a waiver of default in and postponed payment of such coupons, inasmuch as such provisions merely control any procedure under the trust deed for enforcing payment. Neither is negotiability destroyed by a provision that the members of the unincorporated joint-stock association

shall not be personally liable. *Hibbs v. Brown*, 190 N. Y. 167 (1907), a minority of the court holding also that the provision exempting the stockholders from personal liability is void.

4 Although the sinking fund and redemption clause provides for annual payments and they are not made, yet they may be made subsequently by the corporation. *Missouri*, etc. Ry. v. *Union Trust Co.*, 156 N. Y. 592 (1898), holding also that where a sinking fund is provided for and bonds are to be drawn by lot for redemption each year, the mortgagor cannot buy a part of the bonds and exclude those bonds from the aggregate number of bonds included in the drawing by lot. The right of a corporation mortgagor to pay off its mortgage cannot be defeated by the fact that it has pledged some of the bonds and given to the pledgee an option to purchase all of the bonds, full payment of the pledgee of the amount borrowed, with interest, being tendered. Any other construction would be an illegal clog on the equity of redemption. *Jarrah*, etc. Corp. v. *Samuel*, 87 L. T. Rep. 44 (1902); *aff'd*, 88 id. 106.

5 See § 887, *infra*.

6 The holder of bonds, issued by a corporation, which is afterwards consolidated with another corporation, cannot claim the right to exchange his bonds for bonds of the consolidated company, even though the mortgage of the consolidated company provides for such exchange, especially where the party has delayed for nine years in claiming the right. New

the right to exchange the same for new bonds, even though the mortgage securing the new bonds provides for such exchange.¹ Where a corporation issues several million dollars of bonds, secured by a mortgage that represents that it covers many thousand acres of land, although, in fact, the company owned but a few hundred acres of land, a purchaser of such bonds may maintain a bill in equity in behalf of himself and other bondholders to hold the directors liable for false representations, and the corporation itself is not a necessary party defendant, a request to the trustee of the mortgage having first been made to bring suit. A provision in the mortgage against individual bondholders maintaining a suit before offering indemnity to the trustee is no bar to such a suit, that provision being applicable to remedies under the mortgage only. The suit may be maintained in the United States circuit court in New York, even though the corporation was organized in Missouri, it appearing that the directors reside in New York.² Bonds payable to bearer are negotiable, even though they are subject to redemption by annual drawings.³ Doubtful phrases in a mortgage deed of trust are construed in favor of the bondholders, and a clause that the bond shall become due upon any sale of the property refers to a sale in behalf of the bondholders and not to a sale by the corporation itself.⁴ A provision in an English debenture that a majority of the holders of debentures might "sanction any modification or compromise of the rights of the debenture-holders against the company or against the property" is valid, and such a compromise is binding on the minority.⁵

York, etc. Trust Co. v. Louisville, etc. R. R., 97 Fed. Rep. 226 (1899).

¹ *Morse v. Chicago, etc. R. R.*, 84 N. Y. App. Div. 406 (1903).

² *Slater T. Co. v. Randolph etc. Co.* (U. S. C. C. 1908), N. Y. L. J. June 27, 1908.

³ *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). See also § 767, *supra*.

⁴ *Lisman v. Michigan, etc. Co.*, 50 N. Y. App. Div. 311 (1900).

⁵ *Sneath v. Valley Gold*, [1893] 1 Ch. 477. Where by the mortgage a majority of the debenture holders may bind all by a vote to modify or compromise, the majority may compel all to turn in their debentures to a reorganized company and take stock

therefor. *Mercantile Inv. etc. v. River Plate Trust, etc. Co.*, [1894] 1 Ch. 578. Cf. § 801, *supra*, and the case of *Hackettstown Nat. Bank v. Yuengling Brewing Co.*, 74 Fed. Rep. 110 (1896). Where a committee is authorized to modify a reorganization plan it may change the plan so that on default of the new second mortgage the stock of the corporation shall belong to the bondholders and the second mortgage shall be discharged. At least such a change is binding on a bondholder who held his bonds four years without objection, and until after the default had taken place and the stock absorbed and the mortgage discharged. *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900).

C. AUTHORIZING, EXECUTING AND RECORDING MORTGAGES.

§ 808. *The board of directors authorize the execution of mortgages—A stockholders' meeting is not necessary—Statutes requiring stockholders' consent—Waiver of such consent or ratification without formal consent—Estoppel, by recitations in mortgage, of formalities of authorization.*—It is now the established rule that the board of directors, without any action whatsoever by the stockholders, has the power to authorize the execution of a mortgage on the corporate property. Formerly it was supposed that a vote of the stockholders was necessary, and it is still customary to have a stockholders' meeting as well as a directors' meeting authorize the mortgage. But the latter only is necessary.¹ And the directors' meeting which authorizes the mortgage may be held out of the state in which the corporation is incorporated.²

¹ The stockholders have no power to authorize a mortgage. Only the board of directors can do so. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). The directors may authorize a mortgage without a vote of the stockholders. *Phinizy v. Augusta, etc. R. R.*, 62 Fed. Rep. 678 (1894). The directors and not the stockholders authorize a mortgage. See dictum in *Louisville Trust Co. v. Louisville, etc. Ry.*, 75 Fed. Rep. 433 (1896). Aside from statute a purchase-money mortgage may be given by a corporation without the vote of its stockholders. *Farmers' L. & T. Co. v. Equity Gas Light Co.*, 84 Hun, 373 (1895)). The directors may authorize the execution of bonds and a mortgage to secure them. The action of the stockholders is not necessary. *Thompson v. Natchez, etc. Co.*, 68 Miss. 423 (1891). A mortgage and bonds secured thereby may be authorized by the board of directors, and no action or authorization by the stockholders is necessary. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). That the directors and not the stockholders are the proper authority to authorize a mortgage, see also *Thomas v. Citizens' Horse Ry.*, 104 Ill. 462 (1882); *Hendee v. Pinkerton*, 96 Mass. 381 (1867);

Wood v. Whelen, 93 Ill. 153 (1879); *McCurdy's Appeal*, 65 Pa. St. 290 (1870); *General Auction, etc. Co. v. Smith*, [1891] 3 Ch. 432. The directors are the proper authority to pledge corporate property. There is no reason why the rule should be different as to mortgages. See also § 712, *supra*. The ratification by the stockholders of an invalid mortgage made by the directors does not validate such mortgage. *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). Where no record is kept of directors' resolutions authorizing a mortgage they may be proved by parol. *Murray v. Beal*, 23 Utah, 548 (1901). A mortgage authorized at a stockholders' meeting, at which all the directors were present, is legally authorized. *Crossette v. Jordan*, 92 N. W. Rep. 782 (Mich. 1902). A stockholders' vote is not necessary to the validity of a mortgage. *Copper, etc. Co. v. Costello*, 95 Pac. Rep. 94 (Ariz. 1908). As to the power of the president or other officers to execute a mortgage, see §§ 716, 717, *supra*.

² *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888); *Arms v. Conant*, 36 Vt. 744 (1864); *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879); *Ohio, etc. R. R. v. McPherson*, 35 Mo. 13 (1864); *Bassett v. Monte Christo, etc. Co.*, 15

Sometimes mortgages by corporations are prohibited by statute, except where a specified proportion of the stockholders assent to the giving of the mortgage. Such a provision is regarded as intended for the protection and security of the stockholders, and, in the absence of fraud and objection upon their part, defects in the proceedings by which the assent is given cannot be held to invalidate the mortgage, unless they are of such a substantial character that the giving of the assent cannot be inferred.¹

Nev. 293 (1880); *Wright v. Bundy*, 11 Ind. 398 (1858); *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870); *Butler v. Rahm*, 46 Md. 541 (1877). The president's acknowledgment of a mortgage may be taken out of the state. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). Under the Illinois statute a mortgage authorized by a directors' meeting held outside of the state is illegal unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors at a regular meeting in the state in accordance with the statute. *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897). Creditors of a Delaware corporation cannot defeat its mortgage on the ground that it held its organization meetings outside of the state. *Hasbrouck v. Rich*, 113 Mo. App. 389 (1905). See also § 713*a*, *supra*.

1 Although the statute requires the assent of two-thirds of the stockholders at a meeting duly called, etc., before a mortgage is given, yet if all the stockholders except one are directors, and he assents to the mortgage, and the directors, at a directors' meeting, authorize it, the mortgage is good. The provision is for the protection of stockholders and not of the public. *Thomas v. Citizens', etc. Ry.*, 104 Ill. 462 (1882); *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328 (1877); *Beecher v. Marquette, etc. Co.*, 45 Mich. 103 (1881). See also § 725, *supra*. The assent may be given subsequently so as to validate a mortgage if there are no intervening rights. And a person purchasing

from the corporation with actual notice is bound by the irregular mortgage. The corporation cannot raise the objection. *Rochester Sav. Bank v. Averell*, 96 N. Y. 467 (1884). Stock owned by the corporation is not to be voted. *Vail v. Hamilton*, 85 N. Y. 453 (1881). Other corporate creditors cannot raise this objection to the mortgage. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). *Cf.* in general, *Astor v. Westchester, etc. Co.*, 33 Hun. 333 (1884). Concerning the New York act requiring the assent of stockholders, see also *Martin v. Niagara, etc. Co.*, 122 N. Y. 165 (1890); *Welch v. Importers', etc. Bank*, 122 N. Y. 177 (1890); *Star Co. v. Andrews*, 58 N. Y. Super. Ct. 188 (1890); *McComb v. Barcelona, etc. Assoc.*, 10 N. Y. Supp. 546 (1890); *aff'd*, 134 N. Y. 598. No consent of the stockholders is necessary to a purchase-money mortgage in New York. *In re Beaver Knitting Mills*, 154 Fed. Rep. 320 (1907).

Where the stockholders have not authorized the issue of bonds as required by statute, the statutory liability of the stockholders cannot be enforced to pay such bonds. *Boyd v. Heron*, 125 Cal. 453 (1899). Under a statute requiring the consent of stockholders to borrow money and give a mortgage, a vote of the stockholders so to do, in order to pay off an existing loan, sustains a mortgage given to secure such existing loan, without a new loan being obtained. The statute is for the protection of the stockholders, and if not followed merely makes the mortgage voidable,

Where the statutes of a state provide that a mortgage shall not be given by a domestic mining corporation on its mines, except by the

but not at the instance of creditors. *Citizens' State Bank v. McGraft*, etc. Co., 122 Mich. 573 (1900). A constitutional and statutory requirement that bonded debt shall only be incurred when voted at a meeting called on sixty days' notice does not prevent a waiver of such notice by all the stockholders either by express waiver or by attendance without such notice. *Riesterer v. Horton*, etc. Co., 160 Mo. 141 (1901). Stockholders cannot object to a mortgage on the ground that it was not authorized by three-fourths of the stockholders as required by statute, where the minutes of a special meeting of the stockholders authorizing the mortgage was read and approved at the next annual meeting, and where there was no bad faith, and where for a year and a half the mortgage had been in existence and interest paid thereon. *Bishop v. Kent*, etc. Co., 20 R. I. 680 (1898). The Montana statute requiring the consent of two-thirds in interest of the stock of a corporation to a deed of its property does not render the deed void if such consent is not obtained, and a stranger to the title cannot raise this objection. *Boston*, etc. Co. *v. Montana*, etc. Co., 89 Fed. Rep. 529 (1898). A judgment creditor under the decisions in California may attack the validity of a prior mortgage on the ground that it was not authorized by the stockholders as required by statute. *Williams v. Gold Hill*, etc. Co., 96 Fed. Rep. 454 (1899); *aff'd*, 186 U. S. 157. A New York statute requiring the consent of two-thirds of the stockholders to a mortgage is satisfied where the president who executes the mortgage and another stockholder who indorses his assent thereon own over two-thirds of the stock. *G. V. B. Min. Co. v. First Nat. Bank*, etc., 95 Fed. Rep. 23 (1899). The New York statute requiring the consent of stockholders

to the execution of a mortgage is for the protection of the stockholders, and only the stockholders can object to the mortgage on that ground. *In re New York*, etc. Co., 110 Fed. Rep. 514 (1901). A corporation cannot defend against a mortgage on the ground that the consent of the stockholders was not obtained, as required by statute. *Atlantic T. Co. v. Crystal Water Co.*, 72 N. Y. App. Div. 539 (1902). Where a company takes over the property of another company and the president delivers goods in payment of debts of the latter with the knowledge and consent of the officers and directors of the purchasing company, such payments are legal, and the statutes of Pennsylvania where such corporation existed, requiring stockholders' consent to the incurring of debts, do not apply. *Curtis v. Natalie*, etc. Co., 89 N. Y. App. Div. 61 (1903); *aff'd*, 181 N. Y. 543. A creditor of a corporation cannot attack a mortgage on the ground that the notice of the stockholders' meeting authorizing the same was not in accordance with the statute, it being shown that a majority of the stock voted in favor of the mortgage. *Anderson v. Bullock*, etc. Bank, 122 Ala. 275 (1899). Even though a mortgage is executed by a corporation without the consent of the stockholders, as required by statute, yet the corporation cannot maintain a bill in equity to cancel the mortgage, unless it restores to the mortgagee what he has paid thereon. *Southern*, etc. Assoc. *v. Casa*, etc. Co., 128 Ala. 624 (1901). Even though a statute requires a certain notice to be given for the increase of stock, and another statute has a similar provision as to bonds, yet both notices may be combined in one notice. *Paliser v. Home Tel. Co.*, 44 S. Rep. 575 (Ala. 1907).

A creditor who is also a stockholder

consent of two-thirds of the capital stock, and the statutes also provide that foreign corporations shall not be allowed to do business

may vote his stock in favor of a mortgage to himself. *Rittenhouse v. Winch*, 11 N. Y. Supp. 122 (1890). A stockholders' vote need not be proved where the company acquiesced in the mortgage. *Augusta, etc. R. R. v. Kitzel*, 52 Fed. Rep. 63 (1892). An actual meeting of the stockholders is not necessary if all consent, even though the statutes require a meeting. A subsequent creditor cannot complain. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). A statutory provision that stock may be issued for property only where the stockholders have authorized the issue at a meeting called for that purpose, is satisfied by the incorporators accepting a subscription payable in property. *Southern, etc. Co. v. Yeatman*, 134 Fed. Rep. 810 (1905). Although the statutes require two-thirds of the stockholders' assent to a mortgage, yet corporate creditors cannot raise that objection where the corporation does not. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). Where the charter of a turnpike company requires the assent of two-thirds of the stockholders to any mortgage, a mortgage without that assent is not ratified by the payment of subscriptions for the purpose of paying the debt secured by the mortgage. *Forbes v. San Rafael, etc. Co.*, 50 Cal. 340 (1875). A contract to make a mortgage and issue bonds may be enforced where the company has received the consideration therefor, even though the statute requires the assent of two-thirds of the stockholders, and such assent was not obtained. *Texas, etc. Ry. v. Gentry*, 69 Tex. 625 (1888). Although the statutes of Montana require that a mortgage may be given only after a stockholders' meeting, convened by publication of notice, etc., has voted it, yet all the stockholders by voting therefor waive the required notice and no one can complain. The

mortgage is valid. *Campbell v. Argenta, etc. Co.*, 51 Fed. Rep. 1 (1892). Concerning such a waiver see also ch. XXXVI, *supra*. A chattel mortgage authorized by *de facto* stockholders is good as to third persons. As against a receiver of the corporation it is valid, although the affidavit is defective and the mortgage is not recorded. *Kane v. Lodor*, 56 N. J. Eq. 268 (1897). Where a mortgage must be authorized by a vote of two-thirds in value of the stockholders, this means a stock vote, irrespective of the fact that some of the stock is only partly paid up. *Purdum v. Ontario, etc. Deb. Co.*, 22 Ont. Rep. (Can.) 597 (1892). A corporation cannot retain the benefits of a mortgage and at the same time claim that it is illegal because not authorized by two-thirds of its stockholders, and because it exceeded two-thirds of the value of the corporate property. Junior judgment creditors have no greater rights than the corporation in this respect. *Hamilton T. Co. v. Clemes*, 17 N. Y. App. Div. 152 (1897); *aff'd*, 163 N. Y. 423. In California, by statute, the vote or consent of the stockholders is necessary to the issue of bonds. *Smith v. Ferries, etc. Ry.*, 51 Pac. Rep. 710 (Cal. 1897). A mortgage not authorized by a majority in interest of the stockholders as required by statute is void. *Carlsbad, etc. Co. v. New*, 33 Colo. 389 (1905). A statute requiring consent of stockholders to a pledge of corporate property is for the benefit of the stockholders, and creditors cannot object that such consent was not given. *Barrett v. Pollak Co.*, 108 Ala. 390 (1895). A provision in a charter that property should not be mortgaged or pledged except with consent of the stockholders is for their benefit, and cannot be set up by one creditor as against another creditor. *Alabama, etc. Co. v. McKeever*, 112 Ala. 134

within the state on more favorable terms than domestic corporations, a mortgage by a foreign corporation on a mine within the state without the consent of the stockholders is void.¹ A mortgage given by a

(1896). Where a mortgage covers one ship and two not yet built, and subsequently, and before they are built, a statute is passed requiring the assent of the stockholders to a mortgage, such mortgage covers such ships without the stockholders' consent. *The Vigilancia*, 68 Fed. Rep. 781 (1895). Although the stockholders authorize a mortgage at a special meeting instead of a "regular general meeting," as required by statute, yet a corporate creditor cannot attack it on that ground. *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143 (1894). Although the New York statute requires the written assent of two-thirds of the stockholders in interest to the execution of a mortgage, yet neither the company nor its officers executing the mortgage, nor the party purchasing the equity expressly subject to the mortgage, can raise the objection. *Beebe v. Richmond Light, etc. Co.*, 3 N. Y. App. Div. 334 (1896). Where a corporation can mortgage its property only by a vote of the stockholders, the president cannot give a mortgage by depositing the title deeds. *Parker v. Carolina, etc. Bank*, 53 S. C. 583 (1898). A statute requiring leases by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. *Coal, etc. Co. v. Tennessee, etc. R. R.*, 106 Tenn. 651 (1901). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to an assignment for the benefit of creditors. *Goetz v. Knie*, 103 Wis. 366 (1899). A statutory requirement that the

stockholders should authorize a mortgage is for their protection only, and if it has received the money without such approval neither it nor its creditors nor stockholders can defeat the mortgage after they have acquiesced therein. *Eastman v. Parkinson*, 113 N. W. Rep. 649 (Wis. 1907). A statute requiring the consent of stockholders to a mortgage does not apply to a mortgage given to obtain an extension of time on an existing mechanic's lien. *Galveston, etc. Ry. v. Fontaine*, 23 Tex. Civ. App. 519 (1900).

¹ *Williams v. Gold Hill, etc. Co.*, 96 Fed. Rep. 454 (1899), the court refusing to follow *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888). A West Virginia corporation owning land in California must, in giving a mortgage on such land, comply with the California statutes requiring a two-thirds vote of the capital stock in favor of such mortgage, otherwise such mortgage is void. *Williams v. Gaylord*, 186 U. S. 157 (1901), the court following the decision of the supreme court of California. Under the Illinois statute which prohibits the directors from holding their meetings outside of the state unless authorized or ratified by a vote of two-thirds of the directors at a regular meeting, a mortgage on land in Missouri authorized at a meeting held in Missouri is illegal, and a subsequent ratification thereof at a meeting regularly held in Illinois does not validate such mortgage as against an attachment levied before such ratification. *Union, etc. Bank v. State, etc. Bank*, 55 S. W. Rep. 989 (Mo. 1900). A mortgage on real estate in Kentucky to secure bonds payable elsewhere is of course governed by the laws of Kentucky. *Bramblet v. Commonwealth, etc. Co.*, 83 S. W. Rep. 599 (Ky. 1904).

New York corporation on property in Idaho is valid although the written consent of two-thirds of the stockholders in interest, which is required by the statute of New York, is not recorded as required by such statute.¹ And a mortgage by a New Jersey corporation on property in New York need not have the consent of the stockholders, as required by the New York statute applicable to New York corporations.² Even though the constitution and statutes require that the capital stock shall not be increased, except upon a majority vote of the stockholders at a meeting called for the purpose, on sixty days' public notice, yet the stockholders may unanimously waive such notice and the expiration of such time.³ Although a deed by a mining company has not been ratified by two-thirds in interest of the stockholders, as required by statute, yet only a stockholder or someone connected with the title of the corporation can raise this objection.⁴

A mortgagee is not bound to inquire into the observance of the rules and regulations of the company relative to the call of meetings.⁵ But where no notice at all of the directors' meeting was

1 *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); *aff'd*, 95 Fed. Rep. 23. A mortgage may be executed by authority of the directors of a company, and even though the statutes of New York require the consent of stockholders, yet this objection cannot be raised by the company itself upon a foreclosure, the mortgaged land being located in West Virginia. Only a stockholder can raise the objection. *Boyce v. Montauk, etc. Co.*, 37 W. Va. 73 (1892).

2 A stockholder in a New Jersey corporation may bring suit in the New York state courts to compel persons holding a majority of the stock to return to the corporation for cancellation a large amount of stock which was issued to them illegally and without consideration, but the legality of such issue will not be determined by the statutes of New York; and such also is the rule as to a mortgage which was made without reference to the requirements of the New York statutes. *Ernst v. Rutherford, etc. Co.*, 38 N. Y. App. Div. 388 (1899). Where a statute requiring the consent of the stockholders to a mortgage is

held by the state court to apply to a mortgage given by a foreign corporation, a federal court will follow such decision. *Williams v. Gaylord*, 102 Fed. Rep. 372 (1900); *aff'd*, 186 U. S. 157. The statute in Massachusetts that a corporation shall not convey or mortgage its real estate, or give a lease thereof for more than a year, "unless authorized by a vote of the stockholders at a meeting called for that purpose," does not apply to foreign corporations, even though the mortgage is authorized in, and is on property in, Massachusetts. *Saltmarsh v. Spaulding*, 147 Mass. 224 (1888):

3 *State v. Cook*, 178 Mo. 189 (1903).

4 *Galbraith v. Shasta, etc. Co.*, 143 Cal. 94 (1904).

5 *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149 (1896). Where a mortgage is approved by all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement as required by statute. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). Even though the statutory

given and some of the directors are not present the rule may be different.¹ Where the seal of the company has been affixed to a

notice of a stockholders' meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. *Atlantic, etc. Co. v. The Vigilancia*, 73 Fed. Rep. 452 (1896). Although the statutes require three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no notice of these facts, is protected. *Kuser v. Wright*, 52 N. J. Eq. 825 (1895), *rev'g Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). See also § 725, *supra*.

1 A mortgage authorized at a meeting of the board of directors of which no notice was given and some of the directors were absent is not valid, and the declarations of a joint mortgagor that the corporation had authorized the mortgage are inadmissible. *Relley v. Campbell*, 134 Cal. 175 (1901). A mortgage authorized at a special meeting of directors, no notice of which had been given to two directors who were not present, is not enforceable, the minutes not having been approved at any subsequent meeting. *Curtin v. Salmon, etc. Co.*, 130 Cal. 345 (1900). A chattel mortgage authorized at a directors' meeting at which only half of the directors were present and notice of which had not been given to directors who were not present, is illegal. *Broughton v. Jones*, 120 Mich. 462 (1889). A mortgage may be valid, even though the directors' meeting which authorized it was without notice to one director, it appearing that he was merely a nominal stockholder and director. *Stiwell v. Webb, etc. Co.*, 79 Ark. 45 (1906). An irregular meeting of the board of directors authorizing the bor-

rowing of money and the giving of a mortgage may be made legal by the company subsequently accepting and using the money. *Murray v. Beal*, 23 Utah, 548 (1901). The separate assent of directors to the president executing a mortgage in the name of the corporation may be equivalent to acquiescence on the part of the directors in his assuming such authority and may bind the corporation. *National, etc. Bank v. Sandford, etc. Co.*, 157 Ind. 10 (1901). Where a mortgage is executed by order of directors assenting apart and not in a meeting, and is executed by a president and secretary who were elected by the stockholders at a meeting not properly called, the stockholders having no power to elect such officers in any case, the mortgage is not good. *Re St. Helen Mill Co.*, 3 Sawy. 88 (1874); *s. c.*, 21 Fed. Cas. 161. Where the entire business is turned over to executive officers and the stockholders, and the directors hold no meetings, a mortgage made by the officers is valid. *Cunningham v. German, etc. Bank*, 101 Fed. Rep. 977 (1900). Where the charter provides that the business shall be managed by three executive officers they may execute a mortgage, it appearing that no directors have ever been elected. *Bell, etc. Co. v. Kentucky, etc. Co.*, 50 S. W. Rep. 2 (Ky. 1899). Where the president has been allowed by the board of directors to carry on all the business as though it was his own, a mortgage in the name of the corporation executed by him on the corporate property is valid. *National, etc. Bank v. Sandford, etc. Co.*, 157 Ind. 10 (1901). See also §§ 716-719, *supra*. Where the board of directors have power to borrow money and issue debentures, and the debenture is issued in due form on its face, a *bona fide* holder thereof is protected, although the company

mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized.¹

had not been fully organized and no directors had been appointed and no resolutions passed by them. *Duck v. Tower, etc. Co.*, [1901] 2 K. B. 314. A creditor of a corporation cannot attack a mortgage on the ground that the notice of the stockholders' meeting authorizing the same was not in accordance with the statute, it being shown that a majority of the stock voted in favor of the mortgage. *Anderson v. Bullock, etc. Bank*, 122 Ala. 275 (1899). Resolutions of the board of directors and of the stockholders authorizing a mortgage to secure money borrowed is an implied authorization for the issue of bonds secured by such mortgage. Moreover, the company having received the money on the bonds and paid interest thereon for many years cannot then repudiate it. *Pomeroy v. New York, etc. Co.*, 48 Atl. Rep. 395 (N. J. 1901). See also § 725, *supra*.

¹ *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. See also *Sioux City etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899); also §§ 712, 725, *supra*. A mortgagee is chargeable with knowledge of the fact that the statute required three directors, and that the company only had two directors when the mortgage was authorized. *Wright v. First Nat. Bank*, 52 N. J. Eq. 392 (1894). It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced. *Savage v. Miller*, 56 N. J. Eq. 432 (1898). A mortgagee need not inquire whether a resolution of the directors authorizing a mortgage, and recited therein, has been actually passed by them. *Manhattan Hardware Co. v. Roland*, 128 Pa. St. 119

(1889). Where the statute requires directors to be stockholders and two of the directors are not stockholders, but a directors' meeting is regularly called, a mortgage authorized at such a meeting is legal, even though one of the directors who held stock and was qualified was not present, especially where he had agreed to the mortgage and the mortgagee took possession and held it for thirteen months and the corporation did not object. *Silsby v. Strong*, 38 Oreg. 36 (1900). A receiver of a corporation cannot defeat a mortgage on the ground that the directors have not expressly authorized it, where the corporation itself could not defeat it. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). As to requirements by charter or by-laws that contracts shall be made by certain officers or with certain formalities, and as to the right of one contracting with a corporation to rely on the corporate action, see § 725, *supra*. A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent where the statute prohibits assignments after insolvency. *Howell v. Keen*, 43 Atl. Rep. 1070 (N. J. 1899). Where the corporate seal is not attached to a mortgage the authority of the president to execute it must be shown. *American, etc. Assoc. v. Smith*, 122 Ala. 502 (1899). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. *Holcomb v. Bridge Co.*, 9 N. J. Eq. 457 (1853). See also § 713a, *supra*.

The supreme court of the United States clearly lays down the rule that "one who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."¹

§ 809. *Ratification of an unauthorized mortgage*.—The resolutions authorizing the mortgage. —The terms of the resolution authorizing the mortgage should be as broad as the terms of the mortgage itself. The better plan is to have the resolution embody the mortgage as a part of the resolution itself. Otherwise there may be a controversy as to whether all the terms of the mortgage were authorized by the board of directors.² Where a mortgage recites that it was

¹ Louisville, etc. Ry. v. Louisville Trust Co., 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record. In this case the court held that even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, but a purchaser with notice cannot enforce such guaranty, the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established and has been constantly recognized by this court."

thorizes a provision for the principal becoming due upon a default in interest. *Farmers' L. & T. Co. v. Iowa Water Co.*, 78 Fed. Rep. 881 (1897). The trustee of a mortgage cannot maintain a suit to reform the same so as to include certain provisions which the board of directors authorized but which the mortgage did not contain, there being no proof of mutual mistake or actual fraud. *Trust Co. v. Universal, etc. Co.*, 90 N. Y. App. Div. 207 (1904). If the stockholders authorize a mortgage in such form and on such terms as the directors may approve, the directors may insert in it an after-acquired property clause. *Cummings v. Consolidated, etc. Co.*, 27 R. I. 195 (1905). Where the mortgage covers after-acquired property "connected with, or issuing from, or relating to" the existing property, it does not cover a railroad subsequently acquired, and it is immaterial that the directors' resolution authorizing the mortgage provided for its covering all subsequently acquired property. *Murray v. Farmville, etc. R. R.*, 101 Va. 262 (1903). Where the president is authorized to execute a mortgage the usual mortgage is understood. The fact that

² A resolution authorizing a mortgage to contain the usual terms au-

duly executed by authority of the corporation, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed.¹ Resolutions of the board

a mortgage and the bonds secured thereby are for a larger amount than authorized by the stockholders does not enable a subsequent creditor to attack such mortgage. *Anderson v. Bullock*, etc. Bank, 122 Ala. 275 (1899). Where the draft of a mortgage, approved by the board of directors, contains a provision for the payment of attorney's fees, such provision is enforceable, even though the resolution of the board of directors did not expressly cover that point. *Hubbard v. University Bank*, etc., 125 Cal. 684 (1899). Where a committee is authorized to modify a reorganization plan it may change the plan so that on default of the new second mortgage the stock of the corporation shall belong to the bondholders and the second mortgage shall be discharged. At least such a change is binding on a bondholder who held his bonds four years without objection, and until after the default had taken place and the stock absorbed and the mortgage discharged. *Lyman v. Kansas City*, etc. R. R., 101 Fed. Rep. 636 (1900). A resolution authorizing the president to execute a chattel mortgage does not authorize him to give a chattel mortgage which can be foreclosed on ten days' notice and which gives other executory powers to the mortgagee. *Monroe*, etc. Co. *v. Arnold*, 108 Ga. 449 (1899). A provision that upon default in interest the bondholder might declare the principal due is unusual, and hence is void, but the rest of the mortgage will be sustained. *Jesup v. City Bank*, 14 Wis. 331 (1861). Since the date of the foregoing decision, however, such mortgages have become usual. A resolution authorizing a mortgage on the road and property sustains the mortgage on the franchises also. *Bardstown*, etc. R. R. *v. Metcalfe*, 4 Met. (Ky.) 199 (1862). Where the

directors authorize a chattel mortgage in certain terms, but the officers execute it in materially different terms, the mortgage is void. *Kendall v. Bishop*, 76 Mich. 634 (1889). Although the resolution authorizing a mortgage does not specify many provisions which are in it, yet if these provisions are the usual ones the whole mortgage is valid. *Savannah*, etc. R. R. *v. Lancaster*, 62 Ala. 555 (1878). Under a general resolution authorizing a mortgage, a provision may be inserted in the mortgage that the principal shall become due upon default in the payment of interest. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879). A vote authorizing a mortgage on the road and appurtenances is broad enough to sustain a mortgage on the railroad itself and all that belonged to it as a railroad; in other words, all the property, real and personal. *Kennebec*, etc. R. R. *v. Portland*, etc. R. R., 59 Me. 9, 22 (1871). A directors' resolution authorizing a mortgage on "all the real and personal property now or hereafter belonging to the company" is sufficient, and covers earnings, income, and profits. *Kelly v. Alabama*, etc. R. R., 58 Ala. 489 (1877). Even though the resolutions authorizing a mortgage were oral, and no written record was made, yet they may be proved to sustain the mortgage. *Boggs v. Lakeport*, etc. Assoc., 111 Cal. 354 (1896). The authorization by the directors need not specify the usual provisions which are inserted in such mortgages. *Vincent v. Snoqualmie Mill Co.*, 7 Wash. 566 (1894). The terms of a mortgage cannot be modified by the president. See § 716, *supra*.

¹ *Sioux City*, etc. Co. *v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899). See also §§ 712, 725, 808, *supra*.

of directors and of the stockholders authorizing a mortgage to secure money borrowed is an implied authorization for the issue of bonds secured by such mortgage. Moreover, the company having received the money on the bonds and paid interest thereon for many years cannot then repudiate it.¹

Even though a mortgage has been made without authority it may be confirmed by acquiescence or accepting the benefits thereof, or may be expressly ratified by subsequent resolutions of the proper corporate authorities.² Thus a note given by a corporation may be

¹ *Pomeroy v. New York, etc. Co.*, 48 Atl. Rep. 395 (N. J. 1901).

² *Shaver v. Hardin*, 82 Iowa, 378 (1891). A mortgage executed by the president is legal, even though not authorized by the board of directors, it appearing that all the officers and stockholders knew of it and accepted the benefit of it. *Fourth Nat. Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905). A corporation cannot set up that the mortgage was not authorized by the stockholders where it has received the benefits of the same. *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904). If all the stockholders are present informalities in voting for a mortgage cannot be set up by general creditors to impeach the mortgage. *William Firth Co. v. South Carolina, etc. Co.*, 122 Fed. Rep. 569 (1903). A ratification by the stockholders of an issue of bonds is the same as an original authorization of such issue. *McAlpin v. Universal, etc. Co.*, 57 Atl. Rep. 802 (N. J. 1904). Even though a mortgage deed of trust is executed by the president without authority, yet, if the corporation afterwards obtains a release of some of the property from the mortgage, it ratifies the same. *Clark v. Elmen-dorf*, 78 S. W. Rep. 538 (Tex. 1904). A vote of the directors ratifying an informally executed mortgage does not necessarily ratify a special provision in it relative to attorney's fees, where such provision is not specially called to the board's attention. *Pacific, etc. Mill v. Dayton, etc. Ry.*, 5 Fed. Rep. 852 (1881). The ratifica-

tion of an unauthorized mortgage may be by express resolutions. *Purser v. Eagle Lake, etc. Co.*, 111 Cal. 139 (1896). Variances in the mortgage executed, from the mortgage authorized, are cured by the directors issuing the bonds and by resolution referring to the mortgage. *First Nat. Bank v. Sioux City, etc. Co.*, 69 Fed. Rep. 441 (1895). Even though the directors have not especially authorized a mortgage, yet, if the person who owns practically all the stock takes part in the transaction, and the corporation receives the benefit of it, the mortgage is good. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). A purchase-money mortgage given by a corporation is binding, even though not authorized by the board of directors, where the company used the property for two years. *Blood v. La Serena, etc. Co.*, 134 Cal. 361 (1901). Even though a mortgage is not authorized at a formal meeting of the directors, nevertheless if the directors knew and approved of the same and the corporation accepted the benefits, the mortgage will be enforced, it having been signed by the president and secretary and the corporate seal having been attached. *Nevada, etc. Syndicate v. National, etc. Co.*, 96 Fed. Rep. 133 (1899). Even though the officers in executing a deed in behalf of the corporation omit a covenant that the grantee assumes a mortgage on the property, as required by the resolutions of the board of directors authorizing such deed, yet if the corporation accepts a consideration for

enforced against it, where it received and kept the money, even

the deed other corporate creditors cannot object thereto. *White v. Shepard*, 41 N. Y. App. Div. 113 (1899). Even though the mortgage differs from the one authorized by the board of directors, yet if the company has used the money the mortgage is valid. *Beach v. Wakefield*, 107 Iowa, 567 (1898). A mortgage made by four directors when the statute required five, there being one vacancy, is legal if the mortgage is ratified by the full board, and such ratification may be by recognition of the mortgage in a second mortgage. *Porter v. Lassen County, etc. Co.*, 127 Cal. 261 (1899). A mortgage need not recite in full the proceedings of the stockholders and directors authorizing it. *Turner v. Kingston, etc. Co.*, 106 Tenn. 1 (1900); s. c., 59 S. W. Rep. 410 (Tenn. 1900). A stockholder's suit to vacate a foreclosure decree seven years after it was entered and three years after a decision that he was entitled to make the application, the property in the meantime having passed into *bona fide* hands, is too late, his claim being that he was a stockholder in a company that was consolidated with another company, and that the property of his corporation was sold on the foreclosure of a mortgage of the latter, which mortgage was executed prior to the consolidation. *Atlantic Trust Co. v. New York, etc. Co.*, 75 N. Y. App. Div. 354 (1902). A change in a mortgage as authorized may be ratified by a resolution subsequently passed. *Prentiss Tool, etc. Co. v. Godchaux*, 66 Fed. Rep. 234 (1894). A mechanic's lien accruing after a mortgage was executed, but before its execution was authorized or ratified, has priority. *National Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006 (1895).

The ratification of an unauthorized mortgage need not necessarily be by express resolutions. Such ratification may be by the acts of the corporation

in accepting the benefits of the mortgage with knowledge of its existence. The law does not allow a corporation to treat a mortgage as legally existing, and then long subsequently to repudiate it on the ground that it was not properly authorized. Instances of the application of this rule are given in the notes below. *McCurdy's Appeal*, 65 Pa. St. 290 (1870), where there was no actual delivery of the mortgage to the trustee; *Wood v. Whelen*, 93 Ill. 153 (1879), where the mortgage was authorized by the promoters instead of the directors; *Harrison v. Annapolis, etc. R. R.*, 50 Md. 490 (1878), where it was alleged that the board was not legally constituted; *Singer v. St. Louis, etc. R. R.*, 6 Mo. App. 427 (1879), where the bonds were issued for what was alleged to be an *ultra vires* lease; *Elwell v. Grand, etc. R. R.*, 67 Barb. 83 (1874), where the terms of the mortgage differed from those authorized; *aff'd*, 67 Barb. 83 and 85; *Aurora, etc. Soc. v. Paddock*, 80 Ill. 263 (1875), where it was claimed that the stockholders as well as the directors must authorize a mortgage; *Ottawa, etc. Co. v. Murray*, 15 Ill. 336 (1854), where the officer signed his own instead of the company's name to the bonds. See also many cases in ch. XLIII, *supra*, sustaining the authority of officials who have been allowed to assume powers for a long time; also ch. XLIV, *supra*, concerning ratification, etc., of *ultra vires* and other acts; *Lewis v. Hartford Mfg. Co.*, 56 Conn. 25 (1888), where the mortgage was made by an agent without a vote of the directors; *Thomas v. Citizens' Horse Ry.*, 104 Ill. 462 (1882), where a stockholders' vote was not taken, although required by statute. See also §§ 723-725, *supra*. *Samuel v. Holladay*, 1 Woolw. 400 (1869); s. c., 21 Fed. Cas. 306, where there was a ratification of the mortgage. A railway mortgage on all real and personal property may be

though the mortgage securing the note was void for want of the consent of the stockholders as required by statute.¹

valid, though not in conformity with the general chattel mortgage act in respect to acknowledgment. *Cooper v. Corbin*, 105 Ill. 224 (1883). Although mortgage bonds are issued by corporate officers without authority, yet, if for several years they are used as a pledge to secure corporate debts, and in the meantime directors and stockholders know of their issue, they are valid. *Stainback v. Junk, etc. Co.*, 98 Tenn. 306 (1897). An unauthorized mortgage is ratified if for several months after the mortgagee takes possession the directors do not object or offer to refund the borrowed money. *Currie v. Bowman*, 25 Oreg. 364 (1894). An unauthorized alteration in a mortgage may be ratified by the subsequent acts of the parties. *Woodbury v. Allegheny, etc. R. R.*, 72 Fed. Rep. 371 (1895). A mortgage executed by the president and secretary of a corporation, instead of by its trustees, and without any formal authorization, is valid where there were only three trustees and two of them were the president and secretary, and the money secured by the mortgage was received by the corporation and used for its benefit. *Dexter v. Long*, 2 Wash. St. 435 (1891). Although the president executes a mortgage for a shorter term and more frequent payments of interest than the board authorized, yet where the company accepts the money and pays the interest for a time, the mortgage is valid. *Gribble v. Columbus Brewing Co.*, 100 Cal. 67 (1893). A chattel mortgage given by the president and treasurer without previous authority from the directors may be validated by the corporation accepting the benefit of the same. *Edelhoff v. Horner, etc. Co.*, 86 Md. 595 (1898). Where a mortgage recites that it was duly

executed by authority of the corporation, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed. *Sioux, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899). Although mortgage bonds are issued by corporate officers without authority, yet if for several years they are used as a pledge to secure corporate debts, and in the meantime directors and stockholders know of their issue, they are valid. *Stainback v. Junk, etc. Co.*, 98 Tenn. 306 (1897). An unauthorized mortgage is not ratified nor is it made valid by estoppel *in pais*, except in a manner in writing sufficient to authorize the mortgage. *Blood v. La Serena, etc. Co.*, 113 Cal. 221 (1896). A mortgage of the corporate property in California without a prior resolution authorizing it is void, although such resolution is recited in the mortgage, and the president, secretary, and two-thirds of the stockholders sign it, and the corporate seal is attached. Separate assent of the directors is not enough. A subsequent assessment by the directors to pay the mortgage is not a ratification. *Alta, etc. Co. v. Alta, etc. Co.*, 78 Cal. 629 (1889). The fact that the proceeds of a mortgage are applied to the business of the company does not, as against other creditors, validate the mortgage which has been made without authorization by the board of directors. The absence of the corporate seal prevents any *prima facie* validity. *Duke v. Markham*, 105 N. C. 131 (1890). Where the stockholders build the road with their own money and take the mortgage bonds of the company as security without formal action of the corporation authorizing it, the bonds are

¹ *Curtin v. Salmon River, etc. Co.*, 141 Cal. 308 (1903).

§ 810. *Signing, sealing, acknowledging, and delivering the mortgage.*—A corporation mortgage should be signed, sealed, and acknowledged in substantially the same way as a corporate deed.¹ Immaterial errors in respect to these matters are not fatal to the mortgage.²

not good in their hands, and an execution sale of the property comes in ahead of the mortgage. *McKee v. Grand Rapids, etc. Ry.*, 41 Mich. 274 (1879). See also, on this subject, §§ 712, 716, 782, *supra*, and § 810, *infra*. Corporate creditors' rights by attachments which are obtained between the time of the execution of an illegal mortgage and the ratification of the same have priority over the mortgage. *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519 (1897).

1 See § 722, *supra*. As to the mode of proving the execution, see *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879). A mortgage to a corporation is legal, even though the witnesses and the notary public who took the acknowledgment are stockholders of such corporation. *Read v. Toledo Loan Co.*, 68 Ohio St. 280 (1903). Even though the name of a corporation is abbreviated as signed to its mortgage and bonds, yet they are legal. *William Firth Co. v. South Carolina, etc. Co.*, 122 Fed. Rep. 569 (1903).

2 See § 722, *supra*. Although the mortgage is irregular in the mode in which the corporate name is signed thereto, yet it may be good as an equitable mortgage, and notice to the trustees of subsequent mortgages is sufficient. *Miller v. Rutland, etc. R. R.*, 36 Vt. 452 (1863). An attestation clause in the mortgage, followed by the corporate seal and the signature of the president as president, is not the usual mode of execution, but is sufficient. *Canandarqua Academy v. McKechnie*, 90 N. Y. 618 (1882). A mortgage given under the seal of the corporation is legally executed; and it is immaterial that the president and treasurer signed it instead of the president and secretary as specified

in the resolution authorizing it. *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875). A corporate mortgage may be made by an attorney of the corporation, in the name of the corporation, but under his own hand and seal, where his power of attorney was under the seal of the corporation. *First Nat. Bank v. Salem, etc. Co.*, 39 Fed. Rep. 89 (1889). A mortgage executed by the president and secretary of a corporation instead of by its trustees, and without any formal authorization, is valid where there were only three trustees, and two of them were the president and secretary, and the money secured by the mortgage was received by the corporation and used for its benefit. *Dexter v. Long*, 2 Wash. St. 435 (1891). The fact that the corporate officer who executes a mortgage for the corporation has himself a prior mortgage on the property does not invalidate his lien. *Traders' Nat. Bank v. Mfg. Co.*, 100 N. C. 345 (1888). When not otherwise provided by statute, a mortgage signed and acknowledged by a majority of the board of directors, and sealed with the corporate seal, is sufficiently executed. *Gordon v. Preston*, 1 Watts (Pa.), 385 (1833). A corporate mortgage deed of trust is good as an equitable mortgage and precedes attachments, even though unwitnessed and without the secretary's acknowledgment. *Frank v. Hicks*, 4 Wyo. 502 (1894). Even though the signature of a mortgagor corporation to the mortgage and to the bonds leaves off a part of the name, yet this does not invalidate the mortgage and bonds. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569. A mortgage is not enforceable against a corporation where it is drawn as a personal obligation and

The bonds and mortgage may be executed outside of the state which incorporated the company.¹

"The omission to attach the corporate seal to the mortgages is not fatal to their validity in equity." Although they may not be good as legal mortgages, yet the court will allow an allegation to be added for their enforcement as equitable liens.² A contract of a corporation to give a mortgage on its property is a lien in equity superior to other creditors of the corporation, where such contract has been performed by the party entitled to the mortgage, and especially where an attempted execution of the mortgage has been made.³

In Montana and some other states the statutes require a deed of trust by a corporation to be accompanied by an affidavit that the same has been made in good faith and without any design to hinder or delay creditors.⁴

signed by an individual "as president." *Clark v. Hodge*, 116 N. C. 761 (1895). Even though a mortgage is signed "Mary L. Byrd, President of the Kingston Lumber & Mfg. Co.," it is a valid mortgage. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); *aff'd*, 106 Tenn. 1. The signature to a corporate mortgage omitting one word of the name is nevertheless good, and although signed "Chas. P. Law, President of the Santa," etc., is sufficient, where the corporate seal is affixed. *Underhill v. Santa Barbara, etc. Co.*, 93 Cal. 300 (1892).

¹ *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884); *Wright v. Bundy*, 11 Ind. 398 (1858). A mortgage on the Kentucky property of a Kentucky railroad corporation may be acknowledged by the president in Ohio. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). See also § 713a, *supra*.

² *Allis v. Jones*, 45 Fed. Rep. 148 (1891). See also § 721, *supra*. Where the mortgage is not sealed, and in order to cure the defect another mortgage is executed, no debts having been incurred in the meantime, both mortgages may be foreclosed as one. *Robinson v. Piedmont Marble Co.*, 75 Fed. Rep. 91 (1896). Even though a corporation does not attach its seal to

a mortgage, yet the mortgage is valid, unless it is shown that the corporation had a seal and that the board of directors did not authorize its omission. *Turner v. Kingston, etc. Co.*, 59 S. W. Rep. 410 (Tenn. 1900); *aff'd*, 106 Tenn. 1. Where a mortgage purports to be by a corporation, but is signed by the president, treasurer, and secretary personally, with their official titles following their names, and is acknowledged the same as they would acknowledge a personal mortgage, and the corporate seal is not attached, the mortgage is at most only an equitable mortgage, and in order to be foreclosed must be alleged to be such. *Brown v. Farmers' Supply Co.*, 23 Oreg. 541 (1893). A mortgage may be valid although the corporate seal is not attached thereto. *First Nat. Bank v. G. V. B. Min. Co.*, 89 Fed. Rep. 439 (1898); *aff'd*, 95 Fed. Rep. 23. A mortgage need not be under seal in Arkansas, a seal not being necessary to a mortgage by an individual. *Fourth National Bank, etc. v. Camden, etc. Co.*, 142 Fed. Rep. 257 (1905).

³ *Hamilton T. Co. v. Clemes*, 163 N. Y. 423 (1900).

⁴ *Teitig v. Boesman*, 12 Mont. 404 (1892). Where by the statutes of a state, a mortgage on personal property must be accompanied by an affi-

The bonds should be of the same date as the mortgage, but a variance in their dates may be explained by parol evidence.¹ Where the mortgage is given a date prior to the actual date when it is authorized and executed, it is a mortgage from the first named date as between mortgagor and mortgagee and will cover property acquired in the meantime if it contains the after-acquired property clause.²

It is not necessary that there be a manual delivery of the mortgage to the trustee in order to constitute a delivery.³

§ 811. *Recording of a mortgage—Release and discharge of mortgage—Decree canceling mortgage.*—A railroad mortgage should be recorded. The railroad being real estate, the mortgage should be recorded as a real-estate mortgage in every county into which the railroad runs, unless the statutes of the state provide otherwise.⁴ The federal courts hold that a railroad mortgage need not be recorded as

davit of good faith, a mortgage covering the railway property of a street railway is not good as to the personal property unless it contains such affidavit, and a judgment creditor may have precedence as to such personalty. *Illinois T. & S. Bank v. Seattle El. Ry.*, 82 Fed. Rep. 936 (1897). A chattel mortgage authorized by *de facto* stockholders is good as to third persons. As against a receiver of the corporation it is valid, although the affidavit is defective and the mortgage is not recorded. *Kane v. Lodor*, 56 N. J. Eq. 268 (1897).

1 Although the bonds are dated October 1, 1871, while the mortgage is dated October 25, 1871, yet parol evidence may show that these are the bonds which are secured by the mortgage. *Butler v. Rahm*, 46 Md. 541 (1877). The date of the mortgage is presumed to be the date when it was acknowledged and not the date of the mortgage itself. *Guaranty, etc. Co. v. Galveston, etc. R. R.*, 107 Fed. Rep. 311 (1901). A mortgage is a first lien ahead of a lease, even though they were executed at the same time, it being shown that the mortgage became due ten years before the lease was to expire and that the lease provided for the execution of the mortgage. *Louisville, etc. R. R. v.*

Schmidt, 52 S. W. Rep. 835 (Ky. 1899).

2 *Guaranty T. Co. v. Atlantic, etc. R. R.*, 138 Fed. Rep. 517 (1905).

3 *McCurdy's Appeal*, 65 Pa. St. 290 (1870). Where the attorney for the mortgagor delivers the mortgage to the trustee and the trustee returns it to him to be recorded, this is sufficient delivery. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569.

4 Record may be made by leaving for record a copy of the mortgage, which copy the clerk has compared with the original and found to be correct. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1874). It has been held that a mortgage to the state, made in pursuance of a public statute, need not be recorded. *Memphis, etc. R. R. v. State*, 37 Ark. 632 (1881). A statutory mortgage not otherwise recorded was involved in *South Dakota v. North Carolina*, 192 U. S. 286 (1904). See also § 794, *supra*. A mortgage recorded, but not properly executed for record, is good as against a subsequent mortgage which refers to it and recognizes it as an existing lien. *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372 (1859). See also ch. L, *infra*.

a chattel mortgage, under the chattel-mortgage statute, unless the highest court in the state has held that that statute applies to railroad mortgages,¹ and that the chattel-mortgage act does not apply to railroads where the statutes expressly authorize railroad mortgages.²

In states where rolling-stock is held to be personalty, it is customary and safer to record the mortgage as a chattel mortgage as well as a real-estate mortgage. The supreme court of the United States has held, however, that even if the rolling-stock be personalty, yet the mortgage need not be recorded as a chattel mortgage.³

Even if the rule were otherwise, the peculiar character of rolling-stock would not make the mortgage void under the chattel-mortgage

1 *Farmers' L. & T. Co. v. Detroit*, etc. R. R., 71 Fed. Rep. 29 (1895).

2 *Southern California, etc. Co. v. Union L. & T. Co.*, 64 Fed. Rep. 450 (1894).

3 *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77 (1881). Rolling-stock is realty to the extent that a mortgage upon the railroad and rolling-stock need not be recorded as a chattel mortgage in order to cover the rolling-stock. If recorded as a real-estate mortgage this is sufficient. The rule is different in regard to coal oil, etc. *Farmers' L. & T. Co. v. St. Joseph, etc. Ry.*, 3 Dill. 412 (1875); s. c., 8 Fed. Cas. 1053. To same effect as regards recording as a chattel mortgage, *Cooper v. Corbin*, 105 Ill. 224 (1883). In Illinois, prior to the constitutional provision to the contrary, rolling-stock was held to be real estate and hence covered and protected against attachment creditors by recording the mortgage as a real-estate mortgage only. *Michigan, etc. R. R. v. Chicago, etc. R. R.*, 1 Bradw. (Ill.) 399 (1878). A mortgage on the rolling-stock is good though not recorded as a chattel mortgage. After the trustee takes possession, creditors cannot levy upon it by attachment. The mortgage covers not only the broad-gauge rolling-stock in use, but also the narrow-gauge rolling-stock which is being gathered together for use upon a change in the gauge. *Hamlin v. Jerrard*, 72 Me. 62 (1881). There are decisions, however, to the

contrary. In *Vilas v. Page*, 106 N. Y. 439 (1887), it was stated that an execution sale of rolling-stock in 1854 had been adjudged to have been good as against the mortgage, the mortgage not having been recorded as a chattel mortgage. Where the rolling-stock is held to be personalty, a mortgage covering it as well as the railroad must be filed as a chattel mortgage in all the towns and cities through which the road runs. If not so filed the rolling-stock may be sold on execution. *Hoyle v. Plattsburgh, etc. R. R.*, 54 N. Y. 314 (1873). On this question see also: *Jones, Corp. Bonds*, § 142, etc. It may be sold for taxes. *Randall v. Elwell*, 52 N. Y. 521 (1873). If the mortgage covers rolling-stock it must be recorded as a chattel mortgage; otherwise executions will come in ahead of it. *Williamson v. New Jersey Southern R. R.*, 29 N. J. Eq. 311 (1878), rev'g 28 N. J. Eq. 277 (1877). Cf. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879). In California by statute a mortgage covering rolling-stock must be recorded as a chattel mortgage. If not, an attachment may be levied on it as though the mortgage did not exist. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). Where rolling-stock is held to be personalty, a mortgage covering it must be recorded as a chattel mortgage. *Radebaugh v. Tacoma, etc. R. R.*, 8 Wash. 570 (1894).

act, by reason of the mortgagor being left in possession.¹ Moreover, until creditors obtain a specific lien on the rolling-stock, the unrecorded mortgage is a valid lien.²

Where, however, an ordinary corporate mortgage covers personal property also, as it generally does, it should be recorded as a chattel mortgage, in addition to its record as a real-estate mortgage.³ An

¹ A mortgage of a railroad and its rolling-stock is legal although the mortgagor retains possession. "The purpose of a railroad, the nature of its property, the necessity of possession to accomplish its purpose, and the powers conferred in this charter, leave no reason to doubt the validity of a mortgage, without delivery of possession, of those chattels which are necessary to carry out the object of incorporation. Though the body is private the object is public, and it is clothed with a portion of the sovereign power to accomplish this." *Covey v. Pittsburg*, etc. R. R., 3 Phila. 173 (1858). See also *Hunt v. Bullock*, 23 Ill. 320 (1860).

² An unrecorded chattel mortgage is not void under the statutes as regards general creditors who have not obtained a specific claim upon the property by attachment, execution, or other lien. *Lane v. Lutz*, 1 Keyes (N. Y.), 203 (1864). Even though a mortgage, by reason of not being recorded as a chattel mortgage, does not cover personal property, cash, and accounts receivable, yet if the receivers take possession of all these, and a decree of foreclosure is entered and a sale had, it is too late for general creditors to then intervene. *State Trust Co. v. Kansas City*, etc. R. R., 120 Fed. Rep. 398 (1903).

³ A mortgage in New Jersey, other than that of a railroad corporation, must be recorded as a chattel mortgage if it is to cover chattels, otherwise it is void as against creditors. *Knickerbocker T. Co. v. Penn.* etc. Co., 66 N. J. Eq. 305 (1904). Under the New Jersey statutes a mortgage by a railroad covering all personal and

real property need not be recorded as a chattel mortgage. The court said: "This act was doubtless passed to put to rest in New Jersey the question which divided many of the federal and state courts: whether a mortgage embracing the franchises, rolling-stock, and chattels of a railroad corporation should be treated as a real-estate mortgage only, or also as a chattel mortgage." *Metropolitan T. Co. v. Pennsylvania*, etc. R. R. 25 Fed. Rep. 760 (1885). If the mortgage covers personal as well as real property, it must be acknowledged and recorded as a chattel mortgage also in order to cut off subsequent liens. *Palmer v. Forbes*, 23 Ill. 301 (1860). Where the chattel mortgage recording act requires that in the affidavit the consideration be stated, it is sufficient to state that the consideration is the full amount of the bonds covered by the mortgage, although such bonds are not yet issued. *Camden*, etc. Co. v. *Burlington*, etc. Co., 33 Atl. Rep. 479 (N. J. 1895). A chattel mortgage by a corporation, not filed in any public office, is invalid as against its receiver, or the claims of creditors, after the appointment of the receiver, where possession of none of the property was taken or delivered in virtue of the mortgage. *Hebbard v. Southwestern*, etc. Co., 55 N. J. Eq. 18 (1896). As to the execution and recording of a chattel mortgage in Connecticut, see *American*, etc. Co. v. *Worcester*, etc. Co., 100 Fed. Rep. 40 (1900). A railroad mortgage in California on real and personal property must be recorded as personal property in order to be a lien thereon. *Bishop v. McKillican*, 124

unrecorded mortgage or lien is good as against subsequent incumbrances where those who take the latter take them with knowledge or notice of the mortgage.¹ A mortgage deed of trust is a lien from the date of its record, even though the bonds are not issued until after

Cal. 321 (1899). A combined real estate and personal property mortgage was held to be defective as to the personal property, by reason of not being recorded as such, in the case of Knickerbocker T. Co. v. Penn. etc. Co., 62 N. J. Eq. 624 (1901). A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state. *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78 (1900). In Nebraska a mortgage, though filed as a chattel mortgage, is not effectual as such where the mortgagor retains possession and there is no evidence of good faith. *Marsh v. Burley*, 13 Neb. 261 (1882). The New York statute, to the effect that corporations need not file or refile chattel mortgages, was amended by Laws 1897, ch. 418. A mortgage upon a leasehold is a mortgage upon a chattel real. *State Trust Co. v. Casino Co.*, 19 N. Y. App. Div. 344 (1897); *State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 381 (1896), holding also that a warehouseman might obtain a lien on personal property in preference to a chattel mortgage securing bonds where the chattel mortgage was not properly filed for record. The recording may be by leaving a copy of the mortgage which has been compared by the register with the original. *Central T. Co. v. Georgia Pac. Ry.*, 83 Fed. Rep. 386 (1896). A mortgage on real estate and personal property covers the latter if recorded in the real-estate record, especially where the personal property consists of machinery and it was the intent that it should become a part of the real estate. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569. A receiver of an insolvent corporation represents the creditors as well as the corporation itself, and may set up that a conditional sale of property by the corporation has not been recorded as required by statute. *Re Wilcox, etc. Co.*, 70 Conn. 220 (1898). A mortgage on coal lands and personal property must be recorded as a chattel mortgage. *Manhattan T. Co. v. Seattle, etc. Co.*, 16 Wash. 499 (1897); *s. c.*, 19 Wash. 493. Where a railroad mortgage by its terms covers after-acquired property, it covers after-acquired personal property, and under the New York statutes, need not be recorded as a chattel mortgage. *Platt v. New York, etc. Ry.*, 9 N. Y. App. Div. 87 (1896); *aff'd*, 153 N. Y. 670. If the mortgage is not recorded as a chattel mortgage, then there arise the old and complicated questions of whether, the mortgagor remaining in possession and continuing to use the property, the mortgage is not void so far as other creditors are concerned. See *Bank of Leavenworth v. Hunt*, 11 Wall. 391 (1870); and a multitude of decisions on this subject as regards the ordinary chattel mortgage.

1 A bondholder's rights are superior to those of a judgment creditor who had knowledge of the unrecorded mortgage before he obtained his judgment. *Butler v. Rahm*, 46 Md. 541 (1877). A purchaser who took with knowledge of an equitable lien takes subject to that lien. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). Where the parties for whose benefit a mortgage is given are directors, they are chargeable with notice of an existing unrecorded chat-

other liens have attached.¹ A debenture which is a mortgage on everything, but which expressly allows the company to sell any part until the mortgagee should take possession, may be void as to other creditors.²

Where a mortgagee at the request of the mortgagor corporation withholds the mortgage from the record to deceive the public until the mortgagor becomes insolvent, the mortgage may be set aside for fraud.³ Although the failure to renew a mortgage may render it void as against creditors, yet this refers only to creditors who are in a position to seize the property under a lien or legal process.⁴

The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a party defendant and resides in the same state as the complaining corporation. The trustee in such a suit is merely a formal party.⁵

tel mortgage. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105, 124 (1879). It may be added that under the recording acts of many of the states an unrecorded mortgage has priority over an attachment or judgment of a general creditor, whether the latter had notice of the mortgage or not. Where a mortgage of a corporation has not been recorded it is not good as against a receiver of the property of the corporation. *Cheney v. Maumee, etc. Co.*, 64 Ohio St. 205 (1901). A receiver appointed at the instance of general creditors may attack a chattel mortgage on the ground that it had not been properly recorded. *Bayne v. Brewer Pottery Co.*, 90 Fed. Rep. 754 (1898). Where a new mortgage is executed to secure bonds to be issued in exchange for old mortgage bonds, and an attachment is levied on the property before the recording of the new mortgage, the court will preserve the lien of the pre-existing mortgage as against such attachment. *Griffin v. International T. Co.*, 161 Fed. Rep. 48 (1908).

¹ *Central Trust Co. v. Bartlett*, 57 N. J. L. 206 (1894). See also § 764, *supra*.

² *Orman v. English, etc. Inv. Trust*, 61 Fed. Rep. 38 (1894). See also § 798, *supra*.

³ *Curtis v. Lewis*, 74 Conn. 367 (1902). A mortgage securing bonds is not fraudulent by reason of the fact that it was agreed that it should not be recorded in order that the credit of the company might not be impaired. *Am. Trust & Savings Bank, etc. v. McGettigan*, 152 Ind. 582 (1899). Cf. §§ 691, 692, *supra*.

⁴ *In re New York, etc. Co.*, 110 Fed. Rep. 514 (1901).

⁵ *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900). As to discharge in general, see § 765, *supra*. Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant, and serves them by publication, and, two of the trustees having died, causes successors to be appointed by the court and obtains decree against the corporation and the trustees of the mortgage, canceling their title to the land, the decree is effective, and even though the mortgage is afterwards foreclosed the purchaser at such sale takes no title to such land, he having waited thirty years before attacking such decree. *Bump v. Butler County*, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for

A decree at the instance of a corporation declaring void a trust agreement is not a bar to a holder of one of the bonds, secured thereby, collecting his bonds.¹

Where a corporation buys its unmatured bonds and causes the mortgage securing them to be canceled, but neglects to cancel the bonds, a *bona fide* pledgee of such bonds from the treasurer, who fraudulently abstracted them, is protected.²

A railroad-mortgage trustee, who certifies on the bonds that they are secured by a mortgage executed and delivered to him, is liable to a holder of the bonds for loss of value occasioned by his neglect to record the mortgage, whereby a subsequent, duly-recorded mortgage obtains priority; but the claim is barred by a delay of over twenty years after the second mortgage was recorded.³

The subject of discharge of a mortgage is considered elsewhere.⁴

thirty years in complaining of fraud and illegality, whereby it conveyed land to a corporation, the court will not grant it any relief. *Rummel v. Butler County*, 93 Fed. Rep. 304 (1899).

¹ *National Salt Co. v. Ingraham*, 143 Fed. Rep. 805 (1906). See also § 762, *supra*.

² *Rockville, etc. Bank v. Citizens', etc. Co.*, 72 Conn. 576 (1900). Even though a corporate mortgage is illegal, yet, if the amount due has been paid, the corporation may file a bill to have the mortgage canceled. *Portneuf, etc. v. Western Loan, etc. Co.*, 6 Idaho, 673 (1899). Even though a railroad mortgage is being foreclosed in the federal court on the supposition that a prior mortgage had been fully paid, yet a *bona fide* purchaser of bonds secured by such prior mortgage may bring a foreclosure suit thereon in the

state court after the foreclosure suit in the federal court has been completed, even though such purchaser purchased during the foreclosure of the subsequent mortgage and was aware of the default on such second mortgage. *Pittsburg, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896). Same case *aff'd sub nom. Pittsburg, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). As to whether a state statute requiring the production and cancellation of notes upon the discharge of a mortgage applies to a railroad mortgage, see *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900). See also § 765, *supra*, and § 816, *infra*.

³ *Miles v. Vivian*, 79 Fed. Rep. 848 (1897), *rev'g Miles v. Roberts*, 76 Fed. Rep. 919 (1896). See also § 814, *infra*.

⁴ See § 816, *infra*.

CHAPTER XLVIII.

TRUSTEES AND BONDHOLDERS—REMEDIES OF EACH.

A. THE POSITION, DUTIES, AND LIABILITIES OF TRUSTEES.

§ 812. Mortgages in the shape of trust deeds—Reason therefor and nature thereof—Mortgages to bondholders direct—Legality of a mortgage deed of trust.

813. Who may be the trustee?

814. Trustee's certificate on the bonds.

815. The nature of the trusteeship, and the duties and liabilities of, and breaches of trust by, the trustee.

816. Right and duty of the trustee to protect the mortgaged property—Suits for that purpose—Purchasing prior liens—Discharging the mortgage or releasing part of the property—Delivery of bonds in trust to trustee—Purchase by the trustee for the bondholders at the foreclosure sale—Suits which the trustee may institute.

817. In the absence of fraud the bondholders are bound by what is done by the trustee within the scope of his authority—Notice to the trustee.

818. Compensation of trustees and reimbursement of trustees' disbursements for counsel, etc.

819. Death, resignation, and removal of trustees—Removal under the terms of the mortgage—Same trustee in two mortgages.

B. THE REMEDIES OF THE TRUSTEE TO ENFORCE THE SECURITY—FORECLOSURE, SALE, AND TAKING POSSESSION.

820. The trustee, upon default of the mortgagor, may sell the property, or may have a strict

foreclosure, or may foreclose by suit in equity, or may take possession and operate the road.

§ 821. The trustee is the proper party to foreclose the mortgage—In a trustee's suit to foreclose, the bondholders are not necessary parties.

822. Possession of the mortgaged property may be taken by the trustee, when?

823. Strict foreclosure by the trustee—Liability of the trustee.

824. Sale of the mortgaged property by the trustee under the power of sale upon a default.

C. BONDHOLDERS' SUITS TO FORECLOSE AND TO PROTECT OR ENFORCE THEIR RIGHTS.

825. Bondholders may bring suit to foreclose where the trustee declines to do so after default.

826. Such a suit, however, cannot be maintained unless the trustee has first been requested to bring it—The suit is for the benefit of all bondholders—Parties plaintiff and defendant in such a suit.

827. Bondholders may foreclose in the federal courts if the requisite diverse citizenship exists.

828. Remedy of bondholders where the foreclosure was fraudulent—Intervention—Laches.

829. A bondholder cannot levy an execution upon the mortgaged property.

830. Bondholders' suits in behalf of all the bondholders to prevent waste, etc.

831. Bondholders cannot claim the benefit of all contracts made by the company with third persons.

A. THE POSITION, DUTIES, AND LIABILITIES OF TRUSTEES.

§ 812. *Mortgages in the shape of trust deeds—Reason therefor and nature thereof—Mortgages to bondholders direct—Legality of a mortgage deed of trust.*—Where a mortgage debt is represented

by a single note or bond, the mortgage itself is generally made directly to the person to whom the debt is payable. But when, as in the case of corporation mortgages, the debt consists of a large number of bonds, and these bonds soon pass into many different hands, a mortgage running to the person to whom the bonds were originally issued, or the subsequent holders of the bonds, is found to be cumbersome, complicated, and dangerous as regards its enforcement upon default.¹

In consequence of the embarrassments due to having a mortgage run to the party to whom the bonds are originally issued, it is the custom and universal practice now to have the mortgage run to a trustee for the benefit of the bondholders. Such an instrument is called a deed of trust or, better still, a mortgage deed of trust. It is a legal way of giving a mortgage.²

1 Where the power of sale runs to "the holder of said bonds or of any one or more thereof," the power of sale is not in the mortgagee, but in the bondholders, and hence it is void for indefiniteness. If the mortgagee assigns the mortgage, the assignee holds it in trust for all the bondholders. *Mason v. York, etc. R. R.*, 52 Me. 82 (1861). In *Re York, etc. R. R.*, 50 Me. 552 (1861), the instrument was a mortgage and ran to a certain person "and his assigns, who shall become holders of the bonds and coupons hereinafter mentioned, each in the ratio of the bonds so held by him." The mortgagee assigned his interest to other parties. The court held that whoever held the mortgage held it as trustee for all the bondholders, and that no one bondholder had greater rights therein than any other. Where a mortgage is created directly by a statute, and no formal instrument is made by the corporation to trustees for the bondholders, the mortgagees are the bondholders themselves. Hence, in any suit of foreclosure, only those bondholders are bound who are parties to the suit. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. Where the mortgage runs to all the bondholders in proportion to their interest, all the bondholders are neces-

sary parties to any foreclosure suit. *Nashville, etc. R. R. v. Orr*, 18 Wall. 471 (1873).

2 A mortgage given by a corporation to a trustee to secure an issue of bonds made by the corporation is not such a trust estate as is referred to in the statute of uses and trusts. *King v. Merchants' Exch. Co.*, 5 N. Y. 547 (1851). A mortgage to a trustee is not void under the Minnesota statute of uses and trusts. *State of Minnesota v. Duluth, etc. R. R.*, 97 Fed. Rep. 353 (1899). A trust deed is not void as suspending the power of alienation, inasmuch as by payment the mortgage may cease or by agreement of all parties interested it may be canceled. *Balfour-Guthrie, etc. Co. v. Woodworth*, 124 Cal. 169 (1899); *Camp v. Land*, 122 Cal. 167 (1898); *Webb v. Rockefeller*, 66 Kan. 160 (1903). A mortgage deed of trust to secure the bonds of a corporation does not suspend the power of alienation in violation of the California statute. *Atlantic Trust co. v. Woodbridge, etc. Co.*, 86 Fed. Rep. 975 (1897). "Mortgages to one person in trust for the benefit of others have frequently been used, and upheld by the courts;" and bonds secured thereby and running to the trustee or bearer are legal. Such a trust deed is a mortgage. The mortgage may be "by a mortgage di-

Where stock in several corporations is put in trust by a deed acknowledged, delivered and accepted by the trustees in New York

rectly to the creditors, or to trustees for their benefit, or by a mortgage to secure bonds issued and delivered to the creditors, or sold to raise money to pay them." *Carpenter v. Black Hawk, etc. Co.*, 65 N. Y. 43 (1875). It is not necessary that separate mortgages should be executed to each creditor to secure his debt, but a single mortgage to one or more persons in trust for the security of all the creditors is proper, and the mortgage may be given to secure bonds issued and delivered to creditors or sold to raise money to pay them. *Lord v. Yonkers, etc. Co.*, 99 N. Y. 547 (1885). A deed in trust to trustees, instead of a direct mortgage to bondholders, is good. *Butler v. Rahm*, 46 Md. 541 (1877); *Central Gold Min. Co. v. Platt*, 3 Daly, 263 (1870). It "is a mortgage in substance, in law, and in fact, though it also creates a trust," and the right of possession is in the mortgagor. *Southern Pac. R. R. v. Doyle*, 8 Sawyer, 60 (1882); s. c., 11 Fed. Rep. 253. Cf. § 622*f*, *supra*.

Speaking of deeds in trust the court said in the case of *Ashhurst v. Montour Iron Co.*, 35 Pa. St. 30 (1860): "They are tripartite in substance and effect. Besides the two contracting parties there are the creditors, unascertained indeed when the instrument is made, but well known as a party when the remedies come to be discussed. Between them and their trustees it is nothing but a trust; between the trustees and the mortgagor it is nothing but a mortgage. And if the creditors be regarded as the substantial plaintiffs on this record, then, as between them and the mortgagor, the instrument can be regarded as nothing else than a mortgage." In *McLane v. Placerville, etc. R. R.*, 66 Cal. 606 (1885), the court said: "Some question is made as to the nature of the instrument

sued on. We think it a mortgage executed and issued in the usual mode and form of railroad mortgages. . . . Though executed to trustees, and in form a conveyance in trust, it is to all intents a mortgage—in essence a mortgage, taking the form usual with such securities executed by railroad corporations. From an apparent necessity and for the convenience of those interested, the security takes the form of a trust deed and thus becomes a contract between the corporation and the persons who may become holders of the bonds secured by it, who are entitled to the same benefit they would have if actually made parties to the instrument." The deed in trust is a mere security for the money obtained, and is in legal effect nothing more than a mortgage, and leaves the title and possession in the grantor subject to the lien. *Wisconsin, etc. R. R. v. Wisconsin, etc. Co.*, 71 Wis. 94 (1888). Power to mortgage gives power to make a deed of trust in the nature of a mortgage. *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32. See also *Jones, Mortgages* (4th ed.), §§ 1764, 1771. When the bondholders take possession of the property covered by the deed of trust, they are equitable mortgagees in possession. *Chamberlain v. Connecticut Cent. R. R.*, 54 Conn. 472, 485 (1887). In *Platt v. Union Pac. R. R.*, 99 U.S. 48, 57 (1878), the court said: "The instrument, we think, though in form a deed of trust, was substantially a mortgage." A corporation may lease its property for a hundred years, even though the statutes forbid any disposition of property which suspends the absolute power of controlling the same for more than two lives and twenty-one years, and may mortgage its interest as lessor. *Sioux, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897);

where the grantor resided, the trust deed is governed by the law of New York, without reference to the residence of the trustees or the subsequent residence of the grantor.¹

In England it is customary to include both the mortgage and the evidence of debt in one instrument, and this instrument is called a debenture. The recording laws in America render this impracticable in the case of a large issue of bonds.² The American deed of trust, or mortgage deed of trust, is given for the purpose of securing debts or obligations. It is to all intents and purposes a mortgage, and is subject to substantially the same rules as a mortgage.³

§ 813. *Who may be the trustee?*—The trustee or trustees—for there may be more than one—may be individuals or may be a trust

aff'd, 173 U. S. 99 (1899). An unincorporated joint-stock association to buy, lease, and sell land is legal, even though the title to the land is held in the name of trustees who cannot act except upon a three-fourths vote of the shareholders. A shareholder cannot have a receiver appointed and the business wound up on the ground of its being illegal. *Howe v. Morse*, 174 Mass. 491 (1899). In suing a railroad for interest on registered bonds it must be alleged that the agreement of the railroad was made under seal or upon a consideration, and that the covenant was made with or for the plaintiff's benefit. *Holmes v. Northern, etc. Ry.*, 65 N. Y. App. Div. 49 (1901). See also same case, 36 N. Y. Misc. Rep. 266 (1901). Where the trustee has obtained judgment on the entire issue of bonds an individual holder of bonds cannot sue the company on his bonds. Upon the trustee obtaining judgment the bonds were all merged therein. *Laing v. Queen City Ry.*, 49 S. W. Rep. 136 (Tex. 1898). In this case the bonds ran to the trustee or bearer, and the court construed all the papers as constituting the trustee of the debt as well as of the property mortgaged. A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given

power to continue the business, is not valid as to personal property in New-York state, even though recorded as a chattel mortgage in New York state. *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78 (1900). A corporation may give a mortgage by conveying land to a person as trustee without specifying the character of the trust. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900).

¹ *Mercer v. Buchanan*, 132 Fed. Rep. 501 (1904).

² See § 776, *supra*, concerning debentures. "In the first place, as regards the powers that were given to the company, there was a power given to mortgage, and a power given to raise money by debentures; but, of course, they might include in one and the same instrument a mortgage and a debenture, which was in substance a bond, and a charge upon this property for the sum borrowed on bond." *Re Panama, etc.*, L. R. 5 Ch. 318 (1870). See *Orman v. English, etc. Inv. Trust*, 61 Fed. Rep. 38 (1894).

³ *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32; *Coe v. Johnson*, 18 Ind. 218 (1862); *Coe v. McBrown*, 22 Ind. 252 (1864); *Re York, etc. R. R.*, 50 Me. 552 (1861). See also *White Water, etc. Co. v. Vallette*, 21 How. 414 (1858); *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 480 (1870); *Meyer v. Johnston*, 53 Ala. 237 (1875); s. c., 64 Ala. 603.

company. The latter is generally preferred because such a company makes this a business; it has more or less experience; it gives strength and stability to the bonds; it renders the expense of trusteeship more easily ascertainable; and the trustee does not die.¹ It is legal for the same person to be the trustee of both the first and second mortgages.² The trustee may be an officer of the company.³ A director may be the trustee in a trust deed executed by his corporation.⁴ Even though one person owns all the bonds which are secured by a mortgage of the corporation, he should not be substituted as trustee, because the office of trustee and beneficiary should not be united.⁵

A statute to the effect that non-residents shall not be trustees in mortgage deeds of trust of property in the state is unconstitutional.⁶

¹ "The trustee in such case is usually, if not always, selected and appointed by the company for the convenience and benefit of itself and of those who may become the owners of its obligations. One mortgage to the trustee is all that is required, no matter how numerous the holders of the notes or bonds secured thereby. He is the representative of the common interests of all who may invest in the security." *Hays v. Galion Gas, etc. Co.*, 29 Ohio St. 330 (1876). An Illinois railroad corporation may execute a mortgage to a New York trust company. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). As to whether a trust company has power to hold as trustee and vote the majority of the stock of a great railroad system, especially where it is also the trustee in a trust deed of the company, see *Clarke v. Central R. R. etc. Co.*, 50 Fed. Rep. 338 (1892). The bill in this case, however, was dismissed on the final hearing. See 62 Fed. Rep. 328 (1894). It is not necessary that there be a manual delivery of the mortgage to the trustee in order to constitute a delivery. *McCurdy's Appeal*, 65 Pa. St. 290 (1870). A corporation which has received a sinking fund as trustee cannot keep the money on the ground that it had no power to act as trustee. *Central, etc. Co. v. Farmers', etc. Co.*, 114 Fed. Rep. 263 (1902).

² See § 819, *infra*.

³ *Ellis v. Boston, etc. R. R.*, 107 Mass. 1 (1871).

⁴ *Bassett v. Monte Christo, etc. Co.*, 15 Nev. 293 (1880). A director of a corporation which is a creditor of another corporation may be the trustee of a mortgage given by the latter to secure the former. *Copsey v. Sacramento Bank*, 133 Cal. 659, 663 (1901). A corporation may mortgage its property to a stockholder even though he controls a large majority of the stock. *Hanchett v. Blair*, 100 Fed. Rep. 817 (1900).

⁵ *Matter of Radam, etc. Co.*, 110 N. Y. App. Div. 329 (1905).

⁶ Although the statutes of a state require the trustee of a deed in trust to be a resident, yet the trust deed is not void where the trustee is a non-resident. The court, if necessary, will appoint a competent trustee to execute the trust. A foreclosure will be decreed without appointing a new trustee. A statute prohibiting citizens of other states from acting as trustee is unconstitutional. *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886). The Indiana statute that the trustee of a mortgage shall not be a non-resident is unconstitutional and void. Citizens of other states under the federal constitution have the right to be such mortgagee. *Roby v. Smith*, 131 Ind. 342 (1892); *Shirk v. La Fayette*, 52 Fed. Rep. 857 (1892).

The Illinois statute requiring trust companies to make a deposit with the state before accepting certain trusts does not invalidate a mortgage given to a foreign trust company. The state cannot intervene in a foreclosure suit in order to set this up, and the corporation cannot set it up.¹ Even though under a statute a foreign corporation is prohibited from acting as trustee of a mortgage, yet this does not invalidate the mortgage or bonds, but the court may substitute another trustee. Where, however, the trust company merely has certified to the bonds in the state where the trust company was incorporated and joined with the bondholders in a suit to foreclose, no substitution of trustee is necessary.² A foreign trust company may foreclose a mortgage given by a Texas telephone company on its property in Texas, even though such trust company has not been granted permission to transact business in Texas under its statutes.³

§ 814. *Trustee's certificate on the bonds.*—The trustee generally accepts in writing, at the end of the deed of trust, the trusteeship. He also generally signs a certificate on the back of the bonds to the effect that the bond is one of the bonds secured by the deed of trust, and sometimes that the deed of trust has been duly recorded. This certificate is not considered a part of the bond, but may be required before the bond itself can be considered as issued.⁴ Coupons detached

¹ Farmers' L. & T. Co. v. Chicago, 101 U. S. 195 (1879).
² In Illinois neither a domestic nor foreign trust company can accept a trust until after they have complied with certain formalities and prerequisites, and deposit \$200,000 in stocks, bonds, or mortgages with the state auditor. Until such compliance the trustee cannot enforce the trust. Pennsylvania Co. v. Bauerle, 143 Ill. 459 (1892). Under the Illinois statute a foreign trust company acting as trustee in the state without complying with the statutes may be removed and enjoined from foreclosing the mortgage. Farmers' L. & T. Co. v. Lake St. El. R. R., 73 Ill. 439 (1898). This decision was reversed, however, in 177 U. S. 51 (1900), on the ground that the federal court first acquired jurisdiction of the case. After foreclosure of a mortgage other creditors cannot attack a mortgage on the ground that the mortgagee had not complied with

the state statutes. Miller v. Gates, 22 Mont. 305 (1899).

² Morse v. Holland T. Co., 184 Ill. 255 (1900).

³ Commercial, etc. Co. v. Territorial, etc. Co., 86 S. W. Rep. 66 (Tex. 1905).

⁴ A provision in the trustee's certificate to the effect that "the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months" does not enable a bondholder to sue for the principal where the terms of the mortgage are inconsistent with such a right to sue. Mallory v. West Shore, etc. R. R., 35 N. Y. Super. Ct. 174 (1873). Bonds may be good, though not certified to by the trustee. The failure of the trustee to sign certain bonds set apart for a specific purpose may be disregarded by the court in carrying out the contract plan. Atwood v. Shenandoah, etc. R. R., 85 Va. 966 (1889). The trustee's certificate is not a part of

from the bond before the bond is certified by the trustee, as required by its terms, are not entitled to the benefit of the mortgage.¹

A railroad-mortgage trustee, who certifies on the bonds that they are secured by a mortgage executed and delivered to him, is liable to a holder of the bonds for loss of value occasioned by his neglect to record the mortgage, whereby a subsequent, duly-recorded mortgage obtains priority, but the claim is barred by a delay of over twenty years after the second mortgage was recorded.² And the general rule is that a trustee's certificate that is silent as to recording does not render the trustee liable in case the mortgage is not recorded.³ A New York trust company that holds, as a depository, the certificates of stock of four railroad corporations, which are about to be consolidated, one of which is incorporated in another state, is not liable for its omitting to have such stock in such corporation transferred into its name, even though thereby an attachment takes precedence over such deposit. The trust company is not bound to know the law of such other state.⁴ Even though a mortgage provides that the trustee

the bond, but a vendor of the bond impliedly warrants that it is correct. *Edwards v. Marcy*, 84 Mass. 486 (1861). Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no *bona fide* purchaser of them. *Maas v. Missouri, etc. Ry.*, 83 N. Y. 223 (1880). See also § 764, *supra*. A certificate indorsed on the bond is construed with the bond and mortgage as part and parcel of the same security. *Benjamin v. Elmira, etc. R. R.*, 49 Barb. 441 (1867). Where a contract is to be approved by the trustees before it is valid the court cannot dispense with such approval, even though one of the trustees has resigned. *Taylor v. Atlantic, etc. Ry.*, 55 How. Pr. 275 (1877). The certificate, although it refers to the trust deed, does not thereby give notice to the bondholder of all the terms of that deed. *Guilford v. Minneapolis, etc. Ry.*, 48 Minn. 560 (1891). An American bond is not issued until the trustee signs the trustee's certificate provided for in the bond itself. *Lord Revelstoke v. Commissioners, etc.*, [1898] A. C. 565.

¹ *Holland T. Co. v. Thomson-Houston El. Co.*, 170 N. Y. 68 (1902), *aff'd* 62 N. Y. App. Div. 299.

² *Miles v. Vivian*, 79 Fed. Rep. 848 (1897), *rev'g Miles v. Roberts*, 76 Fed. Rep. 919 (1896).

³ Even though a mortgage is not recorded, yet the trust company that signs the following certificate on the back of the bonds, "It is hereby certified that this bond is one of a series of six hundred bonds for five hundred dollars each for the security of which the within mortgage was executed," is not liable in an action for deceit brought by a purchaser of the bonds. *Bauernschmidt v. Maryland, etc. Co.*, 89 Md. 507 (1899), the court saying: "It has never been understood here, or elsewhere, so far as we are informed, that a trustee, under a mortgage like the one before us, creating, as it does, a mere trust to certify the bonds, did more by the form of certificate adopted than to thereby identify them as the bonds of the company which the mortgage was executed to secure."

⁴ *New Jersey Con. Co. v. Farmers' L. & T. Co.*, 39 N. Y. Misc. Rep. 672 (1903).

shall certify and deliver the bonds or the proceeds thereof, only upon a written statement by the mortgagor declaring the purposes for which said bonds or proceeds are to be used, the trustee is not liable for failure to require such written statement, where the trustee has not expressly agreed to carry out that provision. Moreover, a suit by a bondholder against the trustee for failure to carry out that provision must be commenced within ten years from the time of the breach thereof.¹

Where the trustee of a mortgage certifies to the bonds without requiring a certificate from the mortgagor, as required by the mortgage, to the effect that the amount of the bonds has been expended on the property, a bondholder may hold the trustee personally liable, and a certificate that improvements to a certain amount have been placed upon the property is not a compliance with the requirement that the mortgagor had actually expended the amount in extensions or permanent improvements. The damage is the additional amount the bondholder would have realized on foreclosure if the amount actually expended by the mortgagor had been as called for by the issue of the bonds.² Where a mortgage provides that before any of the bonds are issued there shall be deposited with the trustee sufficient money to

¹ *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), aff'g *Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App. Div. 473; s. c., *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169. A suit by a bondholder against the trustee for not protecting the interests of the bondholders is for breach of duty implied by law and not for breach of covenant, so far as the statute of limitations is concerned, and hence a claim that the trustee has certified bonds without requiring certain proof, as required by the mortgage, is barred by the statute of limitations applicable to simple contracts. *Frishmuth v. Farmers', etc. Co.*, 107 Fed. Rep. 169 (1901). The lower federal court held that a bondholder may hold the trustee liable for certifying to bonds and delivering them to the mortgagor, where the mortgage restricted the purposes for which the mortgagor was to use such bonds, and the trustee knew that the mortgagor had not complied with this provision

in regard to a part of the bonds already issued; that the general provision exempting the trust company from liability and also releasing it from any obligation to inquire into the application of the bonds is no defense, inasmuch as the mortgage provided that the trustee should issue the bonds only on orders declaring the purposes for which the mortgagor proposed to use them; that the trustee must use such care as a mortgagee would use in making such advances; that a mortgagee is not a necessary party to such a suit, but the suit must be brought by a bondholder, not for himself alone, but in behalf of all bondholders; and that the statute of limitations may be a bar. *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5 (1899). Cf. *McClure v. Central T. Co.*, 165 N. Y. 108 (1900).

² *Polhemus v. Holland T. Co.*, 61 N. J. Eq. 654 (1900), rev'g 59 N. J. Eq. 93.

pay two years' interest, but the trustee certifies the bonds without such deposit being made, it is liable to the holder in damages.¹

Where neither the mortgage nor bonds state that the mortgage is a first-mortgage lien, the fact that the mortgage quotes a resolution of the stockholders reciting that it is a first lien does not make the trustee of the mortgage liable for misrepresentation.² The usual endorsement of a trust company on the back of bonds that "This bond is one of a series of bonds mentioned and described in the mortgage within referred to," does not render the trust company liable on account of the mortgage securing the bond not being a first mortgage, even though the bond itself stated that it was a first mortgage.³ Where the trustee merely issued a certificate calling for bonds, it is not liable in a suit in equity to a holder thereof for a misstatement as to the title, and for not requiring prepayment of certain interest, as required by the mortgage. His remedy, if any, is at law.⁴ A trust company may certify, on certificates of deposit issued by another trust company, that the former holds certain property as security therefor, and it is liable for negligence if it negligently certifies to the value of such security.⁵ Where a bond on its face recites that it is secured by all the assets of the company, while in fact it is not secured at all, the purchaser thereof may hold the president personally liable, the latter having taken part in the issue of the bonds.⁶

§ 815. *The nature of the trusteeship, and the duties and liabilities of, and breaches of trust by, the trustee.*—The trustee, when he accepts the trust, undertakes something more than the receipt of

1 *Sprigg v. Commonwealth, etc.* Trust Co., 131 Fed. Rep. 5 (1904), rev'g 119 Fed. Rep. 434.

2 *Byers v. Union Trust Co.*, 175 Pa. St. 318 (1896), the court intimating also that there would be no liability, even though the trustee's certificate had asserted that the mortgage was a first lien. See § 765, *supra*. Where a corporation issues bonds having the words printed on their face "first-mortgage bonds," when as a matter of fact there was an underlying mortgage which the party to whom the bonds were sold agreed to pay, but did not pay except in part, the officers and the directors who took part in the issue of the bonds are liable to an innocent purchaser who relied on the statement contained on the face of the bonds. His measure of damages

is the difference between the value of the bonds as first-mortgage bonds and second-mortgage bonds. *Bank v. Byers*, 139 Mo. 627 (1897). In the case *Donnelly v. Baltimore, etc. Co.*, 102 Md. 1 (1905), a suit by a purchaser of bonds against a trust company that had offered them for sale and made various representations, failed, the deceit not being clearly proven, and the representations having been practically correct.

3 *Tschetinian v. City Trust Co.*, 186 N. Y. 432 (1906).

4 *Sprigg v. Commonwealth, etc. Co.*, 206 Pa. St. 548 (1903).

5 *Smith v. Bank of New England*, 72 N. H. 4 (1903).

6 *Stickel v. Atwood*, 25 R. I. 456 (1903).

his pay. He is bound to use reasonable care in seeing that the property is not wasted or destroyed. This trust is not a dry, naked agency, but is coupled with important duties. Many bondholders rely upon the trustee to protect them, and when it is considered that the trustee alone has a standing in court to protect or enforce the mortgage security, and that the bondholders have no such standing, except in exceptional cases, it is right that the trustee should be held to an active and rigid performance of duty.¹

The duty of the trustee is an active one. He is not allowed to sit quietly by where there is danger to the mortgaged property, or where a foreclosure should be had. The law requires the trustee to act, and a bondholder, by suit, may compel him to act.² Especially after default in the mortgage the trustee's duties are active and exacting.³ It is his duty to move when the occasion requires, and not let a part of the bondholders act for him. Hence, if on default in interest he allows a part of the bondholders to use his name in foreclosing, and other bondholders are injured thereby, the latter may hold the trustee liable in damages.⁴ Where a mortgage covers shares of stock and the trustee has the voting power, its discretion cannot be controlled by a majority of the bondholders.⁵

¹ As regards trustees the court said, in *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881): "As the defendants hold the mortgage not to secure a debt due to themselves, but as trustees for the holders of the bonds of the mortgagor, their duties are regulated by the general rules of law which affect all trustees, and whenever they fail to perform them, either through wilfulness, indifference, or error of judgment, the bondholders who are aggrieved by their conduct may obtain relief in this court sitting as a court of equity. . . . Among the duties of the defendants as trustees are these: They must act in good faith for the best interests of the bondholders; they must take care that the property is not wasted nor depreciated; they must see that its income is not improperly diverted from the payment of interest on the mortgage debt as it accrues; and in case of a manifest purpose on the part of the mortgagor to waste or destroy the property, or not to apply

the income to payment of interest, to the injury of the bondholders, it is their duty to enter and take possession of the property, and manage it for the security of the *cestui que trust*. Perry on Trusts, § 749."

² See § 830, *infra*.

³ The duties of the trustee, after a default occurs, are active and responsible. "It not only is not a dead, dry trust, but is one of the most active and momentous responsibility." *Sturges v. Knapp*, 31 Vt. 1, 55 (1858).

⁴ *Merrill v. Farmers' L. & T. Co.*, 24 Hun, 297 (1881), where the majority controlled the foreclosure, caused the property to be sold at a very low figure, and bought it in. Ordinarily the trustee is not personally liable where he acts in good faith in the administration of the property. *Hollister v. Stewart*, 111 N. Y. 644 (1889).

⁵ *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). Bondholders cannot sustain a bill in equity to remove a trustee who holds the stock of various gas companies as collateral

The duty of the trustee is to each bondholder severally, and not to a majority of the bondholders.¹ Nevertheless, when differences of opinion exist among the bondholders, and the trustee is in doubt, "it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of the trust."²

It is fraudulent for the trustee to enter into an agreement with a part only of the bondholders to get control of the property to the injury of the other bondholders.³ Bondholders may compel the trustees to render accounts where the trustees are in possession of the property.⁴ A bondholder may compel the trustee to record the mortgage.⁵ The bondholders may hold the trustees personally liable for

security for the payment of their bonds, even though such trustee has voted such stock in favor of directors who have made improvident contracts in which such directors were personally interested, it appearing that by the terms of the trust agreement the trustee was to vote such stock as the pledgors directed, until default on the bonds, and it not being shown that the trustee knew that such default had been made. Moreover, such removal will be denied when the trust agreement itself provides for the removal of the trustee by vote in writing of one-third in interest of the bondholders at a meeting called for that purpose, and no reason is shown for disregarding this mode of changing the trustee. *Dillaway v. Boston, etc. Co.*, 174 Mass. 80 (1899).

¹ *Hollister v. Stewart*, 111 N. Y. 644 (1889). As regards the trustee, "the bonded debt is a unit so far as his duties and powers are concerned. He must regard the bondholders as a class and not as individuals. He cannot permit, and, if so wanting in fidelity to his trust as to be willing, the courts will not permit, the least discrimination between members of the same creditor class." *Commonwealth v. Susquehanna, etc. R. R.*, 122 Pa. St. 306, 320 (1888).

² *First Nat. Bank v. Shedd*, 121 U. S. 74, 86 (1887).

³ A sale may be set aside where the

trustee of the mortgage entered into a combination with part of the bondholders to purchase at the sale at a small price and reorganize, at a sacrifice to minority bondholders. *Sahlgard v. Kennedy*, 2 Fed. Rep. 295 (1880). Where the foreclosure sale is conducted as secretly as possible and advertised as quietly as possible in accordance with an agreement between the receiver and the trustee of the mortgage and third persons, for the purpose of enabling such third persons to buy the property at a low figure, the sale will be set aside in a suit brought by a bondholder for that purpose. *Atkins v. Judson*, 33 N. Y. App. Div. 42 (1898).

⁴ Bondholders may file a bill in equity for an accounting by the trustees in the deed of trust, who have taken possession of the property, operated it, received net earnings, and turned it over to another company. *Dwight v. Smith*, 13 Fed. Rep. 50 (1882). A bill in equity by bondholders to compel trustees to account for net earnings received must allege clearly and definitely the various facts that make up the breach of duty. *Dwight v. Smith*, 9 Fed. Rep. 795 (1881).

⁵ A bondholder bringing suit to compel the recording of the deed in trust securing his bonds must prove the due execution of the deed in trust, and must make subsequent mortgage

breach of duty.¹ The trustee of a mortgage deed of trust, by writing to a party who intends to buy some of the bonds that the trustee thinks the security is adequate, does not thereby make false representations, and an action for deceit will not lie by reason thereof. But a statement that the trustee considers the title good, inasmuch as it has guaranteed some of the bonds, renders the trustee liable, if the statement is false.² In a foreclosure suit, a cross-bill by a resident bondholder to remedy alleged misconduct on the part of the complainant trust company may be served on the attorneys for the trust company.³ The trustee has a right to examine the books of the company where there has been a default.⁴ The power and duty of the trustee to bid for the mortgaged property in behalf of the bondholders at the foreclosure sale is considered elsewhere.⁵ The law does not allow

gees parties defendant. *Riggs v. Pennsylvania, etc. R. R.*, 16 Fed. Rep. 804 (1883).

¹ See § 830, *infra*, and § 814, *supra*. The sale of bonds does not carry also a cause of action against the trustees unless there is an assignment of that also. *Dwight v. Smith*, 9 Fed. Rep. 795 (1881). A provision in a mortgage that the trustees shall deliver the bonds only for certain purposes and upon certain written statements of such purposes, followed by a provision that the trustee shall not be bound to inquire into the actual application of the bonds or funds, prevents a bondholder from holding the trust company liable for failure of the mortgagor railroad company to apply the bonds to the purposes indicated, especially where suit is brought more than twenty years after the act, it being shown that the trust company did require written statements before issuing the bonds. *Fleisher v. Farmers' L. & T. Co.*, 58 N. Y. App. Div. 473 (1901); *aff'd*, *Rhineland v. Farmers' L. & T. Co.*, 172 N. Y. 519 (1902), involving the same mortgage that was passed upon in *Frishmuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5, and 107 Fed. Rep. 169.

² *Nash v. Minnesota, etc. Trust Co.*, 159 Mass. 437 (1893). The court held also that a representation that a bond is secured by a mortgage on property,

the title to which is good, is false, and renders the trustee liable, if there is a prior mortgage on the land, even though the trust company reserves in its hands bonds greater in amount than the amount of such prior mortgage. The liability of the trustee in such a case, however, extends only to those who purchased bonds from the original party to whom they were issued, and to whom the trust company made the representations for the purpose of inducing parties to buy the bonds. This, however, may be a question for the jury. The trust company was held to have power to make the representations where it had power to insure the title to the property, and had done so. The president and officer of the company had power to make representations and bind the company. Representations made by the party to whom the bonds were issued do not bind the trust company.

³ *Gasquet v. Fidelity Trust, etc. Co.*, 57 Fed. Rep. 80 (1893).

⁴ Where there has been a default in interest it is the duty and right of the trustee to examine the books of the company, and the company is bound to allow it. *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); *s. c.*, 20 Fed. Cas. 32.

⁵ See § 885, *infra*.

the trustee to purchase the property for himself at either public or private sale. He is disqualified, and the purchase will be held to be for the benefit of the bondholders.¹ Where the trustees of the mortgage foreclose and buy the property for the bondholders, and the trustees do not turn over to the new corporation all the property purchased by them, and they have been guilty of malfeasance in other respects, a bondholder may hold them liable by a suit in equity, even though he deposited his bonds and took stock in exchange therefor, it appearing that he did not then know of the acts complained of. The new corporation is not a necessary party defendant and a purchaser of the stock in the new corporation cannot make such a complaint, but the complaint may be by one of the bondholders, even though he has sold his stock.² But where the trustee sells trust property to himself personally, and the *cestuis que trust* are cognizant thereof and do not object for several years they cannot set the trans-

1 See § 885, *infra*, and § 653, *supra*. The general rule is that a trustee cannot purchase the trust estate, and this applies to a mortgage deed of trust, where the trustee has no personal interest and where the mortgage does not contemplate such purchase, and the purchase is not made for the benefit of the *cestui que trust*. *Brewer v. Harrison*, 27 Colo. 349 (1900). Where trustees hold stock as security for various debts of various parties, the stock to be sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustees to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price for the benefit of himself and the other trustees. The sale will be set aside. *Jenkins v. Hammerschlag*, 38 N. Y. App. Div. 209 (1899). A person appointed on the sale of the corporate property to sell stock received in payment therefor, cannot sell to himself, neither can he subsequently purchase from one to whom he has sold such stock. *Wing & Evans v. Hartupce*, 122 Fed. Rep. 897 (1903). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings, all claims are allowed as of the

same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall purchase such securities at a price named. *Bank Com'rs v. New Hampshire, etc. Co.*, 69 N. H. 621 (1899). Where the trustee of a mortgage loans money to the mortgagor and takes part of the bonds as security, and then at the request of the mortgagor sells the bonds at public sale and buys them in, it cannot enforce the bonds for their full amount, but only to the extent of the debt secured, and upon payment must deliver up the bonds for cancellation. *Knickerbocker, etc. Co. v. Penacook, etc. Co.*, 100 Fed. Rep. 814 (1900). But see § 692, *supra*. Where the trustee sells at public sale without a judicial foreclosure, and the property is purchased by a corporation in which the trustee is a stockholder and director, the mortgagor may have the sale set aside and may claim the profits of a resale by such corporation. *Herbert Craft Co. v. Bryan*, 68 Pac. Rep. 1020 (Cal. 1902).

2 *Dunning v. Bates*, 186 Mass. 123 (1904).

action aside.¹ A trustee has no right to loan money to the mortgagor and claim a first lien on property, which property the trustee was bound to have known should have been placed under the mortgage.²

Where all the bonds are paid excepting one that is supposed to be lost, the trustee may retain a fund to pay that bond and may discharge the mortgage.³ Although a trust company is a pledgee of bonds for the benefit of many notes of the pledgor in the hands of many holders, and the trust company, after notice by mail to the holders of the notes, is authorized by the court to sell the bonds at ten cents on the dollar, yet a holder of the notes may thereafter question the good faith of the trust company in making such sale.⁴

The trustee is trustee not only for the bondholders, but also for the corporation mortgagor. He occupies a fiduciary position towards both.⁵ Where the trustee of the mortgage in foreclosing knows that the corporation is entitled to the surplus, but pays the same to a pledgee of the corporation, the trustee is personally liable.⁶ Until the bonds are sold or pledged, the trustee of the mortgage securing the bonds is the agent of the maker of the bonds and mortgage only, and

¹ Hoyt v. Latham, 143 U. S. 553 (1892).

² Guaranty T. Co. v. Atlantic, etc. R. R., 138 Fed. Rep. 517 (1905).

³ Wilson v. Welch, 157 Mass. 77 (1892). See also § 816, *infra*.

⁴ Minneapolis Trust Co. v. Menage, 73 Minn. 441 (1898). Where a corporation owns all of its bonds, excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet if that settlement was caused by misrepresentations as to the value of the securities, he is not bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities

will also be allowed to participate the same as the bondholder who did not turn in his bonds. Anthony v. Campbell, 112 Fed. Rep. 212 (1901). Cf. § 848k, *infra*.

⁵ A trustee in possession is trustee not only for the bondholders, but also for the corporation. In a bill by the company to redeem, the acts of the trustee in breach of trust as regards the corporation may be set aside. Ashuelot R. R. v. Elliot, 57 N. H. 397 (1874); s. c., 58 N. H. 451. See also § 885, *infra*, and notes. Cf. Loeb v. Chur, 6 N. Y. Supp. 296 (1889). Where the trustee of a mortgage, the day after the mortgage is executed, accepts some of the mortgage bonds from the secretary as collateral security for a personal loan to the secretary, and it transpires that such pledge was in breach of trust by the secretary, the trustee is not protected as pledgee. Buffalo, etc. Co. v. Medina, etc. Co., 162 N. Y. 67 (1900). See also § 293, *supra*.

⁶ Brinkerhoff, etc. Co. v. Boyd, 192 Mo. 597 (1905).

is bound to follow his directions.¹ Money paid to a trustee with which to pay coupons cannot be attached by a general creditor.² The trustee of a mortgage with whom money is deposited by the corporation to pay the interest may return to the corporation any balance which it has for coupons not yet presented for payment. The trustee is merely the agent of the corporation in this respect and there is no irrevocable trust as to such funds in favor of the coupon-holders.³ Sometimes the trustee of a mortgage acts also as registrar of the bonds.⁴ Where a bond provides that it may be registered and the coupons surrendered, and that thereafter the interest will be paid by check, a bondholder may, by an action for specific performance, compel the carrying out of this contract on the part of the party issuing the bonds.⁵ A registered municipal bond with coupons attached is negotiable where the name of the payee is left blank on the face of the bond, even though in books kept for that purpose the name of the registered owner is entered. Hence a purchaser in good faith of such a bond is protected, although the bond was stolen. A *bona fide* pledgee is likewise protected.⁶ Where trust deeds to a trust company run to the president as trustee, the court will compel him to administer the trusts for the benefit of the company.⁷

Where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel

1 *Peninsular Iron Co. v. Eells*, 68 Fed. Rep. 24 (1895).

2 *Holland Trust Co. v. Sutherland*, 177 N. Y. 327 (1904).

3 *Staten Island, etc. Club v. Farmers' L. & T. Co.*, 41 N. Y. App. Div. 321 (1899).

4 Where a trust company, as registrar of stock, allows a transfer on a forged assignment, it is liable to the owner for the value of the stock, less any amount which he may have recovered from other parties. *Wiechers v. Central Trust Co.*, 80 Hun, 576 (1894). It is "necessary" and proper for executors to unregister registered bonds before selling them. *Re Gasquoine*, [1894] 1 Ch. 470. Where trustees under a will hold registered bonds, the registration being to them as trustees, it is illegal for the corporation to allow one of them to transfer such registered bonds, and the corporation

is liable for the same if such transfer is in breach of trust on the part of the trustees. *Cooper v. Illinois, etc. R. R.*, 38 N. Y. App. Div. 22 (1899). In this case the bonds had been registered in the name of the executor of the estate, who, upon his death, was succeeded by two trustees, and one of these trustees caused the corporation to transfer the bonds from the name of such executor to bearer. The court held, however, that a broker who sells the bonds is not liable, although he knew that the bonds were registered in the name of the executor prior to the transfer thereof to bearer. See also § 327, *supra*.

5 *Benwell v. Mayor*, 55 N. J. Eq. 260 (1897).

6 *Manhattan Sav. Inst. v. N. Y., etc. Bank*, 170 N. Y. 58 (1902).

7 *Tulleys v. Keller*, 45 Neb. 220 (1895).

the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock, on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage.¹

Where the trust agreement provides against liability of the trustee except for willful and intentional breach of trust, the trustee is not liable for omissions to act through mistake or misconception of duty.² The trustees of an unincorporated bank are liable for depositing its money with a stock brokerage house, even though the agreement exempted them from liability except for willful misconduct.³ Any covenant to protect a person who acts in bad faith is against public policy and void.⁴

§ 816. *Right and duty of the trustee to protect the mortgaged property—Suits for that purpose—Purchasing prior liens—Discharging mortgage or releasing part of the property—Delivery of bonds in trust to trustee—Purchase by the trustee for the bondholders at the foreclosure sale—Suits which the trustee may institute.*—

It is the right and duty of the trustee to protect the mortgaged property from injury or loss. One instance of this is the right of the trustee to institute a suit to declare void the orders of a railroad commission reducing rates to a point where the mortgaged property would be inadequate to pay the mortgage.⁵ Any other act which imperils the

¹ Bracken v. Atlantic T. Co., 167 N. Y. 510 (1901). See also § 317, *supra*.

² Black v. Widersheim, 143 Fed. Rep. 359 (1906). See § 622*h*, and 805, *supra*.

³ Holmes v. McDonald, 226 Ill. 169 (1907).

⁴ Industrial, etc. v. Tod, 180 N. Y. 215 (1904).

⁵ The trustee of a railroad mortgage may file a bill to enjoin the enforcement of a statute illegally reducing the railroad rates. Reagan v. Farmers' L. & T. Co., 154 U. S. 362 (1894). The federal courts have jurisdiction of a bill in equity to enjoin a city from enforcing an ordinance unreasonably reducing water rates, where the complainant claims that the reduction amounts to a taking of its property without just compensation; and such suit may be by the mortgagee of the property, the mortgagor being a necessary party. Con-

solidated W. Co. v. City of San Diego, 84 Fed. Rep. 369 (1897); *aff'd*, 93 Fed. Rep. 849 (1899). The trustees may maintain a suit in equity to enjoin the enforcement of a state statute which allows the state railroad commissioners to reduce railroad rates in their discretion, it being shown that the reductions made are ruinous to the companies, and will prevent the payment of interest on the bonds secured by the mortgages. Mercantile T. Co. v. Texas, etc. Ry., 51 Fed. Rep. 529 (1892). The trustee of the mortgage of a water-works company may bring suit to enjoin an illegal reduction of the water rates by a municipality; but a bondholder secured by such mortgage cannot bring such suit unless the trustee has refused to bring it. Consolidated Water Co. v. City of San Diego, 89 Fed. Rep. 272 (1898). A trustee of a mortgage of a water-works company cannot file a bill in

security will enable the trustee to apply for an injunction against the same.¹ It is not necessary in such cases that the trustee wait until

the United States court against the company and the city in which the water-works are located, where the company and the city are citizens of the same state and it transpires that the interests of the trustee and the company are the same, the suit being practically against the city. *Boston, etc. Co. v. City of Racine*, 97 Fed. Rep. 817 (1899). See also §§ 830, 902, *infra*.

1 Where a city is about to remove poles and wires of a telephone company in violation of a grant from the city, the trustee of a mortgage given by the telephone company may enjoin such action. *Old Colony Trust Co. v. City of Wichita*, 123 Fed. Rep. 762 (1903); *aff'd*, 132 Fed. Rep. 641. Even though the franchise of a water-works company has been declared forfeited in a suit by the city against the company, yet a mortgagee of the property may begin suit in the federal court to maintain the franchise and may have a receiver appointed, the mortgagee not having been a party to the first suit in the state court. *Farmers', etc. Co. v. Meridian, etc. Co.*, 139 Fed. Rep. 661 (1905). In *Detroit v. Detroit, etc. Ry.*, 54 Fed. Rep. 1 (1893), the court held that where a city filed a bill for a decree that the franchises of the company had expired, a non-resident trustee of the mortgage might remove the case into the federal court on the ground of local prejudice. In *Clapp v. Spokane*, 53 Fed. Rep. 515 (1892), a trustee obtained an injunction against the city tearing up the tracks for the purpose of laying a sewer, it being shown that the sewer could be laid on the side of the street; and the remedy by injunction was granted because both the mortgagor and the city itself were practically insolvent. A trustee may maintain a bill to enjoin employees of the mortgagors from

intimidating other persons and preventing their entering the employ of the mortgagor, where it is alleged that such action will stop the payment of the interest on the mortgage. *United States v. Haggerty*, 116 Fed. Rep. 510 (1902). *Cf. Illinois, etc. Bank v. Minton*, 120 Fed. Rep. 187 (1902). A trustee of the mortgage filed a bill to declare void an ordinance repealing a street-railway franchise, and succeeded, although there had been no default, in *Baltimore Trust, etc. Co. v. Baltimore*, 64 Fed. Rep. 153 (1894); *rev'd* on another point, 166 U. S. 673. The trustee of the mortgage instituted a suit in the case of *Central Trust Co. v. Citizens' Street R. R.*, 80 Fed. Rep. 218 (1897), to enjoin the enforcement of a statute reducing street-railway fares from five cents to three cents. The trustee of a mortgage brought suit to prevent the city from tearing up one of two tracks which were covered by the mortgage, in *Baltimore v. Baltimore Trust, etc. Co.*, 166 U. S. 673 (1897). Where a municipality has repealed an electric-light franchise after the plant has been in operation for eight years, a trustee of a mortgage given by the owner of the plant may file a bill to enjoin the city from acting on the repeal and from cutting down the poles. *Newton v. Levis*, 79 Fed. Rep. 715 (1897). A trustee of a mortgage of a company entitled to build a street railway on a street may enjoin the municipality and another street railway from building thereon, where the street is too narrow for both. *Africa v. Knoxville*, 70 Fed. Rep. 729 (1895); reversed on other grounds, 77 Fed. Rep. 501. In *Union Pac. Ry. v. United States*, 59 Fed. Rep. 813, 834 (1894), being a bill in equity by the government to set aside an alleged illegal lease of a telegraph line, the court said: "The bill shows

there is a default in the payment of interest on the mortgage debt.¹ In a suit by a trustee to enjoin strikers from intimidation, jeopardizing the property, a request to the corporation to bring such suit, and its refusal, must be alleged, and the corporation is a necessary party defendant.²

A trustee may file a bill in equity to obtain the instructions of the court as to the rights and duties of the trustee where money has been deposited with it to pay interest and has then been attached by a general creditor.³ The trustee has a right to insure the property and charge the estate for the expense of so doing.⁴ But a mortgagor is not bound to insure the property for the benefit of the bondholders unless the mortgage expressly requires him to do so, and the trustee is not bound to obtain such insurance where the mortgage merely provides that the trustee should not be liable for not obtaining insurance, but authorizes the trustee to demand such insurance; hence, if the mortgagor sells the property, the purchaser may insure in his own name and the mortgagee is not entitled to such insurance, even though the property is burned.⁵ A trustee is not liable for failure to defend a suit to forfeit the right to acquire certain real estate where it is not shown that a defense by the trust company would have been effective.⁶ The trustee may enjoin the foreclosure, by adver-

that the government has a lien upon the railroad and telegraph lines to which the litigation relates, and, as such lien-holder, it is undoubtedly entitled to have its rights and equities in and to the telegraph property along the right of way of the Union Pacific Railway Company judicially ascertained, and to have the rights of other persons and corporations therein also ascertained and adjudicated. Incidental to that relief is the right to have all provisions of contracts set aside and annulled that are unlawful and that in any manner impair the security of the United States, or cloud its title or prejudice its rights." Reversed on other grounds in *United States v. Union Pac. Ry.*, 160 U. S. 1 (1895).

¹ Same cases.

² *Illinois, etc. Bank v. Minton*, 120 Fed. Rep. 187 (1902).

³ *Holland Trust Co. v. Sutherland*, 177 N. Y. 327 (1904).

⁴ *Farmers', etc. Co. v. Penn., etc. Co.*, 103 Fed. Rep. 132, 161 (1900); *aff'd*, 186 U. S. 434.

⁵ Such also would be the case, even if the mortgagor expressly obligated himself to insure. *Farmers', etc. Co. v. Penn., etc. Co.*, 103 Fed. Rep. 132 (1900); *aff'd*, 186 U. S. 434 (1902). Where the mortgaged property is burned and the insurance money is paid over to the trustee and the trustee with the consent of all the bondholders and in pursuance of an order of the court pays over the money to the reorganized company on representations that the money will be used to rebuild the buildings, and the reorganized company uses only part of the money for that purpose, a bill in equity to compel the new company to account for the remaining part and to apply it to the rebuilding of the buildings will not lie. *Dallett v. Staten Island, etc. Co.*, 61 N. J. Eq. 39 (1901). See also § 799, *supra*.

⁶ *Antelo v. Farmers' L. & T. Co.*, 95 Fed. Rep. 12 (1899). A trustee is not liable for not defending a suit for the forfeiture of land to which the mortgagor would have been entitled on making a certain payment, where

tisement, of a prior mortgage that has been paid.¹ The trustee may pay off a prior incumbrance in order to avoid a forced sale and may be subrogated to such lien.² Where the trustee and the company deed the mortgaged land for certain of the bonds, the company cannot afterwards object.³

The trustee of course has no power to release any part of the mortgaged property unless expressly authorized so to do,⁴ nor to discharge the mortgage while a part of the bonds are still outstanding.⁵ But where all the bonds are paid, excepting one that

there was no defense or where the rights of the mortgagor had been previously lost without fault of the trustee. *Frishmuth v. Farmers' L. & T. Co.*, 107 Fed. Rep. 169 (1901).

1 The trustee may enjoin a former mortgagee, whose mortgage has been paid, from foreclosing by advertisement. The effect of the advertising "could not be otherwise than seriously to depreciate the value of the bonds secured by the mortgage to the plaintiffs; and this injurious effect would be greatly increased if a sale were actually to be made in advance of a legal determination of the respective rights of the parties." *Murdock v. Woodson*, 2 Dill. 188 (1873); s. c., 17 Fed. Cas. 1017; *aff'd*, 22 Wall. 351.

2 The trustees in a mortgage may pay off a prior incumbrance in order to prevent a forced sale of the property, and may then, by a bill in equity, be subrogated to the lien so paid. *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887).

3 Where bonds are exchanged for land, and the trustee and the railroad join in the deed, the railroad cannot afterwards say that the trustees had no power to make the deed. *Wood v. Dubuque, etc. R. R.*, 28 Fed. Rep. 910 (1886).

4 Improvements on mortgaged real estate are subject to the mortgage, and the trustee of the mortgage will be enjoined from waiving the lien. *Gibson v. American L. & T. Co.*, 58 Hun, 443 (1890). Even though an income mortgage does not authorize a release of property not needed, yet a

court of equity may authorize it, and the bondholders need not be made a party to the proceeding. *Mayor, etc. v. United Rys., etc. Co.*, 69 Atl. Rep. 436 (Md. 1908). See also § 798, *supra*. Where bondholders sue to restrain trustees from conveying land, and to set aside certain agreements to convey, any conveyance subsequent to service in the suit is subject to the decree canceling such contracts. The principle of *lis pendens* applies. *Union Trust Co. v. Southern Nav. Co.*, 130 U. S. 565 (1889), where a mortgage by the grantee was held to be void.

5 Where the bondholders deliver their bonds to the trustee under an agreement by which the bonds are to be exchanged for a new issue, and the trustee proceeds to release the mortgage before the specified new issue is made, the release is voidable, and subsequent mortgages are not prior in right where the trustees of such mortgages had substantial notice of the facts. *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 32 W. Va. 244 (1889). Where the trustees wrongfully release the mortgages, the bondholders may file a bill to set aside the releases and to foreclose, and two years' delay is not fatal where the trustees themselves had filed a similar bill soon after the releases were given. The bondholder may also hold the trustee liable. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885). Stockholders have no power to authorize a trust company to release a mortgage securing bonds issued by the corporation. The trustee should have the consent of the

is supposed to be lost, the trustee may retain a fund to pay that bond and may discharge the mortgage.¹

Sometimes the bonds are left with the trustee to be thereafter delivered to certain persons or on certain conditions. He is then a trustee in two different capacities.² The agreement of the trustee to hold certain of the bonds subject to the order of a specified person, in accordance with the order of the mortgagor, does not make such a person a bondholder, nor make the trustee a trustee for him.³ Where a corporation deposits securities with a trust company and the trust company issues and sells interest-bearing certificates against them, the holder of such a certificate is a creditor of the corporation.⁴ A person depositing securities with a trust company to distribute as

bondholders as bondholders and not as stockholders. *Moore v. Ensley*, 112 Ala. 228 (1896). A general creditor cannot attack a release of a mortgage by the trustee. Only a bondholder could attack it. *Loeb v. Chur*, 6 N. Y. Supp. 296 (1889). A release of a mortgage by the mortgagee after the mortgagee has assigned the same, together with the debt secured, is not effective. *Franklin Sav. Bank v. Colby*, 105 Iowa, 424 (1898). See also §§ 793 and 815, notes, *supra*. Concerning a provision in the mortgage authorizing the release, see §§ 798, 807, *supra*.

¹ *Wilson v. Welch*, 157 Mass. 77 (1892). In this case receivers were appointed to wind up the corporation. All the outstanding bonds were paid except one which had been lost. This the receivers recovered in a replevin suit. The trustees, "at the request of the receivers," released to the corporation the mortgaged premises, retaining a fund to cover the lost bond. This suit was to compel an accounting and conveyance of that fund. The court ordered a conveyance to the corporation and the delivery of the fund to the receivers. A railroad has no right to pay off bonds before they are due, nor to pay the money to the trustee and have the mortgage canceled. *Missouri, etc. Ry. v. Union Trust Co.*, 156 N. Y. 592 (1898), *aff'g* 87 Hun, 377 (1895). The contract of a corporation to sell first mortgage bonds

on a certain date cannot be rescinded by the vendee on the ground that the previous first mortgage had not been released, it appearing that all but a few of the bonds secured by the previous mortgage had been paid and that these few could not be traced, but a fund had been set apart for that payment. *Nes v. Union Trust Co.*, 64 Atl. Rep. 310 (Md. 1906).

² The bonds may be delivered to the trustee to deliver to creditors upon their asking for them. Until so delivered the creditor has no claim upon them. *Hubbell v. Syracuse Ironworks*, 14 N. Y. Supp. 345 (1891). A trust company is a necessary party defendant in a suit to enjoin it from issuing bonds in violation of its trust and of the mortgage. Where the trustee is to issue the bonds as fast as ten-mile sections are completed, and the construction involves many short branches, each being less than ten miles in length, they are to be added together, and for every ten miles bonds are to be issued. *Denver, etc. R. R. v. U. S. Trust Co.*, 41 Fed. Rep. 720 (1890). A letter by a trustee to the effect that it will hold certain bonds for delivery is not necessarily a representation that the bonds are valid bonds. *Sprigg v. Commonwealth, etc. Co.*, 119 Fed. Rep. 434 (1902).

³ *Sprigg v. Commonwealth, etc. Co.*, 206 Pa. St. 548 (1903).

⁴ *Gallagher v. Asphalt Co., etc.*, 65 N. J. Eq. 258 (1903).

directed by him cannot file a bill for an accounting unless he shows what disposition was to be made of them.¹ Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value.²

The certificate of the trust company entitling a subcontractor to bonds does not prevent the subcontractor suing the contractor for the money equivalent to the bonds, where the bonds have already been disposed of by the trustee and contractor.³ Where a trust company has orally agreed to hold certain bonds for delivery in accordance with certificates issued by another company, and subsequently the trust company loans money to such other company and takes such bonds as security, the holders of the certificates may hold the trust company liable for not protecting the certificates.⁴

Where stock is deposited with a person as security for a guaranty of bonds issued by a corporation, and the trustee of the mortgage securing such bonds demands the stock from such depository, and upon refusal to deliver the same brings suit to obtain the stock and for a sale of the same to apply on such guaranty, and obtains judgment to that effect, all the bondholders are bound by such judgment, and they cannot afterwards hold the depository liable for depreciation in the value of the stock after the demand is made and before it was sold under such decree of the court.⁵ Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he holds bonds specified in such certificate to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person named in the certificate, although the certificate itself is not actually delivered until several years after the date of the certificate.⁶ Scrip entitling a person named to bonds

1 *Young v. Mercantile T. Co.*, 140 Fed. Rep. 61 (1905); *aff'd*, 145 Fed. Rep. 39.

2 The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. *McClure v. Central Trust Co.*, 165 N. Y. 108 (1900).

3 *Reynolds v. Manhattan T. Co.*, 83 Fed. Rep. 593 (1897).

4 *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898).

5 *Bracken v. Atlantic Trust Co.*, 36 N. Y. App. Div. 67 (1899), following *Serrao v. Noel*, 15 Q. B. Div. 549 (1885); *Bracken v. Atlantic Trust Co.*, 167 N. Y. 510 (1901).

6 If such coupons have been canceled and returned to the corporation issuing the bonds and the trustee is held liable for such coupons, the trust

may be assigned, even though by its terms it can be assigned only with the assent of the corporation issuing the same.¹

Where mortgage bonds are deposited with the trustee to be issued in exchange for outstanding bonds, the right of a holder of outstanding bonds to make the exchange cannot be defeated by the mortgagor after such holder has actually deposited his bonds and asked for the new bonds.² Where the trustee of a mortgage receives money sufficient to pay the coupons, but is instructed not to pay certain coupons, the trustee is not liable to the holder of such coupons for not paying the same.³ Where the corporation leases all its property ruinously and in opposition to the wishes of the stockholders, the trustee of the mortgage may institute a suit to have such lease canceled.⁴ A trustee cannot maintain a suit in equity to enjoin condemnation proceedings in the state court against the railroad to construct a drain.⁵

Where several bondholders agree among themselves to buy the property at foreclosure sale, the purchase to be for the benefit of the bondholders, and the price to be the expense of the foreclosure, and the trustee of the mortgage makes the sale on that understanding, the trustee may compel the purchaser to take a deed for the benefit of all the bondholders.⁶ A trustee, as trustee of a corporate mortgage, may file a bill in equity to have the court decide whether certain hydrant rentals, which are expressly covered by the mortgage, belong to the coupon-holders or to an attaching creditor, the interpretation of the trust agreement being doubtful.⁷

Where an appeal is taken from a foreclosure decree and sale of a street railway and the upper court sets aside the sale, but in the meantime the purchaser at the foreclosure sale has abandoned the franchise and dismantled part of the property and relocated other parts so that it is impossible to return the property, the trustees of

tee may hold the corporation liable. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899).

¹ *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898).

² *Wakefield, etc. Co. v. New England T. Co.*, 175 Mass. 478 (1900).

³ *New England, etc. Co. v. Farmers', etc. Co.*, 54 N. Y. App. Div. 309 (1900).

⁴ *Guardian, etc. Co. v. White Cliffs, etc. Co.*, 109 Fed. Rep. 523 (1901).

⁵ *Farmers' L. & T. Co. v. McAndrews*, 109 Fed. Rep. 109 (1901). In a suit by the trustee of a mortgage to enjoin the condemnation of the mort-

gaged property the mortgagor is a necessary party, and if it is a citizen of the same state as the party that is condemning, the federal court has no jurisdiction. *Old Colony, etc. Co. v. Atlantic Ry.*, 100 Fed. Rep. 798 (1899).

⁶ The court stated also that it would have been a breach of trust for the trustee to have made such a sale except for the benefit of all the bondholders. *Sullivan v. Haskin*, 70 Vt. 487 (1898).

⁷ *Holland Trust Co. v. Sutherland*, 177 N. Y. 327 (1904), rev'g 65 N. Y. App. Div. 252 (1901).

the mortgage may hold him liable in damages for the actual value of the property at the time of the sale less the amount realized from such foreclosure sale.¹ The trustee may institute suit to determine the priority of liens where a sale, which is about to take place, would create a cloud upon his title.² The trustee may bring suit to enjoin a lease of the property in derogation of the bondholders' rights,³ and may defend against liens alleged to be prior to the mortgage.⁴ The trustee may also bring suit to enjoin an execution sale of such part of the property as is essential to the operation of the whole property.⁵ Other instances of suits which a trustee may bring are given elsewhere, the suits having actually been brought by bondholders.⁶ The trustee of a mortgage cannot maintain a suit to reform the same so as to include certain provisions which the board of directors authorized but which the mortgage did not contain, there being no proof of mutual mistake or actual fraud.⁷ Where the trustee fails to properly protect the mortgaged property, a bondholder may institute suit in his stead.⁸ Bondholders

1 *Hubinger v. Central T. Co. etc.*, 94 Fed. Rep. 788 (1899). In this case the foreclosure proceedings were in the state court, but the suit at law mentioned above was in the federal court.

2 Trustees may bring suit to have determined the priority of mortgages where another mortgagee claims priority and is about to sell the property, thereby creating a cloud on the title of the complaining mortgagee. *Murdock v. Woodson*, 2 Dill. 188 (1873); s. c., 17 Fed. Cas. 1017; *aff'd*, 22 Wall. 351.

3 In an action brought by a trustee to enjoin a lease in derogation of the rights of creditors secured by deed to the trustee, the court, in *Phillips v. Eastern R. R.*, 138 Mass. 122 (1884), ordered notice by publication to be given to creditors so secured. The mortgagee of a street railroad may object to the mortgagor leasing the terminals if such lease is likely to deprive the mortgagor of profits and thereby injure the security, especially where such lease is to a competing company, but the mortgagee cannot prevent such lease if its only effect is to prevent enlargements of the plant of the mortgagor, inasmuch

as the mortgagee took the property as security in the condition it was at the time of the mortgage. It is no defence to such a suit for the mortgagor to offer to pay the bonds on demand; neither is it a defense that some of the directors of the mortgagee, which is a trust company, are also directors in the mortgagor. *Fidelity Trust Co. v. Hoboken, etc. R. R.*, 63 Atl. Rep. 273 (N. J. 1906).

4 In a suit to declare a vendor's lien of personalty to be superior to a mortgage given by the company, the non-resident trustee of the mortgage need not be made a party if substantially all the bondholders are before the court. *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. Rep. 19 (1892). The trustee cannot remove a case to the federal court on the ground that its controversy is separable, where the suit is to enforce liens against the railroad company. *Marsh v. Atlanta, etc. R. R.*, 53 Fed. Rep. 168 (1892).

5 See §§ 852, 858, *infra*.

6 See § 830, *infra*.

7 *Trust Co. v. Universal, etc. Co.*, 90 N. Y. App. Div. 207 (1904).

8 See §§ 830, 902, *infra*, giving instances of the exercise of this right.

are not bound by a decision against the corporation relative to taxation, the bonds having been issued before the decision, and no one representing them being a party to the suit.¹ In a suit by a city against a street railway company and its lessee to compel them to remove tracks from the street a mortgagee of the lessee is not a necessary party.² The question of whether the trustee should purchase at the foreclosure sale for the benefit of the bondholders is considered elsewhere.³ The purchaser at foreclosure sale cannot revive an action begun by the mortgagor after the giving of the mortgage to enjoin the collection of taxes.⁴ A trust company that has instituted a suit to foreclose a mortgage and caused a receiver to be appointed may be required to pay the debts of the receiver and the expenses in excess of the amount realized on the foreclosure sale.⁵

§ 817. *In the absence of fraud the bondholders are bound by what is done by the trustee within the scope of his authority—Notice to the trustee.*—While the general rule is that the bondholders are bound by what is done by the trustee, yet they are not bound by his *ultra vires* acts. Thus bondholders are not estopped by the action of the trustee in consenting to the issue of receiver's certificates where the corporation which gave the mortgage was a land company.⁶ But bondholders are bound by the consent of their trustee to the issue of receiver's certificates where the court has power to authorize such an issue.⁷ And the bondholders are bound by what is done by the trustee in the foreclosure proceedings. They are bound by the decree the same as the trustee, unless fraud is involved on the part of the trustee.⁸

¹ *Wicomico, etc. v. Bancroft*, 135 Fed. Rep. 977 (1905); rev'd on another point in 203 U. S. 112.

² *Suburban Ry. v. City of Chicago*, 204 Ill. 306 (1903).

³ See § 885, *infra*.

⁴ *Keokuk, etc. R. R. v. Scotland County*, 152 U. S. 318 (1894).

⁵ *Chapman v. Atlantic T. Co.*, 119 Fed. Rep. 257 (1902), the court refusing to follow *Farmers' L. & T. Co. v. Oregon, etc. R. R.*, 31 Oreg. 237 (1897).

⁶ *Belknap, etc. Bank v. Lamar, etc. Co.*, 28 Colo. 326 (1901).

⁷ *Rochester, etc. Co. v. Oneonta, etc. Ry.*, 122 N. Y. App. Div. 193 (1907).

⁸ In the absence of fraud the bondholders are bound by what is done by their trustee in foreclosure proceedings. *Credit Co. v. Arkansas Cent.*

R. R., 15 Fed. Rep. 46 (1882). In the absence of fraud or bad faith the bondholders are bound by the action of the trustee in foreclosing. *Richter v. Jerome*, 123 U. S. 233 (1887); *Shaw v. Railroad Co.*, 100 U. S. 605 (1879). A bondholder is bound by a decree against his trustee. *Corcoran v. Chesapeake, etc. Co.*, 94 U. S. 741 (1876). The trustee may execute a release of errors in the decree and of the right to appeal. If given in good faith, the bondholders are bound and cannot appeal. *Elwell v. Fosdick*, 134 U. S. 500 (1890). Bondholders are bound by a decree which passes upon the priority of two different mortgages, although only the trustees were parties to the suit. *Iowa County v. Mineral Point R. R.*, 24 Wis. 93 (1869); *McElrath*

In a suit by a receiver of two insolvent corporations to set aside a mortgage executed by both of them, service out of the state on the trustee of the mortgage is effective, the trustee being a non-resident and the property being within the jurisdiction.¹ A person

v. Pittsburgh, etc. R. R., 68 Pa. St. 37 (1871); *Union T. Co. v. Morrison*, 125 U. S. 591, 608 (1888); *New Jersey, etc. Co. v. Ames*, 12 N. J. Eq. 507 (1859), where, on foreclosure of the first mortgage, bondholders under the second mortgage were not allowed to become parties. In *Farmers' L. & T. Co. v. Kansas City, etc. R. R.*, 53 Fed. Rep. 182 (1892), the court held that the trustee might assent to claims growing out of labor, material, etc, being paid before the bondholders were paid, and that the bondholders were bound by this assent of the trustee. The court said: "The bondholders claiming under the mortgage have no interest in the security, except that which the trustee holds and represents, and, if the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them.

. . . And where the trustee in good faith assents to terms imposed by the court as a condition for appointing a receiver, the bondholders are bound by such assent as fully and absolutely as if it had been given by them in person," reviewing the cases. In *Politz v. Farmers' L. & T. Co.*, 53 Fed. Rep. 210 (1892), it was held that the trustee represents the bondholders in all litigation relative to the trust, even in a suit which resulted in a decree that the property be reorganized without a foreclosure, ample provision being made for the payment in full of those bondholders who preferred to have their bonds paid in cash. The trustee will not be allowed, on his mere motion, to discontinue the suit to the prejudice of parties interested in the trust. A bondholder will be allowed to intervene and carry on the suit. *Bill v. New Albany, etc. Ry.*,

2 Biss. 390 (1870); s. c., 3 Fed. Cas. 379. Although the trustees are the same for the first and second mortgages, yet in a suit by a bondholder under the first mortgage to compel the trustees to take possession, he need not join the bondholders under the second mortgage as defendants. *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). The bondholders cannot appeal except by intervening and becoming parties. *Sage v. Central R. R.*, 93 U. S. 412 (1876). See also §§ 821, 848, *infra*. Although a corporation sells all its property to an individual for purchase-money mortgage bonds and distributes these bonds among its stockholders without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors. A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. *Lebeck v. Ft. Payne Bank*, 115 Ala. 447 (1897). Bondholders are not bound by a decision against the corporation relative to taxation, the bonds having been issued before the decision, and no one representing them being a party to the suit. *Wicomico, etc. v. Bancroft*, 135 Fed. Rep. 977 (1905); *rev'd* on another point in 203 U. S. 112.

¹ *Woods v. Woodson*, 100 Fed. Rep. 515 (1900). Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant and serves them by publication, and two of the trustees having died causes successors to be appointed by the court, and obtains decree against

claiming water rights from a company may file a bill against the company and its mortgagee to have those rights established and may join the bondholders as defendants.¹

The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a party defendant and resides in the same state as the complaining corporation. The trustee in such a suit is merely a formal party.² But in a suit brought to have bonds declared illegal and void, the bondholders whose bonds are attacked need not be made parties defendant if the trustee is a party defendant.³ The bondholders cannot claim railroad iron free from a lien where the trustee knew of the lien and impliedly assented thereto when the iron was laid.⁴

the corporation and the trustees of the mortgage canceling their title to the land, the decree is effective, and even though the mortgage is afterwards foreclosed the purchaser at such sale takes no title to such land, he having delayed thirty years before attacking such decree. *Bump v. Butler County*, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality, whereby it conveyed land to a corporation, the court will not grant it any relief. *Rummel v. Butler County*, 93 Fed. Rep. 304 (1899).

1 *Howe & Davidson Co. v. Haugan*, 140 Fed. Rep. 182 (1904).

2 *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900). Where a creditor of a vendor corporation accepts bonds of the vendee corporation in settlement of his claim, he cannot sue to set aside the sale and the mortgage, on the ground of fraud, unless the trustee of the mortgage is made a party. *United, etc. Co. v. Hess*, 159 Fed. Rep. 889 (1908).

3 A decree in equity canceling bonds of one corporation which are secured by the mortgage of another corporation, the bill being filed by the latter against the former company and against the trustee under the mortgage, is binding upon all the bondholders, although they were not par-

ties thereto, unless the decree was fraudulent and collusive. *Beals v. Illinois, etc. R. R.*, 133 U. S. 290 (1890). A decree adjudging a mortgage and bonds to be fraudulent, and allowing certain general creditors to obtain payment in priority to such bonds, is binding on the bondholders where the trustee was a party to the suit. *Manhattan Trust Co. v. Seattle, etc. Co.*, 19 Wash. 493 (1898). The deed of trust and bonds may be declared invalid in a suit instituted against the trustee and all known bondholders. Other bondholders cannot afterwards follow the property into other hands. *Beals v. Illinois, etc. R. R.*, 27 Fed. Rep. 721 (1886). A decree at the instance of a corporation declaring void a trust agreement is not a bar to a holder of one of the bonds, secured thereby, collecting his bonds. *National Salt Co. v. Ingraham*, 143 Fed. Rep. 805 (1906). As to the remedies against an illegal mortgage and bonds after foreclosure is commenced, see § 848, *infra*.

4 If iron is purchased by the company on an agreement that the vendors shall retain a lien on it, and the trustees of the mortgage assent thereto, the mortgage does not come in ahead of the lien, although the iron is actually laid on the tracks. *Pierce v. Emery*, 32 N. H. 484 (1856).

In general, a notice to the trustee is sufficient notice to all the bondholders.¹ But there is a limit to this principle of law. Where the trustee of a mortgage is selected by the mortgagor and he is really the agent of the mortgagor, and bonds are issued to the trustee, who sells them to a *bona fide* purchaser, such *bona fide* purchaser is not affected by the knowledge of the trustee that the property covered by the mortgage is equitably covered by another prior mortgage.² Notice to a trustee while acting as director is not notice to the bondholders.³ Where the bondholders purchased their bonds with knowledge of the fact that a manufacturing company has erected machinery on the property covered by the mortgage, under a contract by which said company reserved title in the machinery and the right to take it away in default of payment, the lien of the manufacturing company is prior in right to that of the bondholders.⁴ A statement of the president of the trustee to the mortgagor that the trustee controlled the bonds and would see that they were exchanged for new bonds does not bind the holders of the old bonds.⁵ The knowledge, acts, or omissions of a minority of the bondholders do not affect the rights of the majority, nor of the trustee.⁶

§ 818. *Compensation of trustees and reimbursement of trustees' disbursements for counsel, etc.*—This subject is considered elsewhere.⁷

§ 819. *Death, resignation, and removal of trustees—Removal under the terms of the mortgage—Same trustee in two mortgages.*—If the trustee dies, a court of equity has power to appoint a new trustee.⁸ One of three trustees may foreclose when he avers that

1 Fidelity, etc. Co. v. Shenandoah, etc. R. R., 32 W. Va. 244 (1889). Although the mortgage is irregular in the mode in which the corporate name is signed thereto, yet it may be good as an equitable mortgage, and notice to the trustees of subsequent mortgages is sufficient. Miller v. Rutland, etc. R. R., 36 Vt. 452 (1863).

2 National Waterworks Co. v. Kansas City, 78 Fed. Rep. 428 (1896).

3 Curtis v. Leavitt, 15 N. Y. 9, 194 (1857); Johnson County v. Thayer, 94 U. S. 631 (1876), where notice to the trustee of defenses to municipal bonds was held not to be notice to bondholders.

4 Central Trust Co. v. Arctic, etc. Co., 77 Md. 202 (1893).

5 Unity Co. v. Equitable T. Co., 204 Ill. 595 (1903).

6 Illinois, etc. Bank v. Doud, 105 Fed. Rep. 123 (1900).

7 See § 879, *infra*.

8 The courts have inherent power to remove and appoint new trustees in a mortgage. Hale v. Nashua, etc. R. R., 60 N. H. 333 (1880). Although the mortgage is made to a certain person, his heirs and assigns, as trustee for the bondholders, yet upon the death of the trustee the court may appoint a new one and the heirs have no interest therein. Gibbes v. Greenville, etc. R. R., 13 S. C. 228 (1879). When there are two trustees, and one dies, the trust passes to the survivor. The heirs and representatives of the de-

one is dead, and the other, who is made a defendant, claimed to have bought the property at a sale under a decree of a state court, and was interested adversely to the complainant.¹ A trustee cannot resign from his trusteeship unless his resignation is accepted.² The duties and office of the trustees do not end so long as they are not discharged, incapacitated, or released by final distribution of the money going to the bondholders.³ Although the mortgage provides that, before foreclosing, the trustee must be requested to foreclose by a majority of the bondholders, yet, if the position of trustee is vacant, a holder of a majority of the bonds may begin foreclosure without any request.⁴ After suit is commenced, the resignation of the trustee of the mortgage does not thereby enable the remaining defendant to remove the case to the United States

ceased trustee have no interest in the deed in trust. *McAllister v. Plant*, 54 Miss. 106 (1876). A trustee substituted in a deed of trust by a court has all the powers to sue in a foreign jurisdiction that the original trustee had. *Glenn v. Soule*, 22 Fed. Rep. 417 (1884). If one of the trustees dies pending suit, the suit is postponed until the vacancy is filled. *Shaw v. Norfolk, etc. R. R.*, 71 Mass. 162 (1855). If the trustee is dead the court takes jurisdiction for foreclosure without appointing a new trustee. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586, 614 (1880). A stockholder cannot set aside a foreclosure on the ground that the order substituting new trustees in the mortgage in place of trustees who were dead was informal, where five years have elapsed since the sale and the property has become valuable. *Godwin v. Whitehead*, 88 Va. 600 (1892). A court of equity has power to appoint new trustees of a mortgage deed of trust where the old trustees have died. A special statutory provision for that purpose is cumulative, and does not take away the power of a court of equity to make the appointment. Bondholders may apply to the court for the appointment. The mortgagor and any surviving trustee are necessary parties to the proceeding. The fact that the mortgage has been foreclosed does not

prevent the appointment, where the validity of the foreclosure is attacked, the trustees not having been parties to such foreclosure suit. *Re Anson*, 85 Me. 79 (1892).

¹ *Alabama, etc. Mfg. Co. v. Robinson*, 56 Fed. Rep. 690 (1893), aff'g *Robinson v. Alabama, etc. Mfg. Co.*, 48 Fed. Rep. 12 (1891).

² *Richards v. Merrimack, etc. R. R.*, 44 N. H. 127 (1862). A trustee is not relieved from his trust by the mere fact that he has parted with his qualification bonds. *Richards v. Merrimack, etc. R. R.*, 44 N. H. 127 (1862). Where a trustee has resigned he need not join in the foreclosure. *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879). In *Wood v. Oregon Dev. Co.*, 55 Fed. Rep. 901 (1893), a resident trustee had resigned, and a foreign trustee appointed for the purpose of giving jurisdiction to the federal court. A minority of the mortgage bondholders may have a receiver appointed, where the mortgage trustees have resigned, the corporation is without officers, executions are being levied, and forfeiture of charter is imminent. *Ralph v. Shiawassee Circuit Judge*, 100 Mich. 164 (1894).

³ *Knapp v. Railroad Co.*, 20 Wall. 117 (1873).

⁴ *Wheelwright v. St. Louis, etc. Transp. Co.*, 56 Fed. Rep. 164 (1893).

court.¹ A bondholder cannot foreclose on the ground that the trustee is incapacitated, where the mortgage provides that in such case a new trustee should be appointed by the court.² It is generally a difficult thing to induce a court to remove a trustee. A court of equity has power to do so, but will not readily use that power.³

It is, however, cause for removal that the trustee has been guilty of bad faith,⁴ or is incapacitated by reason of absence.⁵ The mere

¹ *Ruohs v. Jarvis, etc. Co.*, 84 Fed. Rep. 513 (1898).

² *Johnes v. Outwater*, 55 N. J. Eq. 398 (1897).

³ The court will not readily remove a trustee in a deed of trust. *McPherson v. Cox*, 96 U. S. 404 (1877). A court of chancery has power to remove a trustee for good cause and appoint a new one. The regularity cannot be attacked by the judgment creditor. *New York Security, etc. Co. v. Saratoga Gas, etc. Co.*, 88 Hun, 569 (1895); *aff'd*, 157 N. Y. 689. The removal of the trustee may be made by petition. *Harrison v. Union Trust Co.*, 144 N. Y. 326 (1895). Bondholders cannot sustain a bill in equity to remove a trustee who holds the stock of various gas companies as collateral security for the payment of their bonds, even though such trustee has voted such stock in favor of directors who have made improvident contracts in which such directors were personally interested, it appearing that by the terms of the trust agreement the trustee was to vote such stock as the pledgors directed, until default on the bonds, and it not being shown that the trustee knew that such default had been made. Moreover, such removal will be denied when the trust agreement itself provides for the removal of the trustee by vote in writing of one-third in interest of the bondholders at a meeting called for that purpose, and no reason is shown for disregarding this mode of changing the trustee. *Dillaway v. Boston, etc. Co.*, 174 Mass. 80 (1899).

⁴ Where it appears that the trust

company, which has acted as trustee under a mortgage covering lands in another state given by a corporation as collateral to bonds issued by it, has acted in bad faith in the prosecution of an action for the foreclosure of the mortgage, and in a manner prejudicial to the interests and rights of the holders of the bonds, such trust company, its officers, agents, and attorneys, will be enjoined by the courts of the state of New York from taking any further proceedings in the matter, pending the final hearing and determination of an action for its removal as a trustee, although the proceedings in foreclosure are pending in another state, and relate to real estate therein. *Gibson v. American L. & T. Co.*, 58 Hun, 443 (1890). Even though a trustee of stock who has been an officer and stockholder in the corporation is voted a salary, this is no ground for removing him as a trustee, there being no proof that he voted in favor of the salary. Neither is the fact that the company did not pay as large dividends as it formerly did, any ground for the removal of the trustee. *Dailey v. Wight*, 94 Md. 269 (1902). *Cf.* § 612, *supra*.

⁵ Where a trustee goes abroad to reside, a new trustee may be substituted, and the former trustee will be enjoined from acting or bringing suits. *Farmers' L. & T. Co. v. Hughes*, 11 Hun, 130 (1877). During the late war a southern railroad company applied to a court for and obtained a change of trustees on the ground that the sole trustee lived in New York and was not fulfilling his trust. The

fact that the same corporation is trustee in two deeds of trust of the same property is not sufficient cause for removal, but the court in such a case will generally authorize the bondholders to intervene and become parties to a foreclosure suit.¹ A trust company as pledgee of second-mortgage bonds may sell them on notice, even though it is the trustee of the first mortgage and even though

new trustees acted and conveyed large tracts of land. Ten years afterwards the New York trustee filed his petition to obtain a decree that he was still trustee. The court dismissed the petition. *Ketchum v. Mobile, etc. R. R.*, 2 Woods, 532 (1876); s. c., 14 Fed. Cas. 414. But in *Washington, etc. R. R. v. Alexandria, etc. R. R.*, 19 Gratt. (Va.) 592 (1870), the court held that such an appointment by reason of the old trustee, president, and directors going into the southern army was illegal and void, although the new trustee was appointed by a court loyal to the federal government.

1 Where one party is trustee under two mortgages and there is a conflict, the court will allow representative bondholders under each mortgage to become parties. *Grand Trunk Ry. v. Central Vermont R. R.*, 38 Fed. Rep. 622 (1898). Where a trust company is trustee of several mortgages issued by one company, and a conflict of interest may arise, the court will allow bondholders to intervene and become parties to the suit, even though the mortgage provides that they must first request the trustee to act, and though it gives them power to remove the trustee. *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 66 Fed. Rep. 169 (1895). If the same company is trustee under several conflicting mortgages, the court will allow representatives of bondholders to come in. *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 70 Fed. Rep. 423 (1895). The fact that one trust company is trustee under twelve different mortgages executed by several companies in one system of roads is not sufficient reason for allowing a bondholder's committee to intervene and become a party

plaintiff in a foreclosure suit, where no negligence on the part of the trustee is shown, and no conflict between the various interests represented by him. *Clyde v. Richmond, etc. Co.*, 55 Fed. Rep. 445 (1893). The court will not, even upon the application of a majority of the first-mortgage bondholders, remove a trustee who is also trustee of the second mortgage, and who is foreclosing both mortgages in one suit, the first mortgage being on a portion of the whole road. If he is acting in good faith, these facts are no cause for removal, nor the fact that he refuses to employ counsel named by the majority of the bondholders. *Beadleston v. Knapp*, 13 Abb. Pr. (N. S.) 335 (1872). The bondholders under a second mortgage need not be joined as parties defendant, although the trustee is the same for both mortgages. *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). Where a trustee is trustee also of a prior mortgage which was fraudulently represented to have been paid, and the trustee has passed into a receiver's hands, one or more bondholders may file a bill for the removal of the trustee and for foreclosure, and the bondholders may exercise the right of the trustee and declare the principal sum due. *Clay v. Selah Valley Irr. Co.*, 14 Wash. 543 (1896). Even though some of the directors of the trustee are also bondholders and stockholders in a defendant corporation in a foreclosure suit, yet this is not sufficient to enable bondholders to intervene, but the court may hear them as to any action to be taken by the trustee prejudicial to their interest. *Bowling Green, etc. Co. v. Virginia, etc. Co.*, 132 Fed. Rep. 921 (1904).

a receiver is in charge.¹ The appointment of the successors of a trustee is made by a court, or in accordance with the terms of the trust agreement itself. In one case, however, the trustees assumed the power to name their successors.²

Where the mortgage authorizes a majority of the bondholders to remove the trustee and appoint another, the motive of the majority is immaterial, unless there is an abuse of trust to the detriment of minority bondholders.³ And where a mortgage provides that the mortgagee company may substitute another trustee, the mortgagor cannot attack such substitution on the ground that the directors of the mortgagee were not duly elected.⁴ The mortgage

¹ Guaranty Trust Co. v. Galveston City R. R., 87 Fed. Rep. 813 (1898).

² In the case of *Matthews v. Murchison*, 17 Fed. Rep. 760 (1883), upon a reorganization, the stock "was to be held by the reconstruction committee for five years from November 1, 1879, in trust for the holders of new first-mortgage bonds, . . . but the same may be issued sooner, when full interest upon second mortgage shall have been paid, upon request in writing of two-thirds in amount of the first-mortgage bondholders." The trustees, being the owners of a majority of the stock thus held in trust, sold that majority, and then resigned their positions as trustees and substituted the purchasers as trustees. The purchasers sold to still other parties, and also resigned their trusteeship and substituted the purchasers as trustees. A minority stock and bondholder brought this suit to remove the trustee. The court refused to do so, and, after stating that the trust is different from any that appears anywhere in the reports, proceeds to say: "We do not think that, even if they did what the trust did not allow, they did it with such dishonesty as to brand them as incapable of holding positions of trust; and *a fortiori* we do not think such incapacity attached to the third set of trustees, who, at the most, merely accepted the positions left vacant by their resignations. We hold that the case, at the most, comes under the head of misunder-

standing, and this we are the more inclined to do as we have ourselves experienced great difficulty in understanding the trust. We do not know what may have been the purposes of the different parties to the creation of the trust. The plaintiff's agent may have expected to protect his third-mortgage bonds by it; the other bondholders may have devised it to protect themselves against the plaintiff and prevent her from obtaining an immediate control of the road. But if we look only at the terms of the trust itself, meagerly as it is expressed, there is enough in it to show that it was so written as to make a trust for the benefit of the holders of the new second-mortgage bonds, and of them only. This clause, the only one indicating the purpose of the trust, shows it: 'But the same may be distributed sooner, when full interest upon second mortgage shall have been paid,' upon request, and so forth. The purpose indicated is that there should be no separation of the stock from the second-mortgage bonds for five years, so that the direction of the road should be determined by the holders of those bonds, with a view to the road being so controlled as to earn income for this class of bonds."

³ *March v. Romare*, 116 Fed. Rep. 355 (1902).

⁴ *Balfour-Guthrie, etc. Co. v. Woodworth*, 124 Cal. 169 (1899).

itself frequently provides that the trustee may be changed by a written instrument signed by a majority in interest of the bondholders.¹ Even though the majority of the bondholders have a right to remove the trustee, yet after the trustee has commenced foreclosure suit at the instance of the minority bondholders the new trustee cannot be appointed by the minority bondholders, except by consent of the court, and such consent will not be given where there is no occasion for a change.² The statutes of a state relative to the appointment of new trustees apply to a railroad mortgage deed of trust.³ A provision in a mortgage that the powers given shall vest in successors of the trustees is legal and binding.⁴ Where the trustee becomes insolvent and the court appoints a new trustee, such trustee may bring suit in another state to foreclose the mortgage.⁵

B. THE REMEDIES OF THE TRUSTEE TO ENFORCE THE SECURITY—FORECLOSURE, SALE, AND TAKING POSSESSION.

§ 820. *The trustee, upon default of the mortgagor, may sell the property, or may have a strict foreclosure, or may foreclose by suit in equity, or may take possession and operate the road.*—Such is

¹ Where the trust deed provides that the trustee may be changed by a specified party, subject to the approval of the court, no notice of the application for a change in the trustee need be given to the mortgagor. *Macon, etc. R. R. v. Georgia R. R.*, 63 Ga. 103 (1879). Where the trustee has been changed, according to the mortgage, and the new trustee brings suit a bondholder cannot intervene to question the validity of such change. *Bowling Green, etc. Co. v. Virginia, etc. Co.*, 132 Fed. Rep. 921 (1904). A corporation in signing a substitution of trustee for a mortgage need not execute the instrument under seal. *Brown v. British American, etc. Co.*, 86 Miss. 388 (1905). A provision in the mortgage for another person to act as trustee in case the regular trustee is absent from the state refers to a permanent and not to a temporary absence. *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (1883), holding also that a new trustee cannot act until he has been fully appointed strictly in accordance with

the terms of the mortgage, nor can he then date back his notice of sale to a time prior to his appointment. A person may legally purchase bonds in order to control the election of new trustees of the mortgage and to elect himself. *Richards v. Merrimack, etc. R. R.*, 44 N. H. 127 (1862).

² *March v. Romare*, 114 Fed. Rep. 200 (1902); rev'd, 116 Fed. Rep. 356.

³ *Mercantile T. Co. v. Portland, etc. R. R.*, 10 Fed. Rep. 604 (1882). A statute relative to changing trustees does not apply to a railroad mortgage which runs, not to any trustee, but to a bondholder and his assigns. *Re York, etc. R. R.*, 50 Me. 552 (1861); *Mason v. York, etc. R. R.*, 52 Me. 82 (1861). Where the mortgage provides for the mode of appointing new trustees, a subsequent statute relative to that subject does not apply to that mortgage. *Fletcher v. Rutland, etc. R. R.*, 39 Vt. 633 (1858).

⁴ *Craft v. Indiana, etc. Ry.*, 166 Ill. 580 (1897).

⁵ *Iowa, etc. Co. v. Hoag*, 132 Cal. 627 (1901).

the rule where the statutes of the state wherein the property is located have not provided otherwise.¹

§ 821. *The trustee is the proper party to foreclose the mortgage—In a trustee's suit to foreclose, the bondholders are not necessary parties.*—This rule is due to two reasons: First, because the trustee represents and acts for all the bondholders; second, because the bondholders are generally numerous, scattered, and more or less unknown, and hence it would be impracticable to make them parties to the suit.²

1 Dow v. Memphis, etc. R. R., 20 Fed. Rep. 260 (1884), where the court held that ejectment or a bill in equity to put the mortgagee in possession after default would lie. The mortgage deed of trust itself generally contains provisions covering all of these points. See §§ 794–807, *supra*. In McAllister v. Plant, 54 Miss. 106, 119 (1876); the court said that the trustees or bondholders were not “confined to any particular order of priority in resorting to any one or all of the several powers conferred by the mortgage; and even if they were, this would not, as before remarked, deprive the chancery court of its right to foreclose in a proper case.” See also § 835, *infra*, and Rice v. St. Paul, etc. R. R., 24 Minn. 464 (1878).

2 See §§ 817, *supra*, and 843, *infra*; Vose v. Bronson, 6 Wall. 452 (1867). None of the bondholders need be joined in a trustee's suit to foreclose. Shaw v. Norfolk, etc. R. R., 71 Mass. 162 (1855); Skiddy v. Atlantic, etc. R. R., 3 Hughes, 320, 350 (1878); s. c., 22 Fed. Cas. 274, holding, however, that if the bondholders wished to extend the time of payment the trustees would not be allowed to proceed with the foreclosure; Wetmore v. St. Paul, etc. R. R., 1 McCrary, 466 (1880); s. c., 3 Fed. Rep. 177, where the court refused to set aside a decree. Bondholders are not necessary parties. Rumsey v. People's Ry., 154 Mo. 215 (1899); Grand Trunk Ry. v. Central Vermont R. R., 88 Fed. Rep. 622 (1898). Where the number of bondholders is large, the trustee may

file a bill in his own name for the benefit of the bondholders to foreclose, without making any of the bondholders parties to the suit. But if a single bondholder brings the suit, he must bring in the other bondholders. Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548 (1883). Although ordinarily the bondholders, as *cestuis que trust*, should be joined as parties yet where they are numerous they need not all be made parties, the trustee being their representative. Chicago, etc. Land Co. v. Peck, 112 Ill. 408 (1885). The bondholders are not necessary parties. Railroad Co. v. Howard, 7 Wall. 392, 415 (1868); Shaw v. Railroad Co., 100 U. S. 605 (1879), where the court said: “The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them.” See also Boston, etc. R. R. v. Coffin, 50 Conn. 150, 159 (1882). That the trustee is the proper party to foreclose, see also Hays v. Galion Gas, etc. Co., 29 Ohio St. 330 (1876); Campbell v. Railroad Co., 1 Woods, 368 (1871); s. c., 4 Fed. Cas. 1178. In Vermont it seems that some of the bondholders must be joined as parties. Brooks v. Vermont Cent. R. R., 14 Blatchf. 463 (1878); s. c., 4 Fed. Cas. 308. Although the state is a bondholder, a failure to make it a party is not fatal to the bill. Young v. Montgomery, etc. R. R., 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. The

If one of the trustees refuses to join in the suit he is made a party defendant.¹ Where there are three trustees and one of them is a citizen of the same state as the mortgagor corporation, two of the trustees may bring suit for the foreclosure in the federal court, the third trustee being made a party defendant, he having refused to join in bringing the suit.² A provision that the trustee might insist on indemnity before foreclosing does not prevent the trustee foreclosing without indemnity.³ Where the trustee enters a deficiency judgment a bondholder cannot thereafter bring suit on his bond.⁴ The bondholders may prove their bonds in the foreclosure suit without becoming parties to the suit.⁵ In a trustee's suit to foreclose, rival claimants of certain bonds cannot have their rights decided.⁶ The remedies of the bondholders for fraud in the foreclosure are discussed elsewhere,⁷ as is also the question of a conflict of jurisdiction between state and federal courts.⁸ In certain cases the bond-

bondholders need not be joined as parties where they are numerous. *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857). A trustee may bring suit in his name alone to obtain possession of the property. *Carey v. Brown*, 92 U. S. 171 (1875); *Coe v. Columbus*, etc. R. R., 10 Ohio St. 372, 410 (1859), holding that the bondholders are not proper parties to trustee suits; *Shaw v. Norfolk*, etc. R. R., 71 Mass. 162 (1855); and *Kerrison v. Stewart*, 93 U. S. 155 (1876), to same effect. In *Coal Co. v. Blatchford*, 11 Wall. 172 (1870), the trustees of the mortgage instituted suit to foreclose. One of them was a citizen of the same state as one of the defendants. The court held that this was fatal to the jurisdiction, and said in regard to the trustees: "So long as they do not refuse to discharge the trusts reposed in them, other parties are not authorized to institute or prosecute any proceedings for the enforcement of the mortgage, or to exercise any control over them." Heirs of a deceased trustee are not necessary parties. *Newport, etc. Co. v. Douglass*, 12 Bush (Ky.), 673, 719 (1877). "Whatever right a bondholder has under the mortgage, he has a right to have the trustee enforce for his benefit. It is for that purpose a trustee is chosen." If there

is a right to foreclose for non-payment of interest, the trustee may foreclose. *Mercantile Trust Co. v. Chicago*, etc. Ry., 61 Fed. Rep. 372 (1893). Where a mortgage is connected with a lease of property in such a manner as to obligate the lessee to apply the income to the interest and a sinking fund, but a foreclosure takes place, the lessee cannot stop the foreclosure, even though the lessee owns all the bonds, inasmuch as the stockholders of the mortgagor company have an interest in the suit. A stockholder will not be allowed to intervene so long as the trustee continues to prosecute the suit. *Phillips v. Southern*, etc. R. R., 110 Ky. 33 (1901).

¹ *Tillinghast v. Troy*, etc. R. R., 48 Hun, 420 (1888); *aff'd*, 121 N. Y. 649.

² *Einstein v. Georgia*, etc. Ry., 120 Fed. Rep. 1008 (1903).

³ *Phillips v. Southern*, etc. R. R., 110 Ky. 33 (1901).

⁴ *Grant v. Winona*, etc. Ry., 85 Minn. 422 (1902).

⁵ *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883).

⁶ *Knickerbocker T. Co. v. Oneonta*, etc. R. R., 116 N. Y. App. Div. 78 (1906); *aff'd*, 188 N. Y. 38. See also § 847, *infra*.

⁷ See § 848, *infra*.

⁸ See § 839, *infra*.

holders may appeal from the decision of the court.¹ In a suit to foreclose the trusteeship should be alleged.²

§ 822. *Possession of the mortgaged property may be taken by the trustee, when?*—The trustee of the mortgage is entitled to take possession of the property as soon as the mortgage is executed, unless the mortgage or the statutes of the state forbid.³ A provision, however, against the trustee taking possession before a default is almost always inserted in the mortgage itself.⁴ A provision is also generally inserted expressly authorizing the trustee to take possession whenever a default occurs. Sometimes such possession upon default is provided for only upon the written request of a specified number of the bondholders to the trustee.⁵ The statutes, however, sometimes provide that possession can be obtained only upon a foreclosure.⁶ Even though a mortgage provides that the trustee shall not take possession until six months after default, yet a court of equity may in a foreclosure suit appoint a receiver before the six months expire.⁷

The possession taken by the trustee may be for the purpose of effecting a strict foreclosure,⁸ or to operate the property and apply the profits to the payment of the mortgage debt, with a view to returning the property to the mortgagor when the debt is paid, or to operate the property until a foreclosure by an advertised sale or by suit in equity has been effected. The trustee after default may file a bill in equity to obtain possession for the purpose of applying the railroad and the income and profits thereof to the payment of the bonds, no foreclosure being sought.⁹

1 William v. Morgan, 111 U. S. 684 (1884), where they appealed upon the question of compensation given to the trustee. Cf. Elwell v. Fosdick, 134 U. S. 500 (1889).

2 Trusteeship is sufficiently alleged by setting forth the mortgage and alleging that complainants are the trustees therein named. Savannah, etc. R. R. v. Lancaster, 62 Ala. 555 (1878).

3 See § 796, *supra*.

4 See § 796, *supra*.

5 See § 802, *supra*.

6 By the statutes of Minnesota "a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure." Hence, ejectment by the mortgagee does not

lie, even after default. But where the special charter allows the company to give its mortgagee the right of possession on common-law conditions, and the company does so, the trustees may maintain ejectment and obtain possession. Hence this power to take possession existing, the court will not appoint a receiver in a suit in equity by the trustees for foreclosure, there being no allegation that possession to the trustees is refused. Rice v. St. Paul, etc. R. R., 24 Minn. 464 (1878).

7 Blanton v. Kentucky, etc. Co., 120 Fed. Rep. 318 (1902); *aff'd*, 149 Fed. Rep. 31. See also § 824, *infra*.

8 See § 823, *infra*, also § 802, *supra*.

9 Shepley v. Atlantic, etc. R. R., 55 Me. 395 (1867). Where the mortgage

The trustee is always disinclined to take possession. Great risk and responsibility are attached to such an act. He becomes personally liable, like other common carriers, for damages due to loss or injury to freight or passengers, and becomes liable for wages, etc.¹ Hence it is that the trustee generally refuses to take possession, and prefers to have a receiver appointed and a foreclosure by bill in equity obtained. Sometimes, however, the court, on the suit of a bondholder for that purpose, may compel the trustee to take possession,² or may appoint a receiver instead.³ Under the usual mortgage giving the trustee power to take possession and also to foreclose, the trustee may commence suit for foreclosure and may also take possession without having any receiver appointed by the court. Such possession cannot be disturbed by a receiver subsequently appointed by the state court.⁴ The trustee of a mortgage, who holds security under the mortgage, is a proper party to a suit in equity to wind up the insolvent mortgagor, and if such trustee is ordered by the court to turn over the securities to a receiver, the trustee is entitled to intervene and have its rights determined.⁵

§ 823. *Strict foreclosure by the trustee—Liability of the trustee—*At an early day in New England this was a common remedy.⁶ It

authorizes the mortgagee to take possession upon default, he may do so, and may maintain an action to be put in possession. *Seibert v. Minneapolis, etc. Ry.*, 52 Minn. 246 (1893); *s. c.*, 58 Minn. 39. Where the mortgage provides for the trustees taking possession upon default, the trustees may by bill in equity obtain a decree ordering the company to deliver possession of the road to them. *Shepley v. Atlantic, etc. R. R.*, 55 Me. 395 (1867). Although a majority of the bondholders are opposed to the trustees, equity will order the company to deliver possession to the trustees. *Shaw v. Norfolk County R. R.*, 71 Mass. 162, 182 (1855); *Sacramento, etc. R. R. v. Superior Ct.*, 55 Cal. 453 (1880); *McLane v. Placerville, etc. R. R.*, 66 Cal. 606 (1885), where the court appointed the trustee a receiver and gave him a receiver's powers. In *Dow v. Memphis, etc. R. R.*, 20 Fed. Rep. 260 (1884), the trustee filed a bill to obtain possession and asked for a receiver in the meantime.

1 See § 823, *infra*.

2 See § 823, *infra*.

3 See § 862, *infra*.

4 Such possession may be taken by the attorney for the trustee. *Pilcher v. Sioux City, etc. Co.*, 12 S. Dak. 52 (1899).

5 *Miles v. New, etc. Assoc.*, 99 Fed. Rep. 4 (1900).

6 The case of *Somerset Ry. v. Pierce*, 88 Me. 86 (1895), upholds the validity of a strict foreclosure. In that case the mortgage was made in 1871, and, the condition having been broken for more than three years, the bondholders in 1883 organized a new corporation, which took over the property with the consent of the old company. In 1884 the new company purchased the equity at execution sale, and no redemption was had. The court held that the bonds became thereby paid to the extent of the value of the property, and that the bondholders thereby became stockholders in the new company, even though some of them had not exchanged some of their old

is a harsh remedy, however, and is not favored by the courts. Strict foreclosure should be resorted to only in extreme cases, and the court will not decree it when all rights can be preserved without it.¹ Sometimes it has been accomplished by a decree of a court that the mortgagee shall be entitled to keep the property absolutely if the mortgagor does not pay the debt within a specified time.²

bonds for new stock. In 1887 a decree of strict foreclosure was entered. The new company then filed a bill to quiet title and to enjoin suits at law by the trustees of the old mortgage contesting the new company's title. The court decreed that the trustees should release all their title in the property upon being paid for their services and disbursements. The process of foreclosure in this case was in accordance with the peculiar statutes of the state of Maine. The court intimated that a court of equity is now the exclusive mode of foreclosing such a mortgage, full equity powers having been recently given to the court. The court held that such bondholders as refused to take stock could hold their bonds and receive their *pro rata* share of the net profits, and, if that were impracticable, that possibly another sale of the property might be had. In another case decided at the same time, *Pierce v. Ayer*, 88 Me. 100 (1895), the court refused to maintain a writ of entry on the application of the trustees in this transaction, inasmuch as there had already been a sufficient foreclosure to invest complete title in the mortgagee.

¹ *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126 (1896).

² Where a strict foreclosure is had, and the court decrees title to the mortgagee unless the mortgagor redeems within a fixed time, the court may order the mortgagee to pay such necessary operating expenses as were incurred in earning the income which the mortgagee has received. A transferee of such claims may enforce them. *Burnham v. Bowen*, 111 U. S.

776 (1884). Although by the terms of the mortgage, on default of payment, the property is to be turned over to the trustees, and after eighteen months is to vest absolutely in them, and although the court decreed a delivery and vesting under this clause, yet in this case a release of the right of redemption was obtained. *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886). A decree of strict foreclosure, without finding the amount due and without giving time to redeem, is void. *Clark v. Reyburn*, 8 Wall. 318 (1868). The trustees may file a bill for the strict foreclosure of the mortgage whereby the trustees take absolute title. A bondholder's separate suit to foreclose and sell will be stayed. *Stern v. Wisconsin Cent. R. R.*, 1 Fed. Rep. 555 (1880). Under the Vermont statutes, where the railroad is foreclosed (apparently by a strict foreclosure), and is being operated by a corporation formed by the bondholders, other bondholders are tenants in common of the railroad with such corporation, and may sue for their proportionate share of the income, although the corporation sets up that there is a receivership of the property in a proceeding in a state court. *Brooks v. Vermont, etc. R. R.*, 22 Fed. Rep. 211 (1884). Strict foreclosure is not favored by the courts, because it cuts off all second, etc., mortgagees, and makes the first mortgagees tenants in common. Foreclosure and sale may be ordered under the general prayer for relief, although strict foreclosure is asked for. *Sage v. Central R. R.*, 99 U. S. 334 (1878). A strict foreclosure was made and decreed by the court in *Ellis v. Boston*,

In Connecticut strict foreclosure seems still to be the usual mode of realizing upon railroad mortgages.¹ The statutes of many of the states now forbid a strict foreclosure. In other states such a foreclosure is regulated by statute, and the procedure is made somewhat similar to a foreclosure by advertisement and sale.²

The chief danger, however, of a strict foreclosure is in taking

etc. R. R., 107 Mass. 1, 18 (1871), and a receiver appointed pending the suit for such foreclosure. In *Duncan v. Mobile*, etc. R. R., 3 Woods, 597 (1879); s. c., 8 Fed. Cas. 25, Mr. Justice Bradley said: "A strict foreclosure may be attended with difficulties in those states where a mortgage is a mere security and does not give a legal title, besides which it places the property in the hands of a vast number of beneficiaries whose consent may be very difficult to obtain in perfecting a new organization for conducting the business." Where a lien holder acquires the legal title to a railroad he may maintain a bill for strict foreclosure to cut off the equities and the right of junior encumbrances to redeem. *Crouch v. Dakota*, etc. R. R., 18 S. D. 540 (1904).

1 In *Gates v. Boston*, etc. R. R., 53 Conn. 333, 344 (1885), the court said: "In this state, irrespective of legislative or judicial authority in the special instance, the effect of a foreclosure is to vest absolutely the property of the mortgagor in the mortgagee. It simply cuts off the right of redemption existing in the mortgagor, and thereafter the mortgagee stands, with reference to the mortgaged property, in the same relation as did the mortgagor. He has the title of the former owner of the equity and nothing more. He holds the property subject to all charges, duties, pledges, and equities existing prior to the execution of the mortgage deed. We have not adopted the practice of selling the property upon foreclosure."

2 After a decree of foreclosure and the expiration of the three years in which to redeem, the mortgagor or

its assigns cannot attack the mortgage on the ground that it was not properly sealed. This was a case in which the trustee took possession and still retained it, the court having put them in possession by a decree. Such was the mode of foreclosure. The trustees, after several years, then filed a bill to have the title declared valid and to have the property sold for the benefit of the bondholders. The court sustained the bill. *Haven v. Grand Junction*, etc. Co., 94 Mass. 337 (1866). In *Kennebec*, etc. R. R. v. *Portland*, etc. R. R., 59 Me. 9 (1871), the trustees had made a strict foreclosure, *i. e.*, had taken the road themselves for the bondholders by giving public notice of intent so to do in accordance with the statutes, and publishing the same, and recording a copy of the notice as required by statute. Three years' possession after this vested the title absolutely in the trustees. The court held that the foreclosure was good. In this case a clear statement is made of the various modes of foreclosing mortgages, showing that, in those states where equity jurisdiction is entirely statutory, a foreclosure in a court of equity was not allowed at an early day. The only modes of foreclosure were "by entry, by consent, by suit at law, by entry before witnesses, and by advertisement in a newspaper." The mode of foreclosure sanctioned in *Kennebec*, etc. R. R. v. *Portland*, etc. R. R., 59 Me. 9 (1871), is binding on the federal court in a case involving the same facts. A reorganized company is not liable on the contracts of the old company. *Sullivan v. Portland*, etc. R. R., 94 U. S. 806 (1876).

possession of the property. The trustee, generally, dare not do so. The property being a losing one, the trustee is unwilling to take the risks of operating the road. He is liable personally for any deficiency in operating it,¹ and this frequently is a serious risk. Consequently he generally refuses to take possession, even though requested to do so by the bondholders.² It has been held, however, that a court may compel him to take possession.³ If the trustee desires to take possession he may file a bill in equity for specific performance, and in this way obtain possession.⁴ The question of who is entitled to the earnings and income after the trustee demands possession is considered elsewhere.⁵ Persons advancing money to keep a street railway in operation, and for taxes, after it has become insolvent, have no preference over the mortgage, the trustee not having taken possession, and there having been no diversion of income to the bondholders, but money so advanced at the request of the trustee after the trustee takes possession may have priority over the mortgage.⁶

A deed by the trustee of a mortgage reciting a foreclosure decree is not limited in its operation to the authority conferred by the decree, but passes the title of the trustee to the land which it purports to convey.⁷ Where the trustees have acquired title by foreclosure, they may make a lease of the railroad, provided the lease is a reasonable and desirable one.⁸ While in possession they must build fences, the

¹ See notes below.

² In *Poland v. Lamoille, etc. R. R.*, 52 Vt. 144 (1879), the trustees refused to take possession because, as they said, they regarded it "as simply impossible for them so to do without the greatest peril of pecuniary loss and ruin to themselves."

³ A bondholder may, upon a default, compel the trustees to take possession, although thereby "a great burden of labor and a great responsibility, moral and financial, will be imposed on the defendants, in that they will be personally liable for all injuries done and debts incurred to others in managing the property." *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). After default a bondholder may file a bill to compel the trustees to take possession. The court will order him so to do, or will appoint a receiver in his place. *Wilmer v. Atlanta, etc. R. R.*, 2 Woods, 409 (1874); s. c., 30 Fed. Cas. 73. In

Scott v. Clinton, etc. R. R., 6 Biss. 529 (1876); s. c., 21 Fed. Cas. 820, the trustees were put in possession of the property by the state court pending the foreclosure. The case was removed to the federal court, and the latter court sustained the order placing the trustees in possession.

⁴ See § 822, *supra*.

⁵ See § 853, *infra*.

⁶ *Mersick v. Hartford, etc. Co.*, 76 Conn. 11 (1903). See § 860, *infra*.

⁷ *Chesapeake, etc. Ry. v. Washington R. R.*, 199 U. S. 247 (1905).

⁸ *Sturges v. Knapp*, 31 Vt. 1, 59 (1858), where the court passed upon the reasonableness of the various provisions of the lease. An injunction against the lease having been granted in a bondholder's suit to set aside this lease made by the trustee, and the suit having failed (31 Vt. 1), a bond for \$30,000 which was given by the bondholder may be enforced, and the trustee is entitled to damages

same as required by statute from the company.¹ Trustees in possession take the place practically of the corporation. They are liable for accidents and loss of freight, and occupy a dangerous position, unless the property is abundantly able to meet the liabilities arising out of the operation.² Where the trustees

to the extent of rent lost during the suit, less the portion that would go to the complainant bondholders. *Sturges v. Knapp*, 36 Vt. 439 (1863). But no damages were allowed for counsel fees. *Sturges v. Knapp*, 33 Vt. 486 (1860). See also *Knapp v. Railroad Co.*, 20 Wall. 117 (1873), holding that, after a strict foreclosure, the trustees still continue to represent all the bondholders. It is true that after strict foreclosure confirmed by bill the trustees will still hold the property as trustees, nevertheless they will then hold it absolutely as trustees for the bondholders. *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857). The trustee cannot lease the railroad to another company in which he is interested. *Ashuelot R. R. v. Elliott*, 57 N. H. 397 (1874); s. c., 58 N. H. 451. Where in a foreclosure suit and before sale the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest, but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. *Farmers', etc. T. Co. v. Missouri, etc. Ry.*, 21 Fed. Rep. 264 (1884). If the security is ample it has been held that the court may authorize a lease without a foreclosure. *Bardstown, etc. R. R. v. Metcalfe*, 4 Metc. (Ky.) 199 (1862). See also § 838, *infra*, concerning defaults for the purpose of paying off the debt. The court has no power, even upon the application of the trustees who are in possession of the road, to allow them to pay a floating debt out of the income, where the bondholders do not expressly assent thereto. *Ashuelot R. R. v. Elliott*, 57 N. H. 397 (1874).

the mortgage may be compelled by specific performance to build fences, the same as the company itself might be compelled. *Jones v. Seligman*, 81 N. Y. 190 (1880).

² Trustees in possession are liable in damages for any accident that occurs on the road, the same as the company itself would be liable if it were still operating the road. *Daniels v. Hart*, 118 Mass. 543 (1875). In Maine, by statute, this liability is limited to the extent of the moneys held by the trustees as trustees. *Stratton v. European, etc. Ry.*, 74 Me. 422 (1883). The bondholders are not liable. The trustees are not their agents. *Stratton v. European, etc. Ry.*, 74 Me. 422 (1883). Where a new corporation purchases the railroad from the trustees who have foreclosed it, the new company is liable in damages for accidents during the time that the trustees were operating the road, the same as where receivers are operating a road. *Stratton v. European, etc. Ry.*, 76 Me. 269 (1884). Where the trustees have obtained foreclosure in the New York courts and have purchased the road for the benefit of the bondholders and are operating it, they are liable for loss of freight. *Barter v. Wheeler*, 49 N. H. 9 (1869). Neither the company nor the trustees in possession are liable for rental on a spur of track, which by license is made to certain mills, and which is used for loading, etc. *Central Mills Co. v. Hart*, 124 Mass. 123 (1878). The corporation itself is liable for the acts of the trustees in possession. *Grand Tower, etc. Co. v. Ullman*, 89 Ill. 244 (1878). Compare, on this subject, § 875, *infra*. If the trustees continue to use the company's name in the business, a judgment against the company

¹ The trustees in possession under

of a mortgage have power to put in an agent to carry on the business, and do so, they are liable for his debts.¹ A purchase by the trustee himself at the sale is voidable and not void, and where the purchaser is a corporation in which the trustee is a director, the sale will not be disturbed if the price paid was a fair one, even though the sale was under the power of sale without a foreclosure, and even though the purchaser was a creditor secured by the mortgage. Moreover, in order to set aside such a claim some injury to the mortgagor must be shown.²

§ 824. *Sale of the mortgaged property by the trustee under the power of sale upon a default.*—The usual mortgage of a corporation contains a provision that upon default in any of the conditions the trustee may proceed to sell the property at public sale after a specified notice and advertisement thereof have been made. This power of sale is an old mode of foreclosure, and was formerly quite common. In most of the states the mode of sale in such cases is regulated by statute. The remedy is a summary one, inasmuch as no suit in equity is involved. It is, however, a harsh remedy and is not particularly favored by the courts. The various equities of creditors cannot be adjusted in such a foreclosure, as they may be in a suit in equity to foreclose. Strict compliance with the pro-

for damages for an injury done while the trustees are in possession may be enforced against the property in the trustees' possession. *Wilkinson v. Fleming*, 30 Ill. 353 (1863). The trustees are liable for injuries to passengers the same as the company would have been if in possession. *Sprague v. Smith*, 29 Vt. 421 (1857); *Lamphear v. Buckingham*, 33 Conn. 237 (1866); *Ballou v. Farnum*, 91 Mass. 47 (1864); *Rogers v. Wheeler*, 43 N. Y. 598 (1871), where the trustees were operating the road after sale. Where the trustees take possession of the road and operate the same and afterwards foreclose and buy the same, a claim for freight earned while they are operating it cannot be offset by a note against the company coming due after the trustees took possession. *Murray v. Deyo*, 10 Hun, 3 (1877). Creditors who by compromise are made directors cannot be held liable as partners in the running of the road. *Beeson v. Lang*, 85 Pa.

St. 197 (1877). A railroad is liable for torts although it has turned over the road to mortgage trustees. *Naglee v. Alexandria, etc. R. R.*, 83 Va. 707 (1887). As to the liability of a new company for the debts of a receiver of the old company, see § 890, *infra*.

¹ *Gaskill v. Gosling*, [1896] 1 Q. B. 669. Where a mortgage gives the trustees power to appoint a receiver to carry on the business of the company as an agent and the trustees do so, they are not liable for the debts of the receiver after winding-up proceedings against the company have been commenced. *Gosling v. Gaskell, etc.*, [1897] A. C. 575.

² *Copsey v. Sacramento Bank*, 133 Cal. 659, 663 (1901). Where the trustee sells under the power of sale and buys the property himself, he having purchased the debt secured by a trust mortgage, the person owning the debt and who knew nothing about the sale may have the sale set aside. *Cheney v. Murto*, 17 Colo. App. 149 (1902).

visions of the mortgage and of the statute is required where sale is made under the power of sale, and irregularities which are cured by a decree in a suit for foreclosure may be fatal to a sale under this power of sale. Hence it is unusual to foreclose a corporate mortgage by a sale under the power of sale and without a suit in equity. Various decisions on this subject are given in the notes below.¹ A sale under a power of sale is good where the first pub-

¹ The sale of mortgaged property under a power of sale must comply strictly with the statute or mortgage provisions. *Shillaber v. Robinson*, 97 U. S. 68 (1877). A trustee's sale of property under a deed of trust is valid though the price was very small, and though the *cestui que trust*, a corporation, purchased. *Clark v. Trust Co.*, 100 U. S. 149 (1879). If a sale is made by the trustee without judicial proceedings at substantially the hour as advertised, this is sufficient, no objection to the delay having been made at the time. *Etna, etc. Co. v. Marting, etc. Co.*, 127 Fed. Rep. 32 (1904). A sale by the trustee without a notice from the bondholders, as required by the terms of the mortgage, is illegal. *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (1883). The trustee should not sell under his power of sale if there is any doubt as to the priority of liens. That question should be settled first. *Washington, etc. R. R. v. Alexandria, etc. R. R.*, 19 Gratt. (Va.) 592, 616 (1870). The trustee may, under this provision, file a bill for specific performance and to be put in possession. The court will put him in possession as receiver and will order him to sell the property if the interests of the parties call for a sale. *McLane v. Placerville, etc. R. R.*, 66 Cal. 606 (1885), holding that such sale may be ordered although the principal is not due and sale is not authorized for non-payment of the interest. If the statutes of the state prohibit any proceedings by the mortgage except by suit for foreclosure in equity, a sale by the trustees under the power of sale is illegal, and the

corporation may make them account for the property. But it must offer to redeem, and long delay may be fatal. Its stockholders must do the same if they sue, and must allege a request to the corporation to sue. *Samuel v. Holladay*, 1 Woolw. 400 (1869); s. c., 21 Fed. Cas. 306. A sale by the trustee as provided for by the trust deed is the proper remedy where the property runs into different states. The statutes of any state in relation to foreclosure by advertisement may be complied with at the same time. *Farmers' L. & T. Co. v. Bankers, etc. Tel. Co.*, 44 Hun, 400 (1887). A sale by the trustee under the express power of sale may be subject to the mortgagor's right to redeem. *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882). It would seem that a *bona fide* purchaser at a trustee's sale under the power of sale is not bound to investigate whether the debt has been paid or not. But a purchaser chargeable with knowledge of that fact is not protected. *Chicago, etc. R. R. v. Kennedy*, 70 Ill. 350 (1873). Where a statute authorizes bonds and gives them a lien on the company's property, the lien is held to have been satisfied by a sale after notice by the trustee of a mortgage given subsequent to secure said bonds. *Brunswick, etc. R. R. v. Hughes*, 52 Ga. 557 (1874). In *Collins v. Central Bank*, 1 Ga. 435 (1846), such a lien was upheld, no foreclosure having been made. Under a power of sale contained in a mortgage, a sale at public auction by the trustee may be made. Although the advertisement of sale requires a cash payment of one-third,

lication is more than thirty days before the sale, the mortgage itself providing for thirty days' notice of the sale. A description of the property in the language used in the mortgage is sufficient.¹

The mortgage may provide for any mode of sale, even without notice, unless the statutes of the state prescribe otherwise.² Some-

yet the mortgagee after the sale may give credit for the whole if the mortgagor does not object. The mortgagee so selling acts as a trustee for all creditors, and is not held liable for errors of judgment and discretion. *Markey v. Langley*, 92 U. S. 142 (1875). A court of equity may order the trustee to sell under the power of sale and to bring the proceeds into court for distribution. *Railroad Co. v. Bradleys*, 7 Wall. 575 (1868). Sales and conveyances of parts of the mortgaged property by the trustees of the mortgages were upheld in *Clafin v. South Carolina R. R.*, 8 Fed. Rep. 118, 138 (1880). Concerning the reasons why sales under the power of sale are not often made, see also *Jones, Corp. Bonds*, § 29. A mortgage on land in Colorado may provide for a sale in New York upon default. In such a case the sale in New York need not conform with the statutes of New York in reference to such sales of real estate located in New York. *Carpenter v. Black Hawk etc. Co.*, 65 N. Y. 43 (1875). The sale under the statute extinguishes the rights of a second mortgagee. *Searles v. Jacksonville, etc. R. R.*, 2 Woods, 621 (1873); s. c., 21 Fed. Cas. 929. In Maryland, by statute, where the property is sold under power of sale a mortgagee must give a bond to the state to abide any order which a court of equity may make concerning such sale. *Erb v. Grimes*, 94 Md. 92 (1901).

¹ *Bell Silver, etc. Co. v. First Nat. Bank*, 156 U. S. 470 (1895). A statute declaring that a mortgage shall not be such a conveyance as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale does not prevent

the mortgage providing for a sale by advertisement and such a sale may be made. When such "a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity of redemption." Compliance with all the essential requirements is sufficient. *Bell Silver, etc. Co. v. First Nat. Bank*, 156 U. S. 470 (1895).

² Unless a statute prohibits it, the parties to a mortgage may agree to any method of sale, even without notice, and may so agree as to that part of the property which is situated in other states. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). A sale without notice under a mortgage authorizing a sale upon sixty days' publication of notice, is void. *Bigler v. Waller*, 14 Wall. 297 (1871). As a matter of fact, however, the statutes of the state generally do regulate the mode of selling under such a power and in that case the statute, of course, must be strictly followed. Where the mortgage provides for the trustee taking possession after default and sixty days' notice of the intent to take possession, and for authority to sell after sixty days' publication, the two periods are successive, and one hundred and twenty days in all are required. *Macon, etc. R. R. v. Georgia, etc. R. R.*, 63 Ga. 103 (1879). Under a provision that the trustees may take possession, and that they may sell at their option, "they may enter and afterwards decline to sell, or they may both enter and sell, when the conditions as to default, application, notice, and persistence in default have all happened. The income arising between entry and sale they are of course to use for the

times it provides that the trustee shall take possession and operate the road, or take possession and sell the property, as he thinks best.¹ All these provisions relative to the trustee's entering into possession of the property and holding it or selling it do not affect or take away the right of the trustee to foreclose the mortgage whenever there is a default in the payment of the principal or interest. The power of sale is an additional or alternative remedy. It is not an exclusive remedy. The trustee may foreclose the same as though there were no provisions in the mortgage for the trustee's selling or taking possession.² A provision that the only method

purposes of the trust." *Macon, etc. R. R. v. Georgia, etc. R. R.*, 63 Ga. 103 (1879).

1 Under the clause authorizing the mortgagee to take possession and receive and apply the income to the debt, the mortgagee may take possession on failure to pay the interest by reason of damage to the mortgaged canal owned by the mortgagor. The mortgagor cannot insist upon a sale. The bondholders may incur the property in order to repair it. A majority of the bondholders rule. *State v. Brown*, 73 Md. 484 (1891). In *Macon, etc. R. R. v. Georgia, etc. R. R.*, 63 Ga. 103 (1879), the trustee was authorized by the mortgage to take possession and then to sell or not to sell, as he might deem best.

2 If a mortgage contains a power of sale by advertisement at public auction for cash upon the request of the holder or holders of seventy-five per cent. in amount of the bonds secured thereby, that remedy is cumulative, and the restriction does not operate upon the right to foreclose by bill in equity, especially when in a separate clause it is provided that nothing in the mortgage contained shall be held or construed to prevent or interfere with the foreclosure of the instrument by any court of competent jurisdiction. *Morgan's, etc. Co. v. Texas, etc. Ry.*, 137 U. S. 172 (1890); *Central T. Co. v. Texas, etc. Ry.*, 23 Fed. Rep. 846 (1885); *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886). Even though a

mortgage provides that the trustee shall not take possession until six months after default, yet a court of equity may in a foreclosure suit appoint a receiver before the six months expire. *Blanton v. Kentucky, etc. Co.*, 120 Fed. Rep. 318 (1902); *aff'd*, 149 Fed. Rep. 31. A trustee of a pledge of stock for the payment of interest on certificates issued by the corporation may on default file a bill in equity to have the stock sold, even though the trust agreement provides for another remedy. *Land, etc. Co. v. Asphalt Co.*, 121 Fed. Rep. 192 (1903). Powers of sequestration and sale given to the trustee are cumulative remedies of the courts. When a bondholder, on refusal of the trustee to act, prosecutes a suit in his own name for the payment of overdue interest by the foreclosure of the mortgage, he is restricted to the usual remedies of the court appropriate to the purpose. *McFadden v. May's Landing, etc. R. R.*, 49 N. J. Eq. 176 (1891). A provision that the trustee may sell after notice to the company does not require notice to be given before commencing foreclosure suit. *Alabama, etc. Mfg. Co. v. Robinson*, 56 Fed. Rep. 690 (1893). The right given by mortgage to take possession of the road, or to sell it, does not prevent the trustee's foreclosing, and asking for the appointment of a receiver without any action of the bondholders. *Phinizz v. Augusta, etc. R. R.*, 56 Fed. Rep. 273 (1893). The clause authorizing the trustee to take

of enforcing a mortgage shall be by a public sale by the trustee is

possession and to foreclose by a sale upon the request of one-third in value of the bondholders is a cumulative, *i. e.*, an additional, remedy. It is "not exclusive of the rights and remedies given by the law to mortgagees, in case of default in payment of the mortgage debt according to the terms of the mortgage." *Dow v. Memphis, etc. R. R.*, 20 Fed. Rep. 260 (1884). The power given by a mortgage to the trustees to sell "if, after notice is served on the president of said company, the same shall remain unpaid for six months after such default," does not prevent foreclosure by suit without such notice. *Robinson v. Alabama, etc. Mfg. Co.*, 48 Fed. Rep. 12 (1891). "The insertion of a power of sale in a deed of mortgage neither deprives the mortgagee of his right to strict foreclosure, where such right would otherwise exist, nor prevents a court of equity from foreclosing by a sale made under its direction in cases where it finds a strict foreclosure is not matter of absolute right on the part of the mortgagee, and a strict foreclosure would be inequitable." *Hall v. Sullivan R. R.*, 11 Fed. Cas. 257 (1857). The mere presence of a power of sale contained in a mortgage does not exclude other modes for foreclosure provided by law, but it is in addition to them. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). In *Central Trust Co. v. New York, etc. R. R.*, 33 Hun, 513 (1884), the defendant, a railroad company, executed a mortgage upon its road to the plaintiff as trustee, to secure the payment of bonds issued by it. The mortgage provided, among other things, that if the company should make default in the payment of the principal moneys secured by the bonds, or any part thereof, "or in the due and punctual payment of the interest, or any part thereof, from time to time accruing and payable

upon such bonds, or any of them, at the time and in the manner provided for payment of such principal or interest," and if such default should continue for twelve months, then the trustee might enter into and take possession of the road, and might sell the same upon giving three months' notice of the time and place of sale. Another provision of the mortgage authorized the company to remain in the possession of the road until some default had been made in payment of the principal and interest. *Held*, that the provision authorizing the entry and sale by the trustee, upon the expiration of twelve months after the default of the company in paying the principal or interest, did not prevent the trustee from at once bringing an action to foreclose the mortgage, to collect any instalment of interest falling due under the terms of the bonds as soon as default was made in its payment. A provision that the trustees, after default, should sell the property upon the request of a certain number of bondholders is no bar to a bondholder's suit on his bonds. *Philadelphia, etc. R. R. v. Johnson*, 54 Pa. St. 127 (1867). Although the mortgage provides that upon default the trustee, upon the request of one-half in amount of the bondholders, shall take possession and sell, yet this does not prevent foreclosure, and if the trustee refuses to foreclose, a bondholder may file a bill to compel him to take possession and foreclose. The trustee may foreclose without a request, although there can be a sale only on request. *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881); *Alexander v. Central R. R.*, 3 Dill. 487 (1874); *s. c.*, 1 Fed. Cas. 363. "The power of sale in a mortgage did not exclude the right of foreclosure by judicial proceedings. It was but a cumulative remedy." *Eaton, etc. R. v. Hunt*, 20 Ind. 457 (1863). To

void and does not prevent a suit in equity to foreclose.¹ But a provision in a mortgage authorizing trustees to sell without judicial proceedings and without appraisal is valid, and no request of the bondholders need be had, even though the mortgage authorized such sale upon the request of a certain proportion of the bondholders or without such request.² The bankruptcy court may enjoin the mortgagee of an insolvent corporation, which has passed into bankruptcy, from selling the mortgaged property, under the power of sale given by the mortgage. The trustee in bankruptcy may take possession of the property or refuse to do so, as he deems best.³

Sometimes there is a very decided advantage in having the trustee sell rather than foreclose, inasmuch as a foreclosure and receiver may subject the property to claims for old supplies, labor, etc., which the court may require to be paid as a condition of the receivership.⁴ In Pennsylvania at an early day, inasmuch as a bill in equity to foreclose a mortgage would not lie, the court would compel the trustee to sell under the power of sale.⁵

same effect, *Williamson v. New Albany, etc. R. R.*, 1 Biss. 198 (1857); s. c., 30 Fed. Cas. 12. After foreclosure by suit, the power of sale given by the mortgage to the trustee cannot be exercised to cut off the lien of a judgment creditor. *Avery & Sons v. Texas, etc. Agency*, 62 S. W. Rep. 793 (Tex. 1901). The right given by the mortgage to the trustee to take possession and sell does not prevent foreclosure. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899).

¹ *Reinhardt v. Interstate, etc. Co.*, 63 Atl. Rep. 1097 (N. J. 1906). See also § 804, *supra*.

² *Etna, etc. Co. v. Marting, etc. Co.*, 127 Fed. Rep. 32 (1904).

³ *In re Jersey, etc. Co.*, 138 Fed. Rep. 625 (1905).

⁴ See § 861, *infra*. Where the trustee sells the property without suit and without applying for a receiver, preferential claims are cut off. *Louisville, etc. R. R. v. Memphis Gaslight Co.*, 125 Fed. Rep. 97 (1903), holding also that the principle, that earnings obtained by the use of supplies and used to pay interest and betterments

may be repaid out of the money realized on a foreclosure sale, does not apply to a gas plant and certainly does not apply where the trustees sell without suit and without a receiver, and does not apply where a bill of complaint filed before such application does not set forth dates and amounts of the diversion and of the use of the coal and coke.

⁵ The trustee of the mortgage, being within the jurisdiction of the court, may be authorized and compelled to sell whatever interest of the company will pass under his sale made in accordance with the power of sale contained in the mortgage, although a part of the road is in another state. The bill in this case was filed by the trustee and a bondholder. *McElrath v. Pittsburgh, etc. R. R.*, 55 Pa. St. 189 (1867); s. c., 68 Pa. St. 37. See § 834, *infra*, as to foreclosures in Pennsylvania. The court may order the trustees to exercise the power of sale given to them by the mortgage. *Youngman v. Elmira, etc. R. R.*, 65 Pa. St. 278 (1870). Where the deed in trust makes it the duty of the trustees upon default to take possession and sell the

Where there are two or more trustees, a power of sale cannot be exercised by a part of them.¹

Under certain circumstances a trustee may purchase at the foreclosure sale for the benefit of the bondholders. A reorganization of the company may also be brought about for the benefit of the bondholders. These questions, however, are discussed elsewhere.²

C. BONDHOLDERS' SUITS TO FORECLOSE AND TO PROTECT OR ENFORCE THEIR RIGHTS.

§ 825. *Bondholders may bring suit to foreclose where the trustee declines to do so after default.*—This is a well-established principle of law. It is the duty of the trustee to foreclose where a default has taken place. If, however, he refuses to do so, the law does not require the bondholders to remove the trustee or file a bill to compel him to act, but the law allows the bondholder himself to file a bill for the foreclosure of the mortgage.³ Where the two trustees of

road, and they decline so to do, the court will appoint a receiver. *Wilmer v. Atlanta, etc. Ry.*, 2 Woods, 409 (1874); s. c., 30 Fed. Cas. 73.

¹ *Pennsylvania Co. v. Bauerle*, 143 Ill. 459 (1892).

² See ch. LIII, *infra*.

³ If the trustee declines to foreclose, a bondholder may do so and make him a party defendant. *Hotel Co. v. Wade*, 97 U. S. 13 (1877). If the trustee "neglects or refuses to move, any bondholder may proceed, by bill filed in behalf of himself and the other members of the class of creditors to which he belongs, to compel a sale of the mortgaged premises, a removal of the trustee, or such other relief as may be appropriate." *Commonwealth v. Susquehanna, etc. R. R.*, 122 Pa. St. 306 (1888). The holder of an unpaid coupon may foreclose after a request to the trustee to foreclose and the failure of the latter to do so. No offer of indemnity to the trustee is necessary if the trustee does not demand the same. The name of the owners of the bonds need not be set forth if unknown to the plaintiff. *Citizens' Bank v. Los Angeles, etc. Co.*, 131 Cal. 187 (1900). Where the corporation refuses to pay the interest on certain

bonds on the ground that they were issued for property concerning which misrepresentations were made, the court will not foreclose the mortgage at the instance of such bondholder, unless the bondholder first brings a suit at law on the coupons and has the question of fraud determined. *Nashua, etc. Bank v. Burlington, etc. Co.*, 99 Fed. Rep. 14 (1900). In *Campbell v. Railroad Co.*, 1 Woods, 368 (1871); s. c., 4 Fed. Cas. 1178, a part of the bondholders brought suit for foreclosure, alleging that one trustee was in Europe and the other refused to act. A bondholder may sue for foreclosure, for non-payment of interest when the mortgage is given to secure interest as well as principal. *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47, 68 (1882). Although the mortgage provides that upon default the trustee, upon the request of one-half in amount of the bondholders, shall take possession and sell, yet this does not prevent foreclosure, and if the trustee refuses to foreclose, a bondholder may file a bill to compel him to take possession and foreclose. *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). Where the trustee intends to sell only such part of the railroad as is within

a mortgage have discretionary power to foreclose, and they disagree, a bondholder may foreclose.¹

A bondholder may commence foreclosure before there is any default in interest, where there is a default in the payment of taxes and the company is insolvent.² A bondholder may bring such a suit to foreclose, even though he bought his bonds for that express purpose.³ The holder of past-due coupons has the same right to fore-

one state, a bondholder may file a bill to compel him to sell the whole road at one time. The federal court has jurisdiction over the entire line. *Randolph v. Wilmington, etc. R. R.*, 11 Phila. 502 (U. S. C. C. 1876); s. c., 20 Fed. Cas. 264. See also *Mercantile T. Co. v. Lamoille, etc. R. R.*, 16 Blatchf. 324 (1879); s. c., 17 Fed. Cas. 25; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). If the trustees are officers of the company, and hence have adverse interests, any bondholder may file a bill to foreclose, making the trustees parties defendant. *Webb v. Vermont, etc. R. R.*, 9 Fed. Rep. 793; s. c., 20 Blatchf. 218 (1881). Where the trustees' foreclosure is collusive and brought for the purpose of paying off bonds paying a high rate of interest, a bondholder may stop it by buying all bonds which desire the foreclosure. *Tillinghast v. Troy, etc. R. R.*, 48 Hun, 420 (1888); *aff'd*, 121 N. Y. 649. A bondholder may bring suit to foreclose where the mortgage was made to the individual, not as trustee, but as an individual, who first took the bonds, and a request to sue need not be made to him. *Mason v. York, etc. R. R.*, 52 Me. 82, 107 (1861), holding also that all the bondholders need not be joined. If bonds are owned by two or more jointly, one of them cannot bring a bondholder's suit unless the other joint owners join. *Messchaert v. Kennedy*, 4 McCrary, 133 (1882); s. c., 13 Fed. Rep. 242. In *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870), foreclosure by bondholders was sustained because the trustees were dead. Bonds issued in Wisconsin in pledge

for a debt of the company, with the stipulation that they should be accounted for for at least seventy-five cents on the dollar, are void under the statutes, and the pledgor cannot maintain a bill in equity to enforce their lien by reason of the bonds. *Pfister v. Milwaukee Electric Ry.*, 83 Wis. 86 (1892). A bondholder may join in his suit to foreclose a cause of action in which he claims bonds held by others. *Hale v. Nashua, etc. R. R.*, 60 N. H. 333 (1880). Even though a mortgage provides that a suit to foreclose may be brought by the trustee, yet if the trustee unreasonably refuses to foreclose, a bondholder or a couponholder may maintain a suit. *Schultze v. Van Doren*, 64 N. J. Eq. 465 (1902).

¹ *Farmers', etc. Co. v. Lake Street, etc. R. R., Co.*, 122 Fed. Rep. 914 (1903).

² The trustees were made defendants, and a request to them to foreclose was alleged. A receiver was appointed. *Putnam v. Jacksonville, etc. Ry.*, 61 Fed. Rep. 440 (1893). An owner of five bonds may file a bill alleging the inability of the railroad to pay the next coupons and other pressing debts, the dangers of attachments and the stoppage of business and the disruption of the railroad, and ask for and obtain a receiver, when it is clear that a receivership is inevitable. *Brassey v. New York, etc. R. R.*, 19 Fed. Rep. 663 (1884).

³ A bondholder's foreclosure is valid, even though he purchased the bonds at the instigation of certain interests hostile to the railroad, and even though he expects those interests to

close that a bondholder has. In fact, it usually is on past-due coupons that the suit is commenced.¹ A pledgee of bonds may bring suit for foreclosure the same as the pledgor might do.² In regard to costs and disbursements, one person suing for the benefit of himself and others is entitled to reimbursements if he succeeds, but to no contribution if he fails in the suit.³ The right of bondholders to appeal from the decision of the court is considered elsewhere.⁴

§ 826. *Such a suit, however, cannot be maintained unless the trustee has first been requested to bring it—The suit is for the benefit of all bondholders—Parties plaintiff and defendant in such a suit.*—The proper person to foreclose is the trustee to whom the deed of trust runs. Unless he refuses or neglects to perform his duty, his *cestuis que trust*, the bondholders, have no standing in court. Hence the bondholder must in good faith place the matter before the trustee and ask him to commence suit. If the trustee then refuse or decline to do so the bondholder may sue. But the bondholder in his bill of complaint must allege the request to the trustee and the refusal or neglect of the trustee to act.⁵ A bond-

protect him from loss. If he owns the bonds himself, this is sufficient. *McFadden v. May's Landing, etc. R. R.*, 49 N. J. Eq. 176 (1891). A bondholder may foreclose if the trustee refuses to do so after default, and it is immaterial what the motive of the bondholder is. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899). See also § 736, *supra*.

1 See § 836, *infra*.

2 Parties holding bonds as collateral security may foreclose, the same as owners of bonds. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408, 439 (1885); *McCurdy's Appeal*, 65 Pa. St. 290 (1870); *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885); *Gilman v. New Orleans, etc. R. R.*, 72 Ala. 566 (1882); *Jesup v. City Bank*, 14 Wis. 331 (1861), where the corporation itself was the pledgor. Where the pledgees of bonds join with the trustee in foreclosure, the pledgor must be joined. *Ackerson v. Lodi, etc. R. R.*, 28 N. J. Eq. 542 (1877).

3 *Hobbs v. McLean*, 117 U. S. 567 (1886). See also § 879, *infra*.

4 See § 849, *infra*.

5 Quoted and approved in *Virginia*,

etc. Co. v. Fisher, 104 Va. 121 (1905). Request to the trustee to foreclose is first necessary. *General Elec. Co. v. La Grande, etc. Elec. Co.*, 87 Fed. Rep. 590 (1898). A request to the trustees to bring suit is necessary, and is not excused by the fact that the trustees are joined as complainants with the complaining bondholder. *Consol, etc. Co. v. City of San Diego*, 92 Fed. Rep. 759 (1899). The bondholder must allege and prove a request to the trustee to bring the suit. *Morgan v. Kansas, etc. Ry.*, 15 Fed. Rep. 55 (1882). The case of *Davies v. New York Concert Co.*, 41 Hun, 492 (1886), was the ordinary case of a foreclosure suit instituted by a bondholder upon the refusal of the trustee to institute the suit. The court, however, held that the bondholder's suit would not lie, inasmuch as the right to foreclose had not yet accrued, and inasmuch as the request to the trustee did not specifically state the failure of the mortgagor to pay taxes, one of the grounds upon which the suit for foreclosure was instituted. In *Weetjen v. Vibbard*, 5 Hun, 265 (1875), a bondholder's suit to restrain two of the

holder may foreclose when the trustee has gone abroad and is credibly reported to be insane. It is not necessary to prove a request to him to foreclose, nor is it necessary to have a new trustee appointed.¹ A holder of mortgage bonds may file a bill for foreclosure, without such request to the trustee, where he alleges that the trustee has committed a breach of trust and has abandoned the trust.² Where the trustee is antagonistic, being interested in a second mortgage, a bondholder need not request it to foreclose before foreclosing himself, even though the mortgage provides for such request.³ Such a suit brought by a bondholder must be for himself and all other bondholders.⁴ A suit, however, brought by a bondholder in behalf of himself and other bondholders who may choose to join with

three trustees from a breach of trust failed because no request to bring the suit had been made to the third trustee. If the trustee has commenced foreclosure, and all but one of the bondholders propose to enter a decree avoiding foreclosure and providing for a reorganization, that bondholder may insist upon a foreclosure, but he cannot bring a separate suit for that purpose. *Stern v. Wisconsin Cent. R. R.*, 1 Fed. Rep. 555 (1880). That a bondholder may foreclose after a request to the trustee, see also *Wilmer v. Atlanta*, etc. R. R., 2 Woods, 409 (1875); s. c., 30 Fed. Cas. 73; *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870), where the trustees were dead and the bondholders sued; *Western R. R. v. Nolan*, 48 N. Y. 513 (1872), where the suit of the *cestui que trust* to set aside a tax failed because no request to the trustees had been made and the latter had not been made co-defendants. Bondholders may foreclose where the trustee has become the assignee of all the corporate property, and hence has interests adverse to the bondholders. *American, etc. Co. v. Kentucky, etc. Co.*, 51 Fed. Rep. 826 (1892). A single bondholder may foreclose for his interest where the trustees refuse to proceed, even though the mortgage provides that the trustees shall foreclose upon the request of a majority of the bondholders in amount. *Beekman v. Hudson, etc. Ry.*, 35 Fed. Rep.

3 (1888). A bondholder may foreclose if a mortgagee unreasonably neglects or refuses to do so. A provision in the mortgage that no proceedings at law or in equity shall be taken by any bondholder secured thereby, to foreclose the equity of redemption independently of the trustee, until after the refusal of the trustee to comply with a requisition first made upon him by the holders of a certain percentage of the bonds secured by such mortgage, is reasonable and valid. Where such provision exists, a single bondholder cannot commence suit to foreclose. *Seibert v. Minneapolis, etc. Ry.*, 52 Minn. 148 (1893); s. c., 58 Minn. 39. *Cf.* § 804, *supra*. No request need be made to trustees to whom property has been conveyed for the benefit of creditors without any right to foreclose. *Tompkins Co. v. Catawba Mills*, 82 Fed. Rep. 780 (1897).

1 *Ettlinger v. Persian Rug, etc. Co.*, 142 N. Y. 189 (1894).

2 *Belknap, etc. Bank v. Lamar, etc. Co.*, 28 Colo. 326 (1901); s. c., 28 Colo. 344.

3 *Cochran v. Pittsburg, etc. R. R.* 150 Fed. Rep. 682 (1907).

4 A bondholder who forecloses does so for the benefit of all the bondholders and not of himself alone. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). The holder of any one of a series of bonds secured by a

him does not make the judgment binding on those who do not join.¹ Where a request to the trustee to foreclose with indemnity is first required, a bondholder must show that he offered indemnity, or that some excuse existed, before he sues for foreclosure.² It is not necessary to make all the bondholders parties to the suit.³ The other bondholders, however, may at any time, upon proper application, become parties to the suit.⁴ Where a bondholder is foreclosing, an offer of the defendant to pay his bonds and the costs to date, upon the assignment of his bonds to the defendant, should be made to the owner of the bonds and not to the attorney.⁵

Although one bondholder brings suit to foreclose in behalf of all bondholders, yet he will not be allowed to obtain any advantage over them. He must see that the sale is conducted fairly and that all are treated alike.⁶ Where a bondholder forecloses, and by collusion buys in the property at an inadequate price, he may be held liable for the value of the property.⁷

The trustee himself is a necessary party defendant. Otherwise the trustee might bring another suit and the first suit be of no avail.

mortgage made to trustees may, on refusal of the trustees so to do, maintain a suit for the foreclosure of the mortgage for default in the payment of interest. Such suit ordinarily should be brought by the bondholder in behalf of himself and all other bondholders, but an averment to this effect is unnecessary when default has been made only on the bonds held by complainant. *McFadden v. May's Landing, etc. R. R.*, 49 N. J. Eq. 176 (1891). A bondholder may foreclose, but he does so for the benefit of all bondholders, and they may come in as defendants or petitioners. *Martin v. Somerville, etc. Co.*, 16 Fed. Cas. 903 (1856).

1 *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908).

2 *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896).

3 *Wilmer v. Atlanta, etc. Ry.*, 2 Woods, 447 (1875); s. c., 30 Fed. Cas. 73. In *Carpenter v. Canal Co.*, 35 Ohio St. 307 (1880), a foreclosure by a part of the bondholders in behalf of all was held to bind the other bondholders. The other bondholders may, how-

ever, be made defendants in the suit. *Hotel Co. v. Wade*, 97 U. S. 13 (1877).

4 *New Orleans, etc. Ry. v. Parker*, 143 U. S. 42 (1892); *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). In Vermont, in a suit of foreclosure brought by bondholders, other bondholders may come in at any time, even after the case has gone to the upper court on appeal. *Re Chickering*, 56 Vt. 82 (1883).

5 *Whittaker v. Belvidere, etc. Co.*, 55 N. J. Eq. 674 (1897).

6 A bondholder cannot by foreclosure obtain any advantage over other bondholders who are secured by the same mortgage. He must allow other bondholders to intervene, and must protect them equally in the decree. *New Orleans, etc. Ry. v. Parker*, 143 U. S. 42 (1892), holding that a decree ordering a sale for the sole benefit of a few bondholders was invalid. To same effect, *Jackson v. Ludeling*, 21 Wall. 616 (1874); s. c., 99 U. S. 513 (1878); *New Orleans R. R. v. Morgan*, 10 Wall. 256 (1869).

7 *Ettlinger v. Persian, etc. Co.*, 66 Hun, 94 (1892); *aff'd*, 142 N. Y. 189.

Another reason for this rule is that all the bondholders are bound if the trustee is made a party defendant.¹

If the trustee at any time prefers to take up the suit and carry it on, he may make an application for that purpose. Thereupon and thereafter the trustee controls the conduct of the case. So, also, where the trustee files a bill of foreclosure, after a bondholder has filed such a bill, the court will consolidate the two and allow the trustee to control the case.²

§ 827. *Bondholders may foreclose in the federal courts if the requisite diverse citizenship exists.*—Such is the established rule, and it is an important one.³ In these days nearly all important rail-

1 In a suit by the bondholders for an accounting and foreclosure, the trustees of the deed of trust are necessary parties defendant. *Mercantile T. Co. v. Portland, etc. R. R.*, 10 Fed. Rep. 604 (1882). In a bondholder's suit to compel the corporation to apply its earnings to the payment of the bonds, the trustee of the deed of trust is a necessary party. *Barry v. Missouri, etc. Ry.*, 22 Fed. Rep. 631 (1884). In a bondholder's suit the trustee is a proper party defendant. *Massachusetts Mut. L. Ins. Co. v. Chicago, etc. R. R.*, 13 Fed. Rep. 857 (1882). A non-resident trustee is not a necessary party to a bondholder's suit, where the other four trustees of the deed in trust have been served. *Stewart v. Chesapeake, etc. Co.*, 1 Fed. Rep. 361 (1880). In *Hale v. Nashua, etc. R. R.*, 60 N. H. 333 (1880), bondholders brought the suit to foreclose, two of the three trustees being in collusion with the corporation to the injury of the bondholders. The court ordered the appointment of two new trustees and the bringing them in as parties. The trustee having obtained judgment the bonds are merged in the judgment. *Stevens v. Union T. Co.*, 57 Hun, 498 (1890), the court holding also that a foreclosure obtained by a bondholder who does not make the trustee a party defendant does not bind the trustee or other bondholders, and receiver's certificates, allowances, etc., in such an action fail, and that

laches is no bar unless the facts were fully known. But in an action by an income bondholder to compel the corporation to ascertain the amount of income as required by the terms of the mortgage, the trustee is not a necessary party. *Spies v. Chicago, etc. R. R.*, 30 Fed. Rep. 397 (1887). A bondholder may foreclose and should make the trustee a party defendant. *First Nat. Bank v. Radford Trust Co.*, 80 Fed. Rep. 569 (1897). In Texas a bondholder may foreclose without joining the trustee as a party defendant. *Hammond v. Tarver*, 89 Tex. 290 (1896).

2 Trustees who are admitted as parties in a bondholder's suit to foreclose control the case thereafter. *Richards v. Chesapeake, etc. R. R.*, 1 Hughes, 28 (1876); s. c., 20 Fed. Cas. 692. The trustee may file a bill to foreclose after the bondholder's bill is filed, and then the two suits will be consolidated and the trustee controls the case. *Farmers' L. & T. Co. v. Central R. R.*, 4 Dill. 533 (1877); s. c., 8 Fed. Cas. 1037.

3 If the trustees decline to act, then the bondholders may bring suit. They may sue in the federal court if they are citizens of states other than the states wherein the trustees and corporation are citizens. If one of the complainants is a citizen of the same state as any defendant, the bill may be dismissed as to him and proceed as to the others. *Nebraska, etc. Nat.*

road foreclosures are brought in the federal courts. This is done in order to include the whole road, where it runs into several states; also to obtain one receiver only; also to secure a decision free from prejudice or local influence; and also to obtain the benefit of the established tendency of the federal courts to uphold and enforce bonds instead of allowing a repudiation thereof. Hence, a bondholder who brings a foreclosure suit generally brings it in the federal court if possible.¹ It has been held that all the bondholders who come into the suit must be citizens of states other than that of the defendants.² But even though the trustee comes into a bondholder's suit and takes his place, this does not change the parties to the extent of defeating the

Bank v. Nebraska, etc. Co., 14 Fed. Rep. 763 (1883). A mortgagee may foreclose in the federal court, although neither he nor the mortgagor resides in the district where the property is and the suit is brought. *Wheelwright v. St. Louis, etc. Co.*, 50 Fed. Rep. 709 (1892). Although the trustees of the deed of trust in a suit brought by the bondholders are made defendants, the federal court is not ousted of jurisdiction by reason of the fact that the complainants and the trustees are citizens of the same state. They are merely nominal parties. *Barry v. Missouri, etc. Ry.*, 27 Fed. Rep. 1 (1886). Where the trustee files a bill in the federal court and the court has no jurisdiction, the trustee may be charged personally with costs. *Tug River, etc. Co. v. Brigel*, 70 Fed. Rep. 647 (1895). A bondholder cannot maintain a suit in the United States court to cancel and avoid mortgages where his proportionate interest is less than \$2,000. *Cowell v. City, etc. Co.*, 121 Fed. Rep. 53 (1903).

¹ Bondholders residing in another state may institute the foreclosure suit in the federal court. All the bondholders, however, will be allowed to participate in the amount realized by the foreclosure. *Jackson, etc. Co. v. Burlington, etc. R. R.*, 29 Fed. Rep. 474 (1887). Although the mortgage has been foreclosed and the property

sold to the trustees, who then lease it, in a suit brought by the trustees to enforce the lease the trustees are necessary and not merely nominal parties, the funds in their hands not yet having been distributed, even though a corporation has been formed to take over the property from the trustees. *Knapp v. Railroad Co.*, 20 Wall. 117 (1873). In *Hotel Co. v. Wade*, 97 U. S. 13 (1877), Pennsylvania and Ohio bondholders foreclosed a mortgage on Nebraska hotel property. In a suit by trustees to foreclose, they cannot sue in the federal court if one of them is a citizen of the same state as the mortgagor, even though the bondholders are residents of other states. *Coal Co. v. Blatchford*, 11 Wall. 172 (1870). A bondholder may sue to foreclose the mortgage securing his bonds, although the trustees have already commenced an action in a state court for such foreclosure. See § 839, *infra*.

² In *Mangels v. Donau, etc. Co.*, 53 Fed. Rep. 513 (1892), a bondholder brought suit to foreclose the mortgage. Other bondholders intervened and were joined as parties plaintiff. The federal court dismissed the case on the ground that, although the original plaintiff was a citizen of another state, some of the other bondholders were citizens of the same state as the defendant. Cf. § 734, *supra*.

jurisdiction of the federal court.¹ Jurisdiction in the federal court in a foreclosure case cannot be obtained by a non-resident bondholder bringing suit, and making both the mortgagor and the trustee of the mortgage parties defendant, the trustee having refused to foreclose, where both of such defendants reside in the same state,² unless the foreclosing bondholder has interests hostile to those of other bondholders.³ The only necessary parties to the foreclosure are the mortgagor and the mortgagee. If judgment creditors who are citizens of the same state as the complainant are joined as defendants in the bill, the complainant may drop them out of the suit by amendment, and by such amendment the jurisdiction of the federal court is maintained. The fact that after the filing of the bill one of the complainants becomes a citizen of the state wherein the defendant resides does not destroy the jurisdiction.⁴ Where the federal court has jurisdiction in a foreclosure suit and takes possession of the property, this possession draws to the court "the right to decide upon conflicting claims to the ultimate possession and control of the property, to marshal all liens upon it, and to enforce them."⁵ Where a general creditor commences suit in the federal court and a receiver is appointed, and then the trustee of a mortgage intervenes and files a cross-bill to foreclose, the court may decree foreclosure, although the mortgagor and mortgagee are citizens of the same state.⁶ Occasionally

¹ *Benson v. City of San Diego*, 100 Fed. Rep. 158 (1900).

² *Shipp v. Williams*, 62 Fed. Rep. 4 (1894). As to whether jurisdiction can be obtained by failure of the defendants to object, see *Central Trust Co. v. McGeorge*, 151 U. S. 129 (1894). A bondholder may bring suit in the federal court, making the trustee a party, although the trustee is a citizen of the same state as other defendants. *Reinach v. Atlantic, etc. R. R.*, 58 Fed. Rep. 33 (1878).

³ *First Nat. Bank of Chattanooga v. Radford T. Co.*, 80 Fed. Rep. 569 (1897).

⁴ *Tug, etc. Co. v. Brigel*, 86 Fed. Rep. 818 (1898).

⁵ *Carey v. Houston, etc. Ry.*, 161 U. S. 115, 133 (1896).

⁶ *Park v. New York, Lake Erie, etc. R. R.*, 70 Fed. Rep. 641 (1895); *Morgan's, etc. Co. v. Texas, etc. Ry.*, 137 U. S. 171 (1890). See also § 844, *infra*, and §§ 734, *supra*, and 845, *infra*; con-

tra, *Richards v. Chesapeake, etc. R. R.*, 1 Hughes, 28 (1876); s. c., 20 Fed. Cas. 692. Where the federal court has taken jurisdiction in a judgment creditor's suit, it may entertain a subsequent foreclosure suit, although the latter could not have been brought by itself alone on account of the citizenship of the parties. *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897); *aff'd in Toledo, etc. R. R. v. Continental T. Co.*, 95 Fed. Rep. 497 (1899). Where the federal court has appointed receivers in a foreclosure suit, it may then acquire jurisdiction of a subsequent foreclosure suit, irrespective of the citizenship of the parties, the *res* being in the possession of the court. *Carey v. Houston, etc. Ry.*, 52 Fed. Rep. 671 (1892). A federal court having possession, through its receiver, of the mortgaged property, has jurisdiction of a suit to foreclose the mortgage, regardless of the citizenship of the parties. *Fish v.*

it is possible to remove the case from the state to the federal courts under some one of the acts of congress allowing removal.¹ The resignation of the trustee after suit has been commenced does not enable the parties to remove the case to the federal court.² Questions relative to a conflict of jurisdiction between the state and federal courts are considered elsewhere.³

§ 828. *Remedy of bondholders where the foreclosure was fraudulent—Intervention—Laches.*—These subjects are considered elsewhere.⁴

§ 829. *A bondholder cannot levy an execution upon the mortgaged property.*—The reason of this rule is that all the bondholders are entitled to share proportionally in the security, and no one bondholder has a right to seize the security himself and exclude the others from participation.⁵

§ 830. *Bondholders' suits in behalf of all the bondholders to prevent waste, etc.*—In addition to bondholders' suits to foreclose the mortgage, where the trustee refuses to do so, the bondholder may bring suit to protect the property where there is imminent danger to it, and the trustee refuses to bring suit.⁶ He may sue to restrain the mortgagor corporation from obeying a state law which has reduced railroad rates.⁷ A bondholder may file a bill to enjoin the enforce-

Ogdensburgh, etc. R. R., 79 Fed. Rep. 131 (1897). Where the federal court has acquired jurisdiction in one foreclosure suit, and has taken possession of the property, it may assume jurisdiction in the other foreclosure suits. *Compton v. Jesup*, 68 Fed. Rep. 263 (1895). Where the federal court has acquired jurisdiction for foreclosure, claimants by lien may file a bill in that court, asserting their right, irrespective of their citizenship. Their bill is in substance an ancillary bill. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893).

¹ A foreclosure suit in a state court involving separate severable controversies may be removed into the federal court as to one of the controversies and thereby drag the rest into the same court. *Wabash, etc. Ry. v. Central T. Co.*, 23 Fed. Rep. 513 (1885). As to the removal of a case to the federal courts by some of the defendants, see *Foster v. Chesapeake, etc. Ry.*, 47 Fed. Rep. 369 (1891). The

court will consolidate two foreclosure suits brought to foreclose the same mortgage, one in the federal court and the other removed to the federal from the state court. *Wabash, etc. Ry. v. Central T. Co.*, 23 Fed. Rep. 513 (1885).

² See § 819, *supra*.

³ See § 839, *infra*.

⁴ See § 848, *infra*.

⁵ This subject is considered in § 772, *supra*. Each bondholder owes a duty to the other bondholders, and the court will not sustain a suit by him on technicalities, which, if successful, would be ruinous to the interests and rights of his fellow bondholders. *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900).

⁶ Quoted and approved in *Virginia, etc. Co. v. Fisher*, 104 Va. 121 (1905).

⁷ See § 816, *supra*, and § 902, *infra*; *Peik v. Chicago, etc. Ry.*, 94 U. S. 164 (1876), one of the "Granger Cases," in which, however, the law was sus-

ment of an ordinance fixing street railway fares, where there is a well-grounded apprehension of loss to him if the ordinance is enforced.¹ But where bondholders delay for five years in applying for an injunction against the city violating a contract with a water-works company, in that the city constructed its own works, the injunction will be refused.² The law applicable to this class of cases is very similar to that applicable to stockholders' suits, where a fraud has been committed and the corporation refuses to bring suit.³ A bondholder may sue to compel the trustee to complete a foreclosure suit, give a deed, and distribute the proceeds.⁴ He may also, of course, sue the trustee to make him account for moneys received.⁵ Although a railroad has been foreclosed and sold by suit in a state court, yet a bondholder may file a bill in the federal court to re-establish the lien of the mortgage on the ground that the foreclosure was collusive, fraudulent, and void. He may sue to reach the stock for which the road was sold by the purchasers to a new corporation. He need not obtain a judgment at law on his bonds before resorting to this suit in equity.⁶ So, also, a bondholder may enjoin the company from taking up a part of the mortgaged railroad.⁷ A bondholder may also sue to enjoin the trustee and company from selling iron rails which are subject to the mortgage,⁸ and in certain cases may enjoin another corporation from using

tained. In *Southern Pac. Co. v. Board of Railroad Com'rs*, 71 Fed. Rep. 437 (1895), a suit instituted to enjoin the reduction of rates, the United States government was allowed to intervene as a creditor. In *Consolidated Water Co. v. Babcock*, 76 Fed. Rep. 243 (1896), the court held that where the owner of the bonds and most of the stock of a water company wished to enjoin the city from contracting with another water company in violation of the rights of the former water company, the former water company was a necessary party to the suit.

¹ *Old Colony T. Co. v. City of Atlanta*, 83 Fed. Rep. 39 (1897).

² *Penn M. L. Ins. Co. v. Austin*, 168 U. S. 685 (1898).

³ See ch. XLV, *supra*.

⁴ *Harrison v. Union Trust Co.*, 80 Hun, 463 (1894); *aff'd*, 144 N. Y. 326.

⁵ *Dwight v. Smith*, 13 Fed. Rep. 50 (1882). By a previous decision in this case, 9 Fed. Rep. 795 (1881), it

was held that a purchaser of the bonds did not acquire an existing cause of action against the trustee. See also § 815, *supra*.

⁶ *Massachusetts Mut. L. Ins. Co. v. Chicago, etc. R. R.*, 13 Fed. Rep. 857 (1882).

⁷ A bondholder may enjoin the corporation from taking up a part of its road, the whole road being subject to the mortgage. *Watt v. Railroad*, 1 Brewst. (Pa.) 418 (1867). Where a county owns the majority of the stock of a turnpike company and condemns the minority and makes the road free, it is personally liable to a mortgagee of the property, even though the mortgagee was a party defendant to the condemnation. *Owen County v. Morgan*, 59 S. W. Rep. 18 (Ky. 1900).

⁸ *Weetjen v. St. Paul, etc. R. R.*, 4 Hun, 529 (1875). See s. c., *sub nom. Weetjen v. Vibbard*, 5 Hun, 265, sustaining a demurrer because a proper request to one of the trustees who was

the name of the mortgagor.¹ A bondholder may protect the property from an illegal tax.² Bondholders have no right to complain of the *ultra vires* acts of the corporation, nor of the frauds of its officers.³ They can only attack acts as fraudulently diverting corporate assets.⁴ A purchaser of bonds who purchases with notice that an alleged covenant in the mortgage securing the bonds, to devote the proceeds of the bonds to the improvement of the property, has been broken, cannot

not implicated, to bring the suit, had not been made.

1 A bondholder may maintain a suit to enjoin another corporation from using the same corporate name as the company which issued his bonds, and thereby obtaining land which secures the bonds of the latter company. It is immaterial that he purchased the bonds for the very purpose of bringing this suit. He may sue in the federal court, being a citizen of California, if the defendant company is organized in Oregon, and his own corporation is organized in Oregon. He must allege that the corporation, although requested so to do, has refused to bring any suit or seek any remedy. *Newby v. Oregon Cent. Ry.*, 1 Sawyer, 63 (1870); s. c., 18 Fed. Cas. 42.

2 A bondholder may maintain a suit to enjoin the collection of illegal taxes. *Commissioners, etc. Co. v. Bancroft*, 203 U. S. 112 (1906). In *Western R. R. v. Nolan*, 48 N. Y. 513 (1872), the court said in a dictum that the beneficiaries may bring suit to protect the trust fund where an illegal tax is laid upon it and the trustees refuse or are reluctant to bring suit to protect the trust fund. The court held, however, in this case, that an injunction to restrain the collection of a tax would not lie.

3 See § 735, *supra*; also the litigation in *Belden v. Burke*, referred to in § 766, *supra*. A bondholder cannot object to the corporation buying the stock of another corporation. *Matthews v. Murchison*, 15 Fed. Rep. 691 (1883). A general creditor who has not obtained a judgment against the

corporation cannot hold the directors liable for unauthorized acts. *Streight v. Junk*, 59 Fed. Rep. 321 (1893). "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor." *Hollins v. Brierfield Coal, etc. Co.*, 150 U. S. 371, 385 (1893). Bondholders cannot sustain a bill in equity to remove a trustee who holds the stock of various gas companies as collateral security for the payment of their bonds, even though such trustee has voted such stock in favor of directors who have made improvident contracts in which such directors were personally interested, it appearing that by the terms of the trust agreement the trustee was to vote such stock as the pledgors directed, until default on the bonds, and it not being shown that the trustee knew that such default had been made. Moreover, such removal will be denied when the trust agreement itself provides for the removal of the trustee by vote in writing of one-third in interest of the bondholders at a meeting called for that purpose, and no reason is shown for disregarding this mode of changing the trustee. *Dillaway v. Boston, etc. Co.*, 174 Mass. 80 (1899).

4 *Force v. Age-Herald Co.*, 136 Ala. 271 (1903).

complain of such breach of covenant, even though the entire proceeds of the bonds were, through the medium of sales of property, diverted to the personal benefit of the stockholders.¹ A bondholder cannot cause the cancellation of bonds, which have been issued to stockholders, on the ground of no consideration, where the bonds are not yet due, and there has been no default, and the plaintiff has no control over the management or earnings or money of the corporation.² A bondholder may have a receiver appointed where he shows that promoters are defrauding the company by selling the bonds and appropriating the proceeds and disabling the company from meeting its bond obligation, various defaults and misfeasances being alleged.³ The purchasers of railroad bonds cannot rescind on the ground that the railroad has used the proceeds for purposes other than those stated in its prospectus.⁴ Where the purchase price on foreclosure sale is not paid, an action lies in behalf of the bondholders to set aside the sale and all subsequent transfers and mortgages as fraudulent,⁵ but a judgment of the federal courts as to subsequent transfers and receivers' certificates cannot be enjoined.⁶ A provision in a mortgage that a certain proportion of the bondholders in interest may modify the bond or mortgage, and postpone the payment of interest, will not be sustained by the courts, where that proportion of the bondholders modify the mortgage for the purpose of compelling the minority bondholders to sell their bonds.⁷ Each bondholder owes a duty to the other bondholders, and the court will not sustain a suit by him on technicalities, which, if successful, would be ruinous to the interests and rights of his fellow-bondholders.⁸ A bondholder has no standing in court to

¹ *Belden v. Burke*, 147 N. Y. 542 (1895). The court said (p. 551) as to the action of the stockholders: "They had raised a vast sum of money by placing a mortgage upon their own property, and had expended and disbursed the money as they thought would best promote their own interests. There is no one who, in this action, has any right to complain of this, unless the bondholders, from whom they borrowed the money, were intentionally deceived to their loss or injury, for which they have no adequate redress at law." The court also said that neither on the ground of a breach of covenant—the covenant being a covenant of the corporation only—nor on the ground of fraud could the action be maintained. The

court referred to the fact that the plaintiff had not paid more for his bonds than they actually were worth, the interest having been promptly paid and the bonds having appreciated in market value.

² *Bibb v. Montgomery Iron Works*, 101 Ala. 301 (1893).

³ *Bird v. People's, etc. Co.*, 158 Fed. Rep. 903 (1908).

⁴ See § 764, *supra*.

⁵ *Stevens v. Central Nat. Bank*, 144 N. Y. 50 (1894).

⁶ *Central Nat. Bank v. Stevens*, 169 U. S. 432 (1898).

⁷ *Hackettstown, etc. Bank v. D. G. Yuengling, etc. Co.*, 74 Fed. Rep. 110 (1896). See also § 807, *supra*.

⁸ *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900).

compel the president of the corporation to return to the corporate treasurer the proceeds of bonds sold by him.¹ A suit at law does not lie against a receiver at the instance of a bondholder to hold the former liable for fraud in managing the property so that it brought a small price at foreclosure sale, even though such a suit might lie in equity.² The bondholders may bring suit to protect the mortgaged property when the trustee might institute such suit, but neglects or refuses to do so when requested.³ Many instances of suits which a trustee may bring for the protection of the property are given elsewhere.⁴ A bondholder, however, who brings suit to protect the property, or to foreclose upon failure or refusal of the trustee to do so, is not allowed pay for his personal services or personal expenses, but may be allowed payment for counsel fees, costs, and necessary expenses in the litigation.⁵ The question of whether the proceeds of the suit are for the benefit of all the bondholders depends on the nature of the suit itself.⁶ Where a receiver has been appointed at the instance of bondholders to preserve the property, and six months later the trustee files an independent bill for foreclosure, the court will consolidate the cases on the motion of the bondholder, but not of the trustee.⁷

§ 831. *Bondholders cannot claim the benefit of all contracts made by the company with third persons.*⁸—The bondholders cannot in all cases claim the benefit of an agreement of a third party with the corporation to pay or guarantee the payment of the bonds,⁹ nor can the

¹ In *Van Weel v. Winston*, 115 U. S. 228 (1885), a bondholder sued to compel the president to account for the proceeds of the bonds which the president had misappropriated. The court said: "The charges in this bill on which relief is sought may be arranged under two heads: 1. Fraudulent misrepresentations of the defendant affecting the character and value of the security on which the bonds in question were negotiated. 2. The violation of certain obligations, in the nature of a trust, which he assumed in regard to the security and ultimate payment of the bonds." The bill was dismissed. See also § 735, *supra*.

² *Fletcher v. Burt*, 126 Fed. Rep. 619 (1903).

³ See §§ 816, 825, *supra*, for instances.

⁴ See § 816, *supra*.

⁵ See § 879, *infra*. In *Cochran v.*

Richmond, etc. R. R., 91 Va. 339 (1895), a bondholder who appealed from the allowances to the receiver's counsel and thereby tied up the fund was punished by a deduction from the amount going to him.

⁶ As to whether other bondholders may participate in the benefits of the judgment, where they have not intervened and become parties to the action, see *Knell v. Buffalo*, 54 Hun, 80 (1889). *Cf.* *Prouty v. Michigan Southern, etc. R. R.*, 1 Hun, 655 (1874); *Re Lewis*, 42 Hun, 542 (1886); *O'Brien v. Browning*, 11 Hun, 179 (1877). See also § 848*k*, *infra*.

⁷ *Bird v. People's, etc. Co.*, 158 Fed. Rep. 903 (1908).

⁸ See § 852, *infra*.

⁹ *National Bank v. Grand Lodge*, 98 U. S. 123 (1878), where the third party agreed to pay for stock by paying the bonds of the company. See also § 775,

bondholders claim that they are entitled to a lien on land which the mortgage purports to cover but does not cover.¹ A bondholder, however, may bring a suit for the specific performance of a contract which certain individuals had made with a company to place land under the mortgage as additional security. The corporation is a proper party defendant in such a suit, and the bondholder may maintain it after a request to, and refusal of, the trustee to bring the suit, where the bond itself, as well as the mortgage, purported to cover the land. Such a suit may be maintained before there is any default upon the bonds.² Individuals who own several railroads and consolidate them

supra, and the notes to § 830, *supra*. The agreement of a railroad company to pay the bonds of another railroad company is not enforceable by the bondholders. The court said: "A mere valid promise or undertaking, taken by the company to give it support financially, by enabling it to escape default for the non-payment of interest, evidently is not the property which the mortgagee took by force of this indenture, although it was obtained by the mortgagor for its financial relief and support, and its performance would have had the effect to enable it to operate its road." There is no privity of contract between the contracting company and the bondholders in such a case as this. The contract is between the two companies alone. The outside company owed no debt and held no fund in trust for the other company nor for the latter's bondholders. *Metropolitan Trust Co. v. New York, etc. R. R.*, 45 Hun, 84 (1887). Where, several years after state bonds are issued, the state allows a corporation to do certain things, provided the company will pay such bonds, a bondholder cannot enforce this contract, not being a party to it. *Stuart v. James, etc. Co.*, 24 Gratt. (Va.) 294 (1874). Where by the term of a lease the net earnings are to be used to pay mortgage bondholders of the lessor, and the lessee afterwards passes into a receiver's hands, the court will enforce such agreement. *Grand Trunk Ry. v. Cen-*

tral Vermont R. R., 78 Fed. Rep. 690 (1897). Where a lessee agrees to apply the income to the payment of interest on bonds secured by mortgage on the road, a decree against it for specific performance binds an assignee of the lease. *Schmidt v. Louisville, etc. Ry.*, 99 Ky. 143 (1896); *aff'd*, 177 U. S. 230.

¹ Although a bond purports to be secured by more than the mortgage specifies, yet, if the mortgage does not cover the lands in controversy, the bondholder cannot subject such lands to the mortgage that actually is given. *New Orleans, etc. Ry. v. Parker*, 143 U. S. 42 (1892). In *Van Weel v. Winston*, 115 U. S. 228, 242 (1885), the court said that if the mortgage differed from the circulars of the company the mortgage "must be looked to as the security on which the bondholders alone had a right to rely." *Cf.* § 764, *supra*.

² *O'Beirne v. Allegheny, etc. R. R.*, 151 N. Y. 372 (1897). A bondholder may enforce a contract by which outside parties agree to place thirty thousand acres of timber land under the mortgage securing the bonds. In this case the court held also that the suit might be in equity for the benefit of all the bonds and that the outside parties, being unable to fulfill, were liable for the principal and interest of the bonds, the value of the thirty thousand acres of land being that much. *O'Beirne v. Bullis*, 2 N. Y. App. Div. 545 (1896); *aff'd*, 158 N. Y. 466 (1899).

and issue bonds thereon with a false and fraudulent statement that the bonds cover certain timber lands are liable personally to the bondholders.¹ Where a corporation issues several million dollars of bonds, secured by a mortgage that represents that it covers many thousand acres of land, although, in fact, the company owned but a few hundred acres of land, a purchaser of such bonds may maintain a bill in equity in behalf of himself and other bondholders to hold the directors liable for false representations, and the corporation itself is not a necessary party defendant, a request to the trustee of the mortgage having first been made to bring suit.² Where bondholders of a lessor railroad are entitled to the rent in payment of their coupons, they may enforce the obligation.³ The question as to how far a mortgage covers contracts, etc., is considered elsewhere.⁴ In a suit by a city against a street railway company and its lessee to compel them to remove tracks from the street a mortgagee of the lessee is not a necessary party.⁵

¹ *O'Beirne v. Bullis*, 158 N. Y. 466 (1899). Co. (U. S. C. C. 1908), N. Y. L. J. June 27, 1908.

² A provision in the mortgage against individual bondholders maintaining a suit before offering indemnity to the trustee is no bar to such a suit, that provision being applicable to remedies under the mortgage only. The suit may be maintained in the United States circuit court in New York, even though the corporation was organized in Missouri, it appearing that the directors reside in New York. *Slater T. Co. v. Randolph etc.* ³ *Schmidt v. Louisville, etc. R. R.*, 101 Ky. 441 (1897); *aff'd*, 177 U. S. 230. See also §§ 775 and 76, *supra*. Where by the terms of a lease the rent is to be used to pay the interest on bonds, the contract may be enforced by the bondholders. *Welden Nat. Bank v. Smith*, 86 Fed. Rep. 398 (1898).

⁴ See §§ 852, 857, *infra*.

⁵ *Suburban Ry. v. City of Chicago*, 204 Ill. 306 (1903).

CHAPTER XLIX.

THE FORECLOSURE OF MORTGAGES BY SUIT IN EQUITY.

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| <p>§ 832. Railroad mortgage bonds.</p> <p>833. In England no foreclosure of railroad mortgages is allowed.</p> <p>834. Courts of equity originally had no power to foreclose mortgages.</p> <p>835. The various modern remedies of the mortgagee.</p> <p>836. The mortgage may be foreclosed if there is a default in the payment of the interest, taxes, etc., even though the principal is not due—The court may apply the surplus on the principal sum—The court may order the property to be sold as a whole or in parcels.</p> <p>837. Power of the court to order a sale of the property free and clear of all incumbrances, including those prior to the one under consideration—Consolidation of suits.</p> <p>838. Default in interest for the express purpose of paying off bonds bearing a high rate of interest.</p> <p>839. Conflict between the federal and state courts in foreclosure suits—Jurisdiction of federal courts.</p> <p>840. Foreclosure of a mortgage on a railroad that runs into two or more states.</p> <p>841. State statutes relative to foreclosure may be, but need not be, followed by the federal courts.</p> <p>842. Claim of title in opposition to the mortgagor's title cannot be tried in a foreclosure suit—Priority of liens may be tried.</p> <p>843. Parties complainant in a suit for foreclosure—Who may foreclose.</p> | <p>§ 844. Parties defendant in a suit for foreclosure.</p> <p>845. Cross-bills—Independent suit to foreclose where a receiver is already in possession.</p> <p>846. Miscellaneous defenses to the foreclosure—Validity of incorporation—Statute of limitations.</p> <p>847. Allegations and proof in foreclosure suits—Title to certain bonds cannot be there tried—Defaults.</p> <p>848. Fraudulent bonds and fraudulent foreclosures—Who may complain.</p> <p style="margin-left: 20px;">a. The trustee.</p> <p style="margin-left: 20px;">b. Bondholders.</p> <p style="margin-left: 20px;">c. Second mortgage bondholders.</p> <p style="margin-left: 20px;">d. Judgment creditors.</p> <p style="margin-left: 20px;">e. General creditors.</p> <p style="margin-left: 20px;">f. The state.</p> <p style="margin-left: 20px;">g. The corporation mortgagor.</p> <p style="margin-left: 20px;">h. A receiver.</p> <p style="margin-left: 20px;">i. Stockholders.</p> <p style="margin-left: 20px;">j. The purchaser.</p> <p style="margin-left: 20px;">k. No relief if no benefit—Subsequent creditors cannot complain—Purchasers of bonds with notice cannot complain—Stock voting in favor of issue cannot be basis of suit—Decree may not be for benefit of all creditors—Invalidity of part of bonds does not invalidate mortgage—Laches as a bar to relief.</p> <p>849. The decree and consent decrees—Appeals.</p> <p>850. Sale—Remedies against the purchaser—Redemption—Tender of interest due—Distribution.</p> |
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§ 832. *Railroad mortgage bonds.*—"Railroad mortgages are seldom made to be paid. If the company is successful they are often renewed, and the money which might have been used for their discharge is

largely spent in heavy salaries, increasing expenses, and questionable extensions of the line. If the company is unsuccessful the end is foreclosure and wreck." Such is the language of the New York court of appeals.¹

A broader view, perhaps, is that a railroad mortgage debt is practically a part of the capitalization. It resembles preferred stock, except that it cannot vote, and its interest must be paid whether there are profits or not. Railroad mortgage debts are renewed, but rarely paid.

§ 833. *In England no foreclosure of railroad mortgages is allowed.*—In England a railroad mortgage is not allowed to cover the railroad and property. It covers the income and earnings only.² Hence in England there can be no foreclosure of a railroad mortgage, the court holding that the mortgage can cover only the "undertaking," which is the right to continue the business and take the profits, and that consequently there can be no foreclosure of the *corpus* of the property. This is the established policy of England not only as to steam railroads, but as to street railways and waterworks.³ In England an application is made to the court for a receiver to receive the profits for the benefit of the mortgagee.⁴ An English railroad mortgage seems to be similar to what is called a "Welsh mortgage."⁵ In England, however, the acts of parliament provide for a reorganization of the company by scaling down or rearranging the obligations on some basis which is agreed to by a certain proportion of the security holders and is approved by the court, and

¹ Wilds v. St. Louis, etc. R. R., 102 N. Y. 410 (1886).

² In England a railway mortgage "is a mortgage only of the tolls and sums of money arising by virtue of the acts." Bowen v. Brecon, etc. Ry., L. R. 3 Eq. 541 (1867); Gardner v. London, etc. Ry., L. R. 2 Ch. 201 (1867).

³ Marshall v. South Staffordshire, etc. Co., [1895] 2 Ch. 36, applying to street railways the cases of Gardner v. London, etc. Ry., L. R. 2 Ch. App. 201 (1867); Blaker v. Herts, etc. Waterworks Co., L. R. 41 Ch. D. 399 (1889), and overruling Bartlett v. West Metropolitan, etc. Co., [1894] 2 Ch. 286.

⁴ See § 862, *infra*; Hodges, Railw. (7th ed.), pp. 121-131. An English railway mortgage being on the "undertaking" and not the railway itself,

ejectment does not lie by the mortgagee against the mortgagor. Myatt v. St. Helen's, etc. Ry., 2 Q. B. 364 (1841), the company in this case having been incorporated by 11 Geo. IV. & 1 Wm. IV.

⁵ Welsh mortgages are frequently mentioned in the English books. They resemble, says Chancellor Kent, the *vivum vadium* of Lord Coke, under which the creditor took the estate to hold and enjoy it without any limited time of redemption and until he repaid himself whatever was due to him out of its rents and profits. But they are now entirely out of use in that country. 4 Kent, Com. (6th ed.) 137. They are inconsistent with the Massachusetts statutes. Shaw v. Norfolk, etc. R. R., 71 Mass. 162 (1855).

is then binding upon all the debenture-holders and stockholders. A foreclosure and sale of a railroad is not allowed. Such a policy has much that might be commended. If the same law prevailed in America the reorganizations would be under the direction of the court, and would not be, as at present, a matter of private manipulation, where disaster enables the strong to take advantage of the weak.¹

§ 834. *Courts of equity originally had no power to foreclose mortgages.*—It was not until modern times that the powers of courts of equity were extended so as to enable them to foreclose mortgages. Consequently, in those states where the extended powers of courts of equity were held not to exist, a foreclosure in a court of equity was impossible, and the old common-law remedies of the mortgagee were the only remedies that he had. In New England especially the courts so held, and consequently the early foreclosures of corporation mortgages were strict foreclosures, or the mortgagee resorted to entry, possession, and sale.² Pennsylvania also rejected the English chancery jurisdiction, but found in the course of time that it was necessary to restore that jurisdiction by statutes, especially in regard to the foreclosure of mortgages.³

¹ See § 889, *infra*.

² See §§ 823, 824, *supra*.

³ In 1860 the court held (*Ashhurst v. Montour Iron Co.*, 35 Pa. St. 30) that it had no power as a court of equity to decree a foreclosure of a mortgage, and that the remedies of the trustees in "the deed of trust were to convey in fee-simple discharged of all trusts," as provided for in the mortgage, or "the common-law remedy of entry or ejectment by the mortgagee," whereby he took the possession and profits subject to redemption, or a *scire facias* as provided by statute, whereby, after a year's default, the estate could be sold and the equity cut off. In *Bradley v. Chester Valley R. R.*, 36 Pa. St. 141 (1860), the court again disclaimed any chancery powers on this subject. Where a provision exists in the mortgage, however, that the trustees may take possession and operate the property, or may, after the principal is due, sell it upon request of the bondholders, the court will not order the trustees to sell the property for non-payment of the interest, since the remedy specified in the mortgage for such a breach is

to take possession and operate the road; but the court said that upon default in the payment of the principal the court could and would compel the trustees to sell the property. In *Mendenhall v. West Chester, etc. R. R.*, 36 Pa. St. 145, note (1860), the court reviewed the modes of enforcing a mortgage and said: "In Pennsylvania a decree of foreclosure is entirely unknown." The same result, however, is accomplished under different forms. In 1862 the legislature of Pennsylvania passed an act giving the supreme court the power of a court of chancery to foreclose corporation mortgages. The court held that this enabled them to foreclose mortgages which were executed prior to the act. *McElrath v. Pittsburg, etc. R. R.*, 55 Pa. St. 189 (1867); s. c., 68 Pa. St. 37; *McCurdy's Appeal*, 65 Pa. St. 290 (1870). By statute in Pennsylvania the courts have jurisdiction to foreclose a railroad mortgage. *Old Colony, etc. Co. v. Allentown, etc. Co.*, 192 Pa. St. 596 (1899). See also *Girard T. Co. v. Avonmore, etc. Co.*, 70 Atl. Rep. 266 (Pa. 1908), and § 824, *supra*.

§ 835. *The various modern remedies of the mortgagee.*—The mortgagee, unless restrained by statute, may, upon a default, sue on the debt, or may sell the property, or may have a strict foreclosure, or may foreclose by suit in equity, or may take possession and operate the property. He may pursue any one of these remedies, or may pursue several of them at the same time.¹ Generally the mortgage itself gives him the power to sell the premises, upon default in the payment of principal or interest.² The mortgagee cannot, however, after obtaining judgment on the debt, sell the mortgaged premises by levy of execution.³ But a receiver in a mortgage foreclosure suit may be authorized to sell the property subject to the mortgage and without right of redemption.⁴ A mortgagor cannot legally convey the equity of redemption to the mortgagee, unless there is a consideration for the same.⁵ Even though a corporation, when it mortgages its mortgage bonds, gives an option to the mortgagee to purchase the bonds, such option cannot be enforced, because a mortgagee is not allowed at the time of making a loan to contract for the purchase of mortgaged property. The rule is different where a day or more intervenes between the two contracts.⁶ The mortgagee may foreclose although there is an action pending in behalf of the state to dissolve the corporation.⁷ A

1 *Gilman v. Illinois, etc. Tel. Co.*, 91 U. S. 603 (1875). See also § 820, *supra*. For an approved form of a bill in equity to foreclose, see *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320 (1879); s. c., 22 Fed. Cas. 274. Concerning ejectment see § 820, *supra*. Where a receiver is in charge of an insolvent mortgagor corporation, the mortgagee will not be allowed to distrain on the premises for the unpaid interest, even though the mortgage provides for that remedy. *Re Higginshaw, etc. Co.*, [1896] 2 Ch. 544.

2 See §§ 803, 824, *supra*. A provision in a mortgage authorizing trustees to sell without judicial proceedings and without appraisement is valid, and no request of the bondholders need be had, even though the mortgage authorized such sale upon the request of a certain proportion of the bondholders or without such request. *Etna, etc. Co. v. Marting, etc. Co.*, 127 Fed. Rep. 32 (1904).

3 *Jones, Mortgages* (4th ed.), § 1229. See § 772, *supra*.

4 *Mercantile Realty Co. v. Stetson*, 120 Iowa, 324 (1903).

5 *U. S. v. Flint, etc. Ry.*, 95 Fed. Rep. 551 (1899). *Cf.* § 479, *supra*.

6 *Samuel v. Jarrah, etc. Corp. Ltd.*, [1904] A. C. 323.

7 *Herring v. New York, etc. R. R.*, 105 N. Y. 340 (1887). The trustee of a mortgage who holds security under the mortgage is a proper party to a suit in equity to wind up the insolvent mortgagor, and if such trustee is ordered by the court to turn over the securities to a receiver the trustee is entitled to intervene and have its rights determined. *Miles v. New Assoc.*, 99 Fed. Rep. 4 (1900). In the case of *Metropolitan Bank v. New Orleans, etc. Assoc.*, 51 La. Ann. 1525 (1899), it appears that under a statute a receiver was appointed of an insolvent corporation, and the property was ordered to be sold by the court for the purpose of paying mortgages, although no suit for the foreclosure of the mortgage had been brought and although the property was insufficient to pay the mortgages.

railroad mortgage trustee may foreclose although other remedies exist.¹ A provision that the only method of enforcing a mortgage shall be by a public sale by the trustee is void and does not prevent a suit in equity to foreclose.² A subsequent mortgagee cannot compel a prior mortgagee to foreclose.³ Where a mortgagee of the corporation has appeared and filed his claim under a receivership, he will not be allowed to begin an independent suit for foreclosure.⁴ In some of the states the statutes prohibit all remedies except foreclosure by suit in equity.⁵ A sale of mortgaged property by a bankruptcy court in accordance with the United States statutes is an additional remedy to the remedy of foreclosure, and is equally effective when taken at the instance of the mortgagee.⁶ The remedies of strict foreclosure and of taking possession are considered elsewhere.⁷ A deed by the trustee of a mortgage reciting a foreclosure decree is not limited in its operation to the authority conferred by the decree, but passes the title of the trustee to the land which it purports to convey.⁸ A corporation which has become hopelessly insolvent may consent to a foreclosure of its mortgage.⁹ A corporation which is financially embarrassed cannot file a bill to compel minority stockholders to scale their bonds to seventy-five per cent. of their face.¹⁰ In a suit to foreclose

¹ *Mercantile, etc. Co. v. Missouri, etc. Ry.*, 36 Fed. Rep. 221 (1888). See also §§ 803, 824, *supra*. A pledge of securities to a trustee to secure the payment of bonds may be foreclosed by the trustee by a suit in equity. The trustee is not bound to sell at public auction without such suit. *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903).

² *Reinhardt v. Interstate, etc. Co.*, 63 Atl. Rep. 1097 (N. J. 1906). See also §§ 804, 824, *supra*.

³ *Seibert v. Minneapolis, etc. Ry.*, 52 Minn. 246 (1893); s. c., 58 Minn. 39.

⁴ And the fact that the corporation has made a deed to its receiver does not affect the mortgagee's substantial rights. *Meeker v. Sprague*, 5 Wash. St. 242 (1892). See also § 845, *infra*.

⁵ By the laws of Kansas all remedies upon mortgages are prohibited except that of foreclosure. *Mercantile Trust Co. v. Missouri, etc. Ry.*, 36 Fed. Rep. 221 (1888).

⁶ *Owen v. Potter*, 115 Mich. 556 (1898).

⁷ See §§ 822, 823, *supra*. Where a lien-holder acquires the legal title to a railroad he may maintain a bill for strict foreclosure to cut off the equities and the right of junior encumbrances to redeem. *Crouch v. Dakota, etc. R. R.*, 18 S. D. 540 (1904).

⁸ *Chesapeake, etc. Ry. v. Washington R. R.*, 199 U. S. 247 (1905).

⁹ *Dickerman v. Northern T. Co.*, 176 U. S. 181, 191 (1900), the court saying: "If the company had become insolvent and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of the stockholders cannot question their right to do so."

¹⁰ *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900), the court saying: "It was broadly suggested at the bar that upon the facts disclosed the time was ripe and the occasion fit for a

a mortgage there cannot be joined a claim for dividends illegally paid.¹

§ 836. *The mortgage may be foreclosed if there is a default in the payment of the interest, taxes, etc., even though the principal is not due—The court may apply the surplus on the principal sum—The court may order the property to be sold as a whole or in parcels.*—The mortgagee may foreclose in case the interest is not paid, even though the principal is not yet due.² A foreclosure suit may be instituted by holders of past-due coupons.³ Where the foreclosure is only for the interest, the debtor can prevent a sale by paying into the master's office the amount necessary to pay the interest in default. All proceedings will then be stayed until another default.⁴

The question of whether a demand of payment of the coupons must

court of equity to take a step in advance and to declare that it could rightly determine the propriety of a scheme of reorganization, and compel recalcitrant bondholders to comply with it. This is certainly a startling proposition, suggesting a wide departure from precedent, and a great enlargement of equity power."

¹ *New Hampshire Sav. Bank v. Richey*, 121 Fed. Rep. 956 (1903).

² *Howell v. Western R. R.*, 94 U. S. 463 (1876); *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47, 68 (1882); *Credit Co. v. Arkansas, etc. R. R.*, 15 Fed. Rep. 46, 52 (1882); *Wabash, etc. Ry. v. Central T. Co.*, 22 Fed. Rep. 138, 142 (1884). Although the holders of coupons waive default and agree to give time, yet, the agreement being without consideration, they may change their minds and insist upon payment or a foreclosure for non-payment of the interest. *Union T. Co. v. St. Louis, etc. Ry.*, 5 Dill. 1 (1878); s. c., 24 Fed. Cas. 710. "Failure to pay the principal of the bonds is not a condition precedent to sale. The prompt payment of the coupons can no more be neglected than prompt payment of the face of the bonds." *Macon, etc. R. R. v. Georgia R. R.*, 63 Ga. 103, 121 (1879); *Goodman v. Cincinnati, etc. R. R.*, 2 Disney (Ohio), 176 (1858). The mortgagor may of course deny that any coupons are un-

paid, and show that the bondholders, as lessees of the property, have been paid their interest. *Chamberlain v. Connecticut, etc. R. R.*, 54 Conn. 472 (1886). Foreclosure may be for failure to pay interest. *Pennsylvania Co., etc. v. Philadelphia, etc. R. R.*, 69 Fed. Rep. 482 (1895). A foreclosure may be brought for non-payment of interest, and a receiver appointed. *Farmers' L. & T. Co. v. Winona, etc. Ry.*, 59 Fed. Rep. 957 (1893). Where the trustee is authorized to pay interest from the fund, the amount to be replaced by the mortgagor, and the mortgagor does not replace it, and is insolvent, the trustee may foreclose. *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903).

³ *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886); *Hotel Co. v. Wade*, 97 U. S. 13 (1877), where a coupon-holder foreclosed, making the trustees and other coupon-holders and bondholders co-defendants; *Alexander v. Central R. R.*, 3 Dill. 487 (1874); s. c., 1 Fed. Cas. 363, to the same effect. On this subject, see § 825, *supra*. A coupon-holder foreclosing should allege ownership. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894).

⁴ *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168, 181 (1894). *Cf.* § 850, *infra*.

be made before foreclosure is considered elsewhere.¹ There may be a foreclosure although only a part of the mortgage debt is due.² But mismanagement and fraud on the part of the directors is no cause for foreclosure.³ Default in the payment of taxes may, by the terms of the mortgage, be made cause for a foreclosure.⁴ The question of whether the mortgage itself may restrict the right of the bondholders or coupon-holders to have a foreclosure for non-payment of interest is considered elsewhere.⁵ So also is the question of the construction of the provision generally contained in a mortgage, to the effect that upon default in the payment of interest a certain proportion of the bondholders may declare the principal sum due.⁶

There of course can be no foreclosure for the principal unless it is due, nor can it be declared due upon a default in the payment of the interest unless the mortgage provides for such declaration.⁷ Accordingly, where the mortgage is foreclosed for non-payment of the interest, a serious question arises as to how the property shall be sold, and how the principal sum is affected. The courts refuse to sell a portion of the property, inasmuch as in the case of a railroad this would disrupt and destroy the line. The supreme court of the United States has said that the property should be sold subject to the mort-

¹ See § 772, *supra*.

² Mortgaged property may "be sold under a judgment in an action for the foreclosure of the mortgage, even where only a part of the mortgage debt may have matured and become payable." *Central T. Co. v. New York, etc. R. R.*, 33 Hun, 513 (1884).

³ A mortgagee cannot commence foreclosure and have a receiver appointed before there is any default in principal or interest, merely because the managers of the corporation have obtained control fraudulently, and are fraudulently mismanaging the traffic arrangements, misappropriating earnings, and neglecting to secure terminal facilities. *American L. & T. Co. v. Toledo, etc. Ry.*, 29 Fed. Rep. 416 (1886). *Cf. Union, etc. Ins. Co. v. Union, etc. Co.*, 37 Fed. Rep. 286 (1889).

⁴ *Davies v. New York Concert Co.*, 41 Hun, 492 (1886), where, however, the suit failed because the bondholder had not properly requested the trustee to foreclose before commencing

foreclosure himself. A foreclosure may be commenced and receiver appointed for non-payment of taxes, general insolvency being alleged. *Putnam v. Jacksonville, etc. Ry.*, 61 Fed. Rep. 440 (1893). Foreclosure may be for non-payment of taxes in accordance with the terms of the mortgage. *Bonner, etc. Co. v. McClelland*, 53 Pac. Rep. 866 (Kan. 1898). *Cf. §§ 799, 862.*

⁵ See § 804, *supra*.

⁶ See § 800, *supra*.

⁷ The bondholder may sue for the interest in default, but not the principal, where the mortgage shows that the principal was to become due only when a majority of the bondholders so decided. *Batchelder v. Council Grove Water Co.*, 59 N. Y. Super. Ct. 262 (1891). The principal cannot be declared due upon a default in the payment of the interest, unless the bond or mortgage so provides, and hence the foreclosure can be for the interest only. *Union T. Co. v. St. Louis, etc. Ry.*, 5 Dill. 1 (1878); *s. c.*, 24 Fed. Cas. 710.

gage lien for the principal of the bonds and the coupons not yet due.¹ But the court may order the whole property sold. In that case the surplus after paying the interest is to be applied on the principal.²

¹ *Howell v. Western R. R.*, 94 U. S. 463 (1876). The court may order a sale of mortgaged premises to satisfy that part of the mortgage debt which is due, and preserve the lien upon the mortgaged premises in the hands of the purchaser as to the unmaturing part of the debt. So also as to coupons. *Pennsylvania R. R. v. Allegheny, etc. R. R.*, 48 Fed. Rep. 139 (1891).

² Where foreclosure is made for non-payment of interest, the foreclosure being for such interest only, and the property is sold, any surplus money remaining after payment of the interest is properly to be ordered paid on the principal. *Central R. R. v. Central Trust Co.*, 133 U. S. 83 (1890). Foreclosure may be to enforce payments of interest, and, if the railroad cannot be advantageously sold in parcels, the court may order a sale of the whole, free from the mortgage, thereby practically foreclosing for the entire mortgage debt. *Farmers' L. & T. Co. v. Oregon, etc. Ry.*, 24 Fed. Rep. 407 (1885). A deed of trust with power to sell on non-payment of interest sustains a sale of all the premises in one lump, the sale taking place on the premises. Although the principal sum is not due and cannot be declared due, yet the proceeds of the sale may be applied to the debt. *Olcott v. Bynum*, 17 Wall. 44 (1872). Where a manufacturing plant, such as a car-manufacturing company, owned by a corporation, is foreclosed, the court may direct that it be sold as an entirety, if a sale of its assets in parcels would lessen the selling value. *Central Trust Co. v. U. S. Rolling-Stock Co.*, 56 Fed. Rep. 5 (1893).

While the court has no power to declare the whole sum due, yet it has power to sell the whole property and

apply the proceeds to the payment of the whole debt. The difference is that under the latter decree the mortgagor can redeem by paying overdue interest and costs, while under the former plan he cannot. *Grape Creek Coal Co. v. Farmers' L. & T. Co.*, 63 Fed. Rep. 891 (1894). Where the property is sold on foreclosure for non-payment of interest, the whole property is sold, and the distribution will be in satisfaction, *pro rata*, of all the bonds, principal and interest. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168, 181 (1894). An objection that property was sold at judicial sale as a whole, and not in the parcels in which it actually existed, and that either of such parcels was of sufficient value to discharge the lien for which the whole was sold, is not available against confirmation of the sale, where neither party objected to the decree which directed its sale as a whole, and where there is no offer to pay a higher price in case the bidding should be reopened. *Central Trust Co. v. Sheffield, etc. Ry.*, 60 Fed. Rep. 9 (1894). The court may order the real and personal property to be sold as an entirety. *Southwestern, etc. Ry. v. Hays*, 63 Ark. 355 (1897). The principal sum cannot be declared due prior to the completion of the sale. *American L. & T. Co. v. Union Depot Co.*, 80 Fed. Rep. 36 (1897). In a proceeding to collect the interest and to enforce payment from the mortgaged property, the whole property may be sold, although the principal is not yet due. *West Branch Bank v. Chester*, 11 Pa. St. 282 (1849); *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882). In *Carey v. Houston, etc. Ry.*, 52 Fed. Rep. 671 (1892), the court refused to set aside a foreclosure sale, although a part of the debt had been declared due before its maturity and had been included in

This practically is the same as though the court had power to declare the principal sum due at once, if it deemed best so to do. Inasmuch as it would be disastrous to sell a part of a railroad line, the court on a foreclosure for a failure to pay interest may order the whole line to be sold and apply the proceeds to the payment of the whole debt. But a sale will not be ordered on terms materially different from those called for by the pleadings. Without the consent of the bondholders the court cannot decree that bonds shall become due at once. Where bonds are worth much more than par and have a long time to run at a high rate of interest, the court will hesitate before declaring them due at once.¹ Where the principal is declared due after foreclosure has commenced, it may be set up by a supplemental bill.² Where the mortgage provides that the bonds shall become due in case of an execution issuing against the company and being unpaid, it is legal for a holder of coupons to obtain judgment and issue such execution, and

the amount upon which the sale was made. The court will order a sale of the whole road, although one class of bondholders oppose, where the receiver is running behind and interest is not being paid. *Bound v. South Carolina Ry.*, 50 Fed. Rep. 853 (1892). Even though the principal is not to become due until maturity, notwithstanding there is a default in interest, yet if the company is insolvent and in arrears, and has large unsecured debts, the court will decree foreclosure of the whole property. Where various mortgages are inextricably interwoven and interest paid on none, the court will so decree. *Carey v. Houston, etc. Ry.*, 45 Fed. Rep. 438 (1891). "Where a mortgage or deed of trust is given to secure the interest and principal of notes or bonds, and the mortgaged property cannot be sold in parts without injury to its value, the whole may be sold on default of the payment of interest before the principal is due." After the sale the court will decide what shall be done with the proceeds. *Wilmer v. Atlanta, etc. Ry.*, 2 Woods, 447, 455 (1875); s. c., 30 Fed. Cas. 80. Concerning the question of priority of coupons, see ch. XLVI, *supra*. Concerning the statutes on this subject, see *Jones, Corp. Bonds*, § 634. Where a company gives a mortgage

on its whole line, but constructs only the middle section, and then another company constructs the two ends on a right of way procured by such latter company, the mortgage does not cover the two ends. On a foreclosure the court will not order a sale of the middle section alone, but of the whole, in order to preserve the system. *Chicago, etc. Ry. v. Loewenthal*, 93 Ill. 433 (1879). In *Goodman v. Cincinnati, etc. R. R.*, 2 Disney (Ohio), 176 (1858), the court said that a part of the railroad would be sold, and directed an inquiry in order to ascertain what part could be advantageously sold. The court may sell the whole property when the interest is unpaid, though the principal is not due. *Mendenhall v. West Chester, etc. R. R.*, 36 Pa. St. 145, note (1860). Where mortgage bonds are a lien on such part of a railroad as is in Ohio and not on a part in Indiana, and the road is sold as a whole without prejudice to such lien-holder's rights, the purchaser must pay such lien or else a resale of such part of the road as is in Ohio will be ordered. *Compton v. Jesup*, 167 U. S. 1 (1897).

¹ *Pennsylvania R. R. v. Allegheny, etc. R. R.*, 48 Fed. Rep. 139 (1891).

² *Seattle, etc. Ry. v. Union Trust Co.*, 79 Fed. Rep. 179 (1897).

the mortgage may thereby become due, even though the judgment on the coupons was obtained by consent for the purpose of having the mortgage become due.¹ If the principal is not due and cannot be declared due, no judgment for deficiency can be given until it does become due, but the property may nevertheless be sold as a whole.² It is to be borne in mind that the adjudicated insolvency of the mortgagor operates to mature mortgage bonds in order that they may participate in the distribution of the general assets not covered by the mortgage, in case the mortgage security is insufficient.³ Upon a sale of the assets and the winding up of the company, bonds not yet due may be paid at par and accrued interest.⁴

The court may decree a sale in a different manner from the mode prescribed by the mortgage giving a power of sale; hence, the court may order the property sold as an entirety and the proceeds apportioned according to the evidence as to the value of the divisions.⁵ A sale of a portion of a railroad to satisfy a lien may be illegal.⁶ Where stock is sold on a mortgage foreclosure it will be sold "by offering the shares in small blocks, and then as a whole, and taking the bid which aggregates the larger sum."⁷

Where a corporation is dissolved even voluntarily under the statute, a mortgage given by the corporation prior to the dissolution cannot be foreclosed, unless by statute the corporation still exists for purposes of litigation. The remedy of the mortgagee is to apply in the proceeding for a dissolution and receivership. The court may order delivery of the possession of the property to the trustees in accordance with the terms of the mortgage.⁸

¹ *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900).

² *Farmers' L. & T. Co. v. Grape Creek Coal Co.*, 65 Fed. Rep. 717 (1895).

³ *Union T. Co. etc. v. Thomas*, 66 Atl. Rep. 450 (Md. 1907). Bonds of an insolvent corporation become due on its dissolution, and accordingly the stockholders' statutory liability thereon commences at that date. *Ramsden v. Knowles*, 151 Fed. Rep. 718 (1906). See also § 642, *supra*.

⁴ *Re Southern, etc. Ry. Co., Ltd.*, [1905] 2 Ch. 78.

⁵ *Low v. Blackford*, 87 Fed. Rep. 392 (1898).

⁶ A sale of a portion of a section of a going railroad is illegal; and hence,

even though a contractor's lien on a portion of a railroad is being foreclosed in the federal court, yet a subsequent foreclosure suit and sale in the state court will not be disturbed by a decree in the federal court; but the purchaser at the foreclosure sale in the state court takes the property subject to such lien, and such purchaser may intervene in the federal court and prevent a sale of a fragment of the property. *Connor v. Tennessee, etc. Ry.*, 109 Fed. Rep. 931 (1901). See also § 772.

⁷ *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168, 181 (1894).

⁸ *Nelson v. Hubbard*, 96 Ala. 238 (1892).

§ 837. *Power of the court to order a sale of the property free and clear of all incumbrances, including those prior to the one under consideration—Consolidation of suits.*—As already shown, a court has no power to declare the principal sum due in a suit for foreclosure for default in the payment of interest, although the court may order the whole property sold.¹ Neither has the legislature the power to direct that a railroad system shall be sold free and clear of all incumbrances, so far as concerns mortgages existing at the time of such act of the legislature.² It seems also that a court of equity has no power to make such a decree in a suit brought by a junior mortgagee. The senior mortgagee is entitled to retain his lien if he so wishes.³ The foreclosure suit of the junior mortgagee, however, generally stops the payment of the interest on the senior mortgage and thus forces the senior mortgagee to begin foreclosure himself.⁴

¹ See § 836, *supra*.

² The legislature cannot, subsequently to the giving of a mortgage, prescribe that certain persons shall sell the property free from incumbrance, and pay off the liens in the order of their priority. A statute in New Jersey to that effect is unconstitutional. *Martin v. Somerville, etc. Co.*, 16 Fed. Cas. 903 (1856); *Randolph v. Middleton*, 26 N. J. Eq. 543 (1875), reversing 25 N. J. Eq. 306. See also § 800, *supra*.

³ A general mortgagee cannot, by bringing into its foreclosure suit ninety other mortgages, thereby compel a sale of the whole system as an entirety. Each mortgagee is entitled to a separate sale of the property mortgaged to him. *Wabash, etc. Ry. v. Central T. Co.*, 22 Fed. Rep. 138 (1884). Under the New Jersey statute the court has no power in insolvency proceedings to sell the property of a corporation free from prior incumbrances, unless the validity of such incumbrances is disputed and the property will deteriorate unless sold. *Reilly v. Penn., etc. Co.*, 58 N. J. Eq. 459 (1899). The court may order the receiver to make a sale without mention of prior liens or incumbrances. This leaves them to be litigated, and enables the purchaser to contest them. Such is the rule even though the sale is subject to prior

legal incumbrances. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). The court may order the sale to be made subject to judgments, taxes, claims, etc., the adjudication as to them to be made subsequently. *Turner v. Indianapolis, etc. Ry.*, 8 Biss. 380 (1878); s. c., 24 Fed. Cas. 367. Where a mortgage bondholder of one of the three companies which have been consolidated into a single company files a bill for foreclosure and makes the consolidated company a party defendant, the court will order a sale of the road as a whole, although there are three divisional mortgages on the property. The proceeds may be apportioned according to the earnings of the different divisions upon equitable principles and the reports of experts. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586, 612 (1880). Where the court orders a sale of the property by the receiver free from all liens, a judgment creditor who claims a prior lien, and who was a party to the suit, is bound by such decree of sale. *Nelson v. Jenks*, 51 Minn. 108 (1892). In Texas it has been held that the property may be sold free from the mortgage without notice to the trustee. *Hammond v. Tarver*, 11 Tex. Civ. App. 48 (1895); *aff'd*, 89 Tex. 290 (1896).

⁴ Underlying mortgagees may of course commence foreclosure proceed-

When the foreclosure suit, either by bill or cross-bill, leads to a foreclosure of several mortgages at the same time in one suit, the court will endeavor to protect the divisional mortgages by ordering a separate sale, unless the value of the property as a system will be thereby destroyed.¹ The court will consolidate the various suits if the proceedings will thereby be simplified and substantial justice done.²

§ 838. *Default in interest for the express purpose of paying off bonds bearing a high rate of interest.*—This is a device which is occasionally resorted to by unscrupulous managers in order to reduce the amount of interest which the company has to pay. Bonds bearing a high rate of interest having been sold during the early existence of the corporation, the managers, after the company has become prosperous, desire to reduce interest by paying off the old bonds and issuing new ones. Hence, in order to pay off the old ones, they stop the payment of interest. The manipulation is generally successful. The court, however, does what it can to circumvent the scheme. It may put in a receiver to operate the business and apply the profits to the payment of the interest,³ or may, on the suit of a bondholder, decree

ings. *Central T. Co. v. Wabash, etc. Ry.*, 25 Fed. Rep. 693 (1885). Where the general foreclosure is nearly complete, the court will not turn over a part of the system to the underlying mortgagees, but will wait for a sale of the whole system. *Central T. Co. v. Wabash, etc. Ry.*, 25 Fed. Rep. 693 (1885).

1 If there is an underlying mortgage on part of the road, the court will order that to be sold separately if it can be done without destroying the value of the whole property. This will enable such a mortgagee to protect himself. *Campbell v. Texas, etc. R. R.*, 2 Woods, 263 (1872); s. c., 4 Fed. Cas. 1188. See also *Farmers' L. & T. Co. v. Newman*, 127 U. S. 649 (1888), and the preceding section. Where a single mortgage secured three series of bonds, each series being a first lien on one-third of the property, the court will order the sale of the property as a whole and apportion the assets according to the value and earning capacity of the different divisions. *Farmers' L. & T. Co. v.*

Cape Fear, etc. Ry., 82 Fed. Rep. 344 (1897). See also §§ 836, 850.

2 Where a railroad construction contractor files a bill to establish a lien on the road and asks a foreclosure of a prior mortgage, and the trustee of the mortgage files a bill for foreclosure, the court may consolidate the suits and allow the latter to be sole complainant. *American L. & T. Co. v. East, etc. R. R.*, 37 Fed. Rep. 242 (1889); also *Wabash, etc. Ry. v. Central T. Co.*, 23 Fed. Rep. 513 (1885). Although three different mortgages on the same property are being foreclosed in three suits, the suits will not be consolidated until they are ready for decree. *Mercantile T. Co. v. Missouri, etc. Ry.*, 41 Fed. Rep. 8 (1889). A judgment creditor's suit may be consolidated with a subsequent foreclosure suit brought independently in the same court. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899).

3 If the mortgagor attempts to compel a foreclosure in order to pay off the debt before it is due, the court

that the trustee take possession of the road.¹ But if the trustee is foreclosing in collusion with the company, an objecting bondholder must offer to pay such bondholders as desire payment at par.² Yet these remedies are dangerous, and rather than resort to them the bondholders generally submit to a reduction of interest. The result is a loss to both sides—a partial loss of interest to the investor and a total loss of credit to the manipulator.

§ 839. *Conflict between the federal and the state courts in foreclosure suits—Jurisdiction of federal courts.*—Although a foreclosure suit has been commenced in a state court, yet this does not prevent the commencement of an independent foreclosure suit on the same property in the federal court. Both suits may go on.³ Thus,

will put in a receiver to apply the income to the payment of the interest in default. "However burdensome this high rate of interest may be to the defendant it has no legal right to demand a reduction, nor can it compel a foreclosure and payment of the mortgage debt before its maturity by refusing to pay the interest according to the obligation of its contract, and appropriating its income and earnings to its own use. It cannot thus take advantage of its own wrong." *Dow v. Memphis, etc. R. R.*, 20 Fed. Rep. 260 (1884). Where a railroad in prosperous condition allows by collusion a judgment to be taken against it and a receiver to be appointed thereunder, all for the purpose of applying its income to improvements instead of to the payment of its debts and interest coupons, the court of its own motion will discharge the receiver. *Sage v. Memphis, etc. R. R.*, 18 Fed. Rep. 571 (1883); *rev'd on another point* in 125 U. S. 361.

¹ Where the company refuses to pay the coupons, although able to do so, its object being to compel the bondholders to take a lower rate of interest, a bondholder may file a bill in equity to compel the trustees of the mortgage to "take possession of the property for the purpose of foreclosure, and manage it and apply the net earnings to payment of the interest on

the bonds." *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881).

² A bondholder may intervene in a foreclosure suit and may prevent the foreclosure by proving that the foreclosure is a scheme to pay off the seven per cent. bonds in order to enable the mortgagor to issue new bonds at a lower rate of interest. He must, however, stand ready to buy all bonds which are presented for payment. The trustee's suit to foreclose will then be stayed. *Tillinghast v. Troy, etc. R. R.*, 48 Hun, 420 (1888); *aff'd*, 121 N. Y. 649.

³ *Beekman v. Hudson, etc. Ry.*, 35 Fed. Rep. 3 (1888); *Weaver v. Field*, 16 Fed. Rep. 22 (1883); *Stanton v. Embry*, 93 U. S. 548 (1876); *Insurance Co. v. Brune*, 96 U. S. 588 (1887). Where a state court does not take possession or control of property in a suit, a similar suit involving the same subject-matter may subsequently be started and prosecuted in the federal court. *Defiance, etc. Co. v. City of Defiance*, 100 Fed. Rep. 178 (1900). A suit in a state court by a mortgagor to restrain the trustee from selling the property is no bar to a suit in the federal court to foreclose the mortgage. *Pierce v. Feagans*, 39 Fed. Rep. 587 (1889). The fact that a bill has been filed by a general creditor in a state court, asking for a receiver of the insolvent corporation, does not

although two foreclosure suits affecting the same property and having the same parties are instituted, one in the federal court and the other

prevent a mortgagee starting a suit afterwards in the United States court to foreclose. *State Trust Co. v. National, etc. Mfg. Co.*, 72 Fed. Rep. 575 (1893). A suit by a stockholder in the federal court for a receiver and the application of all assets to the debts is not a bar to a suit in the state court by a creditor for a receiver and the application of the assets to the debts, even though a receiver appointed in a former action takes possession of little of the property and is discharged. *Liggett v. Glenn*, 51 Fed. Rep. 381 (1892). See also § 865, *infra*. Where the property of a corporation is in the hands of state receivers, and any judgment against it in the federal court would have to be referred to the state court for payment, a case which has been removed to the federal court should be remanded. *Goldberg, etc. Co. v. German, etc. Co.*, 152 Fed. Rep. 831 (1907). A stockholder may maintain a suit in the state court to enjoin directors from extending a lease at a reduced rental and from releasing security for such rental, where he charges fraud, even though both the lessor and lessee are in the hands of receivers appointed by the federal court. Moreover the federal court has no authority in such suits to compel the lessor to execute such lease. *Guaranty Trust Co. v. North Chicago St. R. Co.*, 130 Fed. Rep. 801 (1904). A sale of all the property of a railroad upon foreclosure proceedings does not prevent judgment creditors claiming a judgment lien on the property from continuing their proceedings in the state court. *Blair v. Walker*, 26 Fed. Rep. 73 (1886). A foreclosure suit and appointment of a receiver in a federal court does not oust a state court of jurisdiction in a pending suit for damages to land by reason of the construction of the road. *Mercantile T. Co. v. Pittsburg, etc. R. R.*, 29 Fed. Rep. 732 (1887). In a suit by a corporate creditor to reach the equity of the corporation in its mortgaged property, a third person who claims part of the complainant's debt and is litigating the same in the state court will not be allowed to intervene. *Coffin v. Chattanooga, etc. Co.*, 44 Fed. Rep. 533 (1891). Where a foreclosure suit is pending in one state court, another foreclosure suit on the same property cannot be commenced in another state court, both courts being in the same parish. *Weymouth v. Roselius*, 36 La. Ann. 527 (1884). The general principles governing this subject of priority of a similar suit in the state court are discussed in *Loring v. Marsh*, 2 Cliff. 311 (1864); s. c., 15 Fed. Cas. 898 (not, however, a corporation case). Although a foreclosure suit on another mortgage, which is claimed to be a first mortgage, is pending in the state court and a receiver has been appointed, yet a bondholder may commence another foreclosure suit in the federal court, setting up that the trustees of his mortgage, which he claims is prior to the above-named mortgage, are committing a breach of trust, one carrying on the suit in the state court and the other acting as receiver therein. No request to the trustees to bring the suit is necessary. The federal court, however, will not appoint a receiver in such a case. *Mercantile T. Co. v. Lamoille, etc. R. R.*, 16 Blatchf. 324 (1879); s. c., 17 Fed. Cas. 25. In *Brooks v. Vermont, etc. R. R.*, 14 Blatchf. 463 (1878); s. c., 4 Fed. Cas. 308, the court held that a bondholder might institute a suit in the federal court for foreclosure, even though the trustee had already instituted a suit for the same purpose in the state court. This case, however, both in its reasoning and its conclusions, can

in the state court, yet the second suit will not be dismissed, but all proceedings therein will be stayed until the first suit is tried and determined.¹ Where a junior mortgage is being foreclosed in the state court and a receiver has been appointed, a subsequent suit in the federal court to foreclose the senior mortgage will be stayed until the completion of the proceedings in the state court.² The United States courts are prohibited by act of congress from enjoining a state court from appointing a receiver or carrying on legal proceedings,³ but they may enjoin suits in their own courts.⁴ A state court may enjoin parties from *instituting* suit in the federal court, but upon the filing of a bill in the United States court jurisdiction attaches, even though the writ of subpoena is not served until after service has been made in a suit commenced in a state court, and hence the state court cannot enjoin the party who files such bill from proceeding with his suit in the United States court.⁵ A gas consumer may enjoin in the state court the company from cutting off his gas because he pays only a rate as reduced by the legislature, even though the company is contesting the reduction in the federal court by a suit to restrain the enforcement of the statute, the plaintiff in the state court not being a

hardly be considered correct. Where foreclosure is commenced in the federal court, and then by agreement of nearly all the bondholders a plan of reorganization is adopted and approved by the court, and is acted on by nearly all the parties, the suit not being formally discontinued, but apparently abandoned, the suit continues nevertheless, and a subsequent foreclosure by the trustee in a state court gives no rights to a purchaser at the foreclosure sale as against a bondholder who did not take part in the reorganization. He may revive and proceed with the case in the federal court. *Bill v. New Albany, etc. R. R.*, 2 Biss. 390 (1870); s. c., 3 Fed. Cas. 379. Although a foreclosure suit is pending in a state court with an injunction against suits being brought against the corporation, yet a bondholder under another mortgage who is not a party to the first suit may sue on his bonds in the federal court. *Parsons v. Greenville, etc. R. R.*, 1 Hughes, 279 (1877); s. c., 18 Fed. Cas. 1255. A pending suit in the federal court is not affected by insolvency pro-

ceedings instituted after such suit was commenced. *Straine v. Bradford, etc. Co.*, 88 Fed. Rep. 571 (1898).

¹ *Hughes v. Green*, 84 Fed. Rep. 833 (1898).

² *Cochran v. Pittsburg, etc. R. R.*, 158 Fed. Rep. 549 (1901).

³ *Cœur D'Alene Ry., etc. Co. v. Spalding*, 93 Fed. Rep. 280 (1899).

⁴ Even though a railroad company occupying the streets commits a breach of the contract between the company and the city, under which contract the tracks were laid, yet the remedy of the city is not a resolution forfeiting the rights of the company and instructing the city officers to take forcible possession of the street and remove the tracks. Such action is a taking of the railroad property without due process of law and may be enjoined in the federal courts. A subsequent suit brought in the federal court by the city to enforce such ordinance will also be enjoined. *Iron Mountain R. R. v. City of Memphis*, 96 Fed. Rep. 113 (1899).

⁵ *Farmers', etc. Co. v. Lake Street, etc. R. R.*, 177 U. S. 51 (1900).

party to the suit in the federal court and there being no injunction in the federal court against the plaintiff bringing a suit in the state court.¹ Even though the franchise of a waterworks company has been declared forfeited in a suit by the city against the company, yet a mortgagee of the property may bring suit in the federal court to maintain the franchise and may have a receiver appointed, the mortgagee not having been a party to the first suit in the state court.² The federal court will not on the application of receivers appointed in a state court at the instance of the state, turn over to them property already in the hands of federal receivers, unless the state suits have proceeded to a point, showing that the state will prevail and that the property should be turned over.³ Where a suit is pending in the United States court in California, and subsequently the defendants commence a suit in England, involving questions that can be adjudicated in the first suit, the United States court will enjoin the defendants from prosecuting such suit in England.⁴

It has been held that, although suit is pending in the federal court to foreclose a mortgage, yet a creditor may file a bill in the state court to have the mortgage declared illegal as having been given to stockholders without consideration.⁵ A suit in a state court to construe and enforce a deed by a corporation for the benefit of creditors does not prevent a subsequent suit in the federal court to set aside such deed.⁶ Even though the federal court has possession of property, a mechanic's lien claimant may file papers in the state court to preserve his lien, but cannot proceed to a sale.⁷

The federal court will not disturb a receiver who has been appointed by the state court before any receiver was appointed by the federal court, and *vice versa*, the rule being that the court which first takes possession may retain possession.⁸ Hence, a receiver

1 *Richman v. Consolidated, etc. Co.*, 186 N. Y. 209 (1906).

2 *Farmers', etc. Co. v. Meridian, etc. Co.*, 139 Fed. Rep. 661 (1905).

3 *Pennsylvania Steel Co. v. R. N. Y., etc. Ry.*, 160 Fed. Rep. 224 (1908).

4 *Gage v. Riverside Trust Co.*, 86 Fed. Rep. 984 (1898).

5 *Gay v. Brierfield, etc. Co.*, 94 Ala. 303 (1891), reviewing many cases.

6 *Powers v. Blue, etc. Assoc.*, 86 Fed. Rep. 705 (1898), reviewing and classifying the authorities.

7 *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294 (1884).

8 *Gay v. Brierfield, etc. Co.*, 94 Ala.

303 (1891). In *Wilmer v. Atlanta, etc. Ry.*, 2 Woods, 409, 427 (1875); s. c., 30 Fed. Cas. 73, the court said: "The test, I think, is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or, having procured an adjudication of

appointed by a federal court cannot take property which is already in the hands of a receiver duly and previously appointed by a state court.¹ "It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court."²

their rights in this court, must wait until the action of that court has been brought to a close, and judicial possession has ceased. . . . The alleged collusion and fraud of the parties cannot alter the case. It is a question between the two courts; and we must respect the possession and jurisdiction of the sister court. We cannot take the property out of its hands unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied."

¹ *Shields v. Coleman*, 157 U. S. 168 (1895).

² *Moran v. Sturges*, 154 U. S. 256, 274 (1894). Where the federal court has appointed a receiver under a foreclosure bill and he has taken possession, a subsequent receiver appointed by a state court on the application of junior creditors will not be given possession. *Central T. Co. v. Chattanooga, etc. R. R.*, 62 Fed. Rep. 950 (1894). After a state receiver has been appointed the federal court will not appoint another, even though the former has been forcibly ousted of possession. *Central T. Co. v. South Atlantic, etc. R. R.*, 57 Fed. Rep. 3 (1893). A United States marshal cannot levy on property in the hands of a state receiver. A state receiver may apply to the federal court and have the levy set aside. The federal court will not inquire into irregularities in the appointment of the receiver. *Remington, etc. Co. v. Louisiana, etc. Co.*, 56 Fed. Rep. 287 (1893). Where the receiver of a system of roads is appointed by the federal court at the instance of the company itself, and subsequently a receiver is

appointed, by a state court, of a railroad company whose road makes up a part of that system, but which is controlled by the parent company as a majority stockholder and creditor, the federal court will direct the receiver to turn over that road to the receiver appointed by the state court. *Central R. R. etc. Co. v. Farmers' L. & T. Co.*, 56 Fed. Rep. 357 (1893). Where a street railroad has been sold out under a damage claim, which by statute has priority over a mortgage, and a state receiver is in charge, the mortgagee cannot have a receiver appointed by the federal court in an action to foreclose. *Lancaster v. Ashville St. Ry.*, 90 Fed. Rep. 129 (1898), holding also that even though state proceedings have been practically closed, yet, if the receiver has not been discharged, the United States court will not appoint another receiver, especially where no great and imminent danger is involved.

Where the federal court has appointed a receiver and directed him to take possession without knowledge of the fact that a state receiver was already in charge, the court will suspend its order to take possession until the termination of the state receivership, the complainant not being a party to the state suit. *Foster v. Lebanon, etc. R. R.*, 100 Fed. Rep. 543 (1900). Even though a receiver has been appointed by a state court at the instance of a creditor, yet the mortgagee may commence suit in the federal court to foreclose his mortgage, but the federal court will not decree sale or take possession of the property until the state court has released the same. *Metropolitan Trust Co. v. Lake Cities, etc. Ry.*, 100 Fed.

It is settled law that the court which first obtains *possession* of the property through a receiver retains that possession until the end

Rep. 897 (1900). Even though a person holding assets of an insolvent corporation is enjoined by a state court from disposing of them, yet, if by order of the federal court he turns them over to a receiver appointed by the federal court, he is protected. *Carter v. Dime Sav. Bank*, 61 Neb. 587 (1901). The attorney-general of a state may file a bill in the state court to enjoin a federal receiver from tearing up a railroad in accordance with an order of the federal court. *In re Attorney-General*, 113 Wis. 623 (1902). Under the usual mortgage giving the trustee power to take possession and also to foreclose, the trustee may commence suit for foreclosure, and may also take possession without having any receiver appointed by the court. Such possession cannot be disturbed by a receiver subsequently appointed by the state court. Such possession may be taken by the attorney for the trustee. *Pilcher v. Sioux City, etc. Co.*, 12 S. Dak. 52 (1899). A federal court has no power to enjoin a receiver in possession of a railroad, under appointment of a state court, from issuing receiver's certificates, or to restrain the parties in the state court from carrying out an agreement sanctioned by that court. *Reinach v. Atlantic, etc. R. R.*, 58 Fed. Rep. 33 (1878). Although a court gives judgment to the effect that a company is not entitled to land, yet it will not order a receiver, in possession of the land by appointment of another court, to give up such possession. *Abbey v. International, etc. Receivers*, 5 Tex. Civ. App. 261 (1893). Where a federal court has taken possession of an interstate railway on foreclosure proceedings, it will not turn over to the state courts a line which was acquired by purchase by the general company, even though that line is wholly within the state and its charter has been

forfeited. *Mercantile T. Co. v. Missouri, etc. Ry.*, 48 Fed. Rep. 351 (1890). No receiver will be appointed by the federal court after a state receiver has taken possession. *Garner v. Southern, etc. Assoc.*, 84 Fed. Rep. 3 (1897). An attachment does not lie in the federal court on property which is in the hands of a receiver of the state courts. *State v. Ellis*, 45 La. Ann. 1418 (1893). The United States court will not appoint a receiver at the instance of a junior mortgagee, where the senior mortgagee is foreclosing in the state court, and the property is in the hands of an assignee in insolvency of the mortgagor, and the junior mortgagee is a party defendant. The court said: "It seems clear to this court that in foreclosure cases the doctrine maintained in the federal courts is that, where the property is in the possession of a receiver or an assignee of a state court, the federal court will ordinarily do nothing to disturb his possession or to interfere with the proper management of the property by the state court pending the foreclosure." *Val. Blatz, etc. Co. v. Walsh*, 84 Fed. Rep. 5 (1897). Where a federal receiver is in charge of property, a mortgagee cannot file a bill for foreclosure, even in the federal court, but must intervene. *American L. & T. Co. v. Central Vt. R. R.*, 84 Fed. Rep. 917 (1898). Where a state receiver is in charge of a mine, a citizen of another state cannot file a bill in equity in the federal court for an injunction against such receiver in his mining operations, unless the state court consents to his being so sued. *Ross v. Heckman*, 84 Fed. Rep. 6 (1897). Where the property is already in the hands of a federal receiver, a state court will refuse to entertain a suit for the foreclosure of a mortgage subsequent to the one being foreclosed in the fed-

of the case in that court.¹ The supreme court of the United States goes farther and lays down the rule that, "as between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute."² But

eral court; and the court said that the rule was the same even of a mortgage prior to the one already in process of foreclosure. *Milwaukee, etc. R. R. v. Milwaukee, etc. R. R.*, 20 Wis. 165 (1865).

¹ Although a foreclosure suit is pending in a state court, yet if a subsequent foreclosure suit against the same property is commenced in the federal court, and a receiver is appointed first in the latter court, the latter court will retain possession of the property and allow the suit to continue. *East Tennessee, etc. R. R. v. Atlanta, etc. R. R.*, 49 Fed. Rep. 608 (1892). Where, after a stockholder's suit to obtain a receiver, a mortgagee files a bill in the federal court to foreclose, and the federal court appoints a receiver first, such receiver will not be ordered to turn the property over to a state-court receiver appointed subsequently. *De La Vergne, etc. Co. v. Palmetto Brewing Co.*, 72 Fed. Rep. 579 (1886).

² *Moran v. Sturges*, 154 U. S. 256, 283, 284 (1894), rev'g *Re Schuyler, etc. Co.*, 136 N. Y. 169. In this case the court held that a state court cannot, in connection with its receiver, enjoin, try, or adjust maritime liens, and that an injunction by a state court against a United States marshal who obtained possession of ships after an order of the state court appointing a receiver, but before the receiver qualified or took possession, is void. Where minority stockholders in a corporation, the charter of which has expired, file a bill in the state court to wind up its affairs, a creditor, who subsequently commences a suit in the

federal court cannot have a receiver appointed. *Louisville Trust Co. v. Knott*, 130 Fed. Rep. 820 (1904), rev'g *Knott v. Evening Post Co.*, 124 Fed. Rep. 342. Where a suit has been commenced in the state court for a receiver the federal court will not appoint a receiver, but will stay the latter suit. *Sullivan v. Algrem*, 160 Fed. Rep. 366 (1908). Even though a receiver appointed by a state court has not taken possession and an appeal has been taken from the order appointing him, yet this prevents the federal court from appointing a receiver of the same property. *State of Texas v. Palmer*, 158 Fed. Rep. 705 (1907). Where a federal court in a foreclosure suit has ordered a sale, its jurisdiction is exclusive, and the subsequent appointment of a receiver of the property by a state court in a suit commenced at the time of such appointment does not affect the exclusive jurisdiction of the federal court, even though the federal court did not appoint a receiver. *Holland, etc. Co. v. International, etc. Co.*, 85 Fed. Rep. 865 (1898). The filing of a bill asking for foreclosure and for a receiver in the federal court gives that court the right to possession of the property through a receivership as against a receiver appointed by the state court in a suit commenced after the filing of the bill in the federal court, even though the state receiver is appointed first. *Appleton, etc. Co. v. Central Trust, etc. Co.*, 93 Fed. Rep. 286 (1899). Where a state court has entertained a bill to administer the assets of an insolvent corporation, and subsequently a similar bill is filed in

even though a street railway has obtained an injunction in a state court against a certain individual interfering with the operation of

the federal court, the federal court will not appoint a receiver, the state court having already refused to make such an appointment. The federal suit will be abated or stayed until the determination of the state suit. *Colston v. Southern, etc. Assoc.*, 99 Fed. Rep. 305 (1899). The court which first takes jurisdiction retains exclusive jurisdiction until its duty is fulfilled, and this is the rule whether possession is taken or not, in suits dealing with specific property or objects, not being suits strictly *in personam*. *Baltimore, etc. R. R. v. Wabash R. R.*, 119 Fed. Rep. 678 (1902). Where a bill is filed in the federal court, and on the same day a receiver is appointed, a suit commenced on the same day in the state court by a stockholder cannot be the basis of a receivership as against the federal receiver, who was appointed prior to the appointment of the state receiver, especially where this was merely ancillary to a prior main receivership in another federal district. *Lewis v. American, etc. Co.*, 119 Fed. Rep. 391 (1902). In *Adams v. Mercantile Trust Co.*, 66 Fed. Rep. 617 (1895), the federal court ordered its receiver to deliver up the property to a state receiver, although the latter was appointed after the former, the state suit having been commenced before the federal suit, and having called for a receivership. Although the federal court has appointed a temporary receiver, yet where it learns that a prior suit for the same purpose was commenced in the state court, the federal court will stop temporarily at least. *Howlett v. Central Carolina, etc. Co.*, 56 Fed. Rep. 161 (1893). The court in which suit is first commenced to "enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all other

suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property," has exclusive jurisdiction, even though actual possession of the property is not taken until after suit has been commenced in another court. *Merritt v. American Steel Barge Co.*, 79 Fed. Rep. 228, 231 (1897). A receiver, appointed by a state court, is entitled to the property as against a receiver subsequently appointed by another court in the same state, even though the latter receiver first took possession. *McDowell v. McCormick*, 121 Fed. Rep. 61 (1902). Where the state by a suit in the state court has forfeited the charter of a waterworks company, no receiver being appointed, and thereafter on a bill filed in the United States court a receiver is appointed by the latter court, and thereafter under a statute the governor of the state appoints a liquidator of the affairs of such corporation, and thereafter the liquidator is brought in as a party defendant to the suit in the United States court and interposes a plea, and thereafter the stockholders organize a new corporation and receive its stock in exchange for their stock in the old corporation, the state cannot maintain a suit to forfeit the charter of the latter corporation and enjoin a transfer of the assets of the old corporation to the new corporation, on the ground that the stock of the new corporation is issued at a fictitious value, the proof being insufficient to sustain any such claim, and the plant itself not yet having been sold and its value ascertained. *State v. New Orleans, etc. Co.*, 111 La. 1049 (1904). The filing of a bill in the federal court for the appointment of a receiver gives that court from that time exclusive jurisdiction over the property of the

a railway, and also has issued a writ of replevin against him, this does not prevent a subsequent suit being commenced in the United States court to foreclose a lien on the property, and does not prevent the appointment of a receiver in the latter suit to take immediate possession of the property.¹ It is not contempt of the federal court to institute a suit in the state court to enjoin the federal receiver from tearing up a railroad track, provided there is no actual physical interference with the possession of the federal court.²

In order to commence foreclosure in the federal court it is of course necessary that the jurisdiction of the court be clear and be set forth in the bill. This jurisdiction almost always turns on the fact that the trustee or bondholder who forecloses is a citizen of a different state from that of the defendants.³ The subject, however,

company, even though the receiver was actually appointed later. *Riesner v. Gulf, etc. Ry.*, 89 Tex. 656 (1896). In *Kerp v. Michigan, etc. R. R.*, 14 Fed. Cas. 383 (1873), the federal court appointed a receiver, although a receiver was already in possession by appointment of the state court; but the state court, upon learning that the suit in the federal court had been commenced first, dismissed the bill in the state court and dismissed the receiver. In *May v. Printup*, 59 Ga. 128, 130 (1877), the court said: "It is not the seizure of the property by the receiver that gives the court jurisdiction over it, but the commencement and service of the bill and process. The object of the seizure of the property is not to give jurisdiction, but only to enable the court to administer effectual and full justice under the jurisdiction it has acquired by virtue of the suit commenced. The contrary view would encourage collusion between parties and unseemly haste in the seizure of property by receivers. The case at bar affords a striking illustration of the propriety of the rule that the commencement of the suit, and not the appointment of the receiver or seizure of the property, gives jurisdiction over the subject-matter." Although a federal receiver has qualified, yet a state court will also appoint a receiver, unless it is shown that the

federal suit was instituted first. *Texas Trunk Ry. v. State*, 83 Tex. 1 (1892). After the commencement of a suit in the federal court for foreclosure and a receiver, a subsequent bill filed in the state court does not deprive the federal court of the right to possession of the property, even though the state court appoints a receiver first. *Union T. Co. v. Rockford, etc. R. R.*, 6 Biss. 197 (1874); s. c., 24 Fed. Cas. 704. Although a state court enjoins creditors from prosecuting any suit against the corporation and fixes a day for a hearing on an application for a receiver, yet in the meantime a non-resident creditor may commence suit in the federal court and obtain the appointment of a receiver in that case. Such a proceeding is not in contempt of the state court. *State v. Nathans*, 49 S. C. 199 (1897). A suit by a city to forfeit a grant to a water-works company is not affected by the subsequent appointment of a receiver by the federal court. *Palestine, etc. Co. v. City of Palestine*, 19 Tex. 540 (1898). See § 870, *infra*.

¹ *Put-in-Bay, etc. Co. v. Ryan*, 181 U. S. 409 (1901).

² *Royal T. Co. v. Washburn, etc. R. R.*, 139 Fed. Rep. 865 (1905). See § 870.

³ See § 827, *supra*, and § 844, *infra*. Where the original contract between a water-works company and the city

of the right of the trustee or bondholders to commence foreclosure in the federal court, or to remove a suit into the federal court, is considered elsewhere.¹ Where the federal court has possession of a railroad through its receiver, an independent suit to foreclose cannot be instituted in the same court. The foreclosure may be by cross-bill in that same suit.² Where the court has possession of the

provides that the rental to be paid by the city shall be paid to the trustee of the mortgage, and such trustee is a non-resident, the trustee may enforce payment by a suit in the United States court. *Columbia, etc. Co. v. City of Dawson*, 130 Fed. Rep. 152 (1903); rev'd in 197 U. S. 178 on the ground that the diverse citizenship was a mere subterfuge. Where there are three trustees and one of them is a citizen of the same state as the mortgagor corporation, two of the trustees may bring suit for foreclosure in the federal court, a third trustee being made a party defendant, he having refused to join in bringing the suit. *Einstein v. Georgia, etc. Ry.*, 120 Fed. Rep. 1008 (1903).

¹ See § 827, *supra*. A judgment creditor of an insolvent corporation may bring suit in the federal court if his judgment is for more than \$2,000, even though the judgment was obtained in the state court on assigned notes of which the federal court would not have had jurisdiction. *Stanwood v. Wishard*, 134 Fed. Rep. 959 (1905), holding also that the claims of intervening creditors need not exceed \$2,000. A bondholder cannot maintain a suit in the United States court to cancel and avoid mortgages where his proportionate interest is less than \$2,000. *Cowell v. City, etc. Co.*, 121 Fed. Rep. 53 (1903). A federal court has jurisdiction of a suit involving a mortgage on property within the district, even though both parties are non-residents, such parties, however, being citizens of different states. *Cowell v. City, etc. Co.*, 96 Fed. Rep. 769 (1899); rev'd on another point in 121 Fed. Rep. 53.

In a suit by a receiver of two insolvent corporations to set aside a mortgage executed by both of them, service out of the state on a trustee of the mortgage is effective, the trustee being a non-resident and the property being within the jurisdiction. *Woods v. Woodson*, 100 Fed. Rep. 515 (1900). Stock is located where the corporation is incorporated, and a non-resident stockholder may file a bill in the United States court in the district where the corporation was organized to set aside an illegal forfeiture of the stock for non-payment of assessments, and in such suit he may bring in non-resident defendants by substituted service. *Jellenik v. Huron, etc. Co.*, 177 U. S. 1 (1899). The objection that a suit in the federal court is not brought in the district where one of the parties resides is waived by the defendant corporation appearing and not objecting, and an intervening stockholder cannot afterwards raise the objection. *Citizens', etc. Co. v. Union, etc. Co.*, 106 Fed. Rep. 97 (1900).

² *American L. & T. Co. v. Central Vt. etc. Co.*, 86 Fed. Rep. 390 (1898). Where a railroad property has passed into the hands of a receiver appointed by a federal court at the instance of judgment creditors, the mortgagee may file a bill in the same federal court to foreclose the mortgage, although the requisite diverse citizenship did not exist to sustain the foreclosure bill standing by itself alone. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899). Where the federal court has foreclosed the second mortgage and made a sale subject to the first mortgage, the first

property, the foreclosing trustee may bring in as a party defendant a citizen of the same state as the complainant.¹ The federal court has no jurisdiction of a suit brought by the holder of 'coupons, where it appears that he does not own them, but is merely allowing his name to be used to give jurisdiction to the court.² Although a bill in equity filed in the United States court turns out to have been collusive, so that the court had no jurisdiction, yet, where receiver's certificates have been issued under order of the court, the court will protect the receiver's certificates by ordering the sale of enough property to pay them, and the court may also retain jurisdiction of intervening petitions.³

We now come to the effect of a decree of foreclosure. Here entirely different rules prevail. The mere *pendency* of a suit does not prevent the commencement of another similar suit in another court. But after decree in one court all the parties to that suit are bound thereby and will not be allowed to prosecute a similar litigation elsewhere. The decree makes the matter *res judicata*, and pending suits of parties who are parties to the decree, as well as subsequent suits brought by them, involving the same subject-matter, will be enjoined by the court that entered the decree.⁴

mortgagee may then commence foreclosure proceedings in the same suit, even though the purchaser at the first sale is a citizen of the same state as the first mortgagee. *Farmers' L. & T. Co. v. Houston, etc. Ry.*, 44 Fed. Rep. 115 (1890). See also § 845, *infra*. Compare § 848, *infra*.

1 *Metropolitan Trust Co. etc. v. Columbus, etc. R. R.*, 93 Fed. Rep. 689 (1899).

2 *Lake County, etc. v. Dudley*, 173 U. S. 243 (1899).

3 *Electrical, etc. Co. v. Put-in-Bay, etc. Ry.*, 84 Fed. Rep. 740 (1898). Where bonds and stock in a Pennsylvania corporation of little or no value are assigned to a citizen of New Jersey without consideration, although absolutely, for the purpose of giving jurisdiction to the United States court for a receiver, this is a fraud on the court's jurisdiction; and the suit will be dismissed. *Kreider v. Cole*, 149 Fed. Rep. 647 (1907). Where a federal court authorizes the issue of receiver's certificates, and it

is afterwards decided that the court had no jurisdiction of the case, a state court which then takes possession of the property need not recognize such certificates. *Crosby v. Morristown, etc. R. R.*, 42 S. W. Rep. 507 (Tenn. 1897). See also §§ 876, 877, *infra*.

4 In the case of *Central Trust Co. v. Western N. C. R. R.*, 89 Fed. Rep. 24 (1898), where a railroad had been sold under foreclosure and the purchaser made a party to the suit, and the final decree contained a provision for the court passing upon claims and entering orders from time to time, the court enjoined a stockholder from subsequently instituting a suit in the state court attacking the validity of the mortgage which had been so foreclosed in the federal court. Where, in a foreclosure suit and sale, the court has included rails and ties laid by the railroad on the land of another person, and has retained jurisdiction of the case to adjudicate adverse claims, the owner of such land

A decree of foreclosure by a state court cuts off the lien of a judgment obtained in a federal court pending the suit, and is a bar to a suit commenced in a federal court by such judgment creditor attacking the mortgage as illegal.¹ So also a decree obtained in the federal court prevents a subsequent suit in the state court.²

cannot commence a suit in a state court to recover damages for the removal of such rails and ties. The federal court will enjoin such suit in the state court. *Mercantile, etc. Co. v. Roanoke, etc. Ry.*, 109 Fed. Rep. 3 (1901). Where a foreclosure has been completed in a federal court, and the purchaser at foreclosure sale has by decree of the court appeared in such suit, he may enjoin a creditor of the corporation from instituting a suit in the state court attacking the good faith of the foreclosure and seeking to enforce a lien on the property. *State Trust Co. v. Kansas City, etc. R. R.*, 110 Fed. Rep. 10 (1901). After a foreclosure has been completed in the federal court a creditor of the insolvent corporation cannot in the state court, in the absence of fraud, attack the foreclosure on the ground that a part of the proceeds should have been used to pay his debt. *Kurtz v. Philadelphia & R. R. R.*, 187 Pa. St. 59 (1898). A holder of receiver's certificates issued by the federal court cannot enforce the lien of those certificates in the state court while the suit in which they were issued is still pending in the federal court. *Passage v. Dansville, etc. R. R.*, 41 N. Y. App. Div. 182 (1899). Where the foreclosure decree in the federal court provides for litigating claims for damages, a claimant who has intervened cannot thereafter withdraw, and by suit in the state court establish a lien on the property. *Tolle v. Owensboro, etc. R. R.*, 111 Ky. 623 (1901). Where a federal court has decreed that a state statute reducing railroad rates is unconstitutional and has enjoined the attorney-general of the state from enforcing such statute, such injunction applies to a new

attorney-general who institutes suit in the state court. *Starr v. Chicago, etc. Ry.*, 110 Fed. Rep. 3 (1901); *aff'd*, 188 U. S. 537. In *Brierfield, etc. Co. v. Gay*, 106 Ala. 615 (1895), after a federal court had finished a foreclosure sale of property, the state court held that it had jurisdiction to pass upon the validity of the mortgage bonds on which such foreclosure was based. A federal court that has foreclosed a mortgage and completed the sale may enjoin a judgment creditor of the mortgagor from issuing execution out of the state court and levying upon the property, even though it is claimed that the purchaser at the foreclosure sale was disqualified from purchasing. *Julian v. Central T. Co.*, 115 Fed. Rep. 956 (1902); *aff'd*, 193 U. S. 93. *Cf.* § 748, *supra*.

¹ *Stout v. Lye*, 103 U. S. 66 (1880). See also § 859, *infra*. A federal court will not sustain a bill by a creditor attacking insolvency and receivership proceedings in the state court, where the charge of conspiracy fails. *Dobson v. Peck Bros. & Co.*, 119 Fed. Rep. 254 (1902). *Cf.* § 848, *infra*.

² Where in a foreclosure suit in the federal court by a consent decree the trustee is put in possession, and by a subsequent decree a sale is ordered, and the trustee files a report of a sale having been made, and then long subsequently the trustee forecloses the same mortgage in a state court, and the purchaser takes possession, the federal court will oust him from possession and put in a receiver, on the application of a bondholder, the trustee being charged with misapplication of the funds. The court is not bound by the foreclosure in the state court. *Bill v. New Albany, etc. R. R.*, 2 Biss. 390 (1870); *s. c.*, 3 Fed. Cas. 379. If

The remedy of a party where a decree was obtained by fraud is considered elsewhere.¹

The foregoing rules do not apply to those who were not parties to the foreclosure suit. If they were neither directly nor indirectly parties, it seems that they may enforce their liens, irrespective of the decree of foreclosure.² And after a federal court has discharged

the state court refuse to recognize the priority of jurisdiction acquired by the federal court, the state proceeding should be brought before the supreme court by writ of error. *Chittenden v. Brewster*, 2 Wall. 191 (1864). *Cf. Blair v. Walker*, 26 Fed. Rep. 73 (1886). Although the purchaser is bound to pay outstanding claims, yet the court will first pass upon them. It will enjoin a suit in the state court relative thereto. *Jesup v. Wabash, etc. Ry.*, 44 Fed. Rep. 663 (1890). See also § 890, *infra*.

1 See § 848, *infra*.

2 A foreclosure suit in the federal court, to which a trustee under a prior mortgage was not made a party, is not a bar to a subsequent foreclosure suit in the state court on such prior mortgage, even though the purchaser of the bonds secured thereby purchased them during the former foreclosure suit. *Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). In the case of *United Lines Tel. Co. v. Boston Safe, etc. T. Co.*, 147 U. S. 431 (1893), *aff'g* 36 Fed. Rep. 288, the court held that as between two mortgages of different companies, each purporting to be a first lien on the same property, a foreclosure of one in the state courts did not give a prior title to the property as against the other mortgage which was afterwards foreclosed in the federal court, it appearing that the mortgagee in the latter was not a party to the foreclosure suit in the state court.

The purchaser at a foreclosure sale in the federal court cannot enjoin a judgment creditor from bringing suit in the state court to enforce his judgment against the property under a

state statute and attacking the validity of the mortgage, it appearing that his cause of action arose after the foreclosure sale, and that he was not in any way a party to the foreclosure suit. The foreclosure should be pleaded as a defense, and if full effect to the foreclosure decree is not given, an appeal may be taken to the supreme court of the United States. *James v. Central, etc. Co.*, 98 Fed. Rep. 489 (1899). Even though a railroad mortgage is being foreclosed in the federal court on the supposition that a prior mortgage had been fully paid, yet a *bona fide* purchaser of bonds secured by such prior mortgage may bring a foreclosure suit thereon in the state court after the foreclosure suit in the federal court has been completed, even though such purchaser purchased during the foreclosure of the subsequent mortgage, and was aware of the default on such second mortgage. *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896). Same case *aff'd sub nom.* *Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). A suit in the federal court to foreclose an alleged lien on a water-works plant without making a mortgagee a party defendant does not prevent the mortgagee commencing a suit in the state court to foreclose his lien, and a foreclosure sale under such mortgage gives full title to the property, the lien being illegal. *National, etc. v. Oconto, etc. Co.*, 105 Wis. 48 (1899). Where a mortgage foreclosure suit is commenced, and then mechanic's lien foreclosure suits are commenced, and then the foreclosure sale under the mortgage takes place, the purchaser is not

its receiver, a state court may then enforce its decree relative to the property as to those who were not parties to the federal case.¹

The jurisdiction of the court is not ended by judgment. The

affected by the mechanic's lien foreclosure. *Andrews v. Natoinal, etc. Works*, 77 Fed. Rep. 774 (1897). Even though a suit is started in the federal court to foreclose a lien, yet, if the court does not take possession of the property, a mortgagee may subsequently commence a suit in the state court and proceed to a foreclosure sale. The *lis pendens* in the federal court does not affect the purchaser at the foreclosure sale. *National, etc. Works v. Oconto, etc. Co.*, 113 Fed. Rep. 793 (1902). Receiver's certificates issued by a state court in a suit brought by a creditor without joining the mortgagee as a party are not superior in right to the mortgage, and are not binding on the federal court in decreeing the foreclosure of such mortgage. *Metropolitan Trust Co. v. Lake Cities, etc. Ry.*, 100 Fed. Rep. 897 (1900). If a creditor is prosecuting a lien in a state court when a suit is brought in the federal court for foreclosure, and a receiver is appointed by the latter court, and the creditor proceeds irrespective of the latter suit and obtains a lien, his lien will not be recognized by the federal court. *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 2 (1885). Where a vendor has obtained a judgment in the state court establishing his vendor's lien on personal property, and he intervenes in a foreclosure suit in the federal court, the latter court will accept the judgment in the state court establishing the lien as conclusive. *State, etc. Co. v. De La Vergne, etc. Co.*, 105 Fed. Rep. 468 (1900). A sale of a portion of a section of a going railroad is illegal, and hence even though a contractor's lien on a portion of a railroad is being foreclosed in the federal court, yet a subsequent foreclosure suit and sale in the state court will not be disturbed by a de-

creed in the federal court, but the purchaser at the foreclosure sale in the state court takes the property subject to such lien, and such purchaser may intervene in the federal court and prevent a sale of a fragment of the property. *Connor v. Tennessee, etc. Ry.*, 109 Fed. Rep. 931 (1901). A judgment in a state court for money, part of which by statute has a lien in preference to a prior mortgage, cannot be paid out of funds from a subsequent foreclosure sale in the federal courts, the trustee not having been a party to the state judgment. The judgment cannot be allowed beyond the amount entitled to the lien. *Hassall v. Wilcox*, 130 U. S. 493 (1889). See *Ames v. Chicago, etc. Ry.*, 39 Fed. Rep. 881 (1889), as to the jurisdiction of the federal courts in the enforcement of a subcontractor's lien on a railroad. Where by decree in a state court a railroad is sold under foreclosure, the court ends its jurisdiction over the railroad. If the purchaser does not fulfill, a holder of receiver's certificates may file a bill in the federal court for another sale. The state court cannot then again assume jurisdiction over the property. *Central Nat. Bank v. Hazard*, 49 Fed. Rep. 293 (1892).

¹ *Texas, etc. Ry. v. Johnson*, 151 U. S. 81 (1894). The state court may enforce its decree after the federal court has ended its jurisdiction over the property. *Blair v. Walker*, 26 Fed. Rep. 73 (1886). Even though a railroad has been foreclosed in the federal court, yet a property owner who was not made a party to that suit may bring suit in the state court for ejectment on the ground that the railroad trespasses on his property. *Central T. Co. v. Grantham*, 83 Fed. Rep. 540 (1897).

jurisdiction continues until the judgment is satisfied.¹ The court will also protect the purchaser at its foreclosure sale.² The purchaser at foreclosure sale in the United States court may obtain an injunction from that court against the enforcement, by a sale of the property, of judgments obtained subsequently in the state court to which he was not a party, the United States court having retained jurisdiction to settle all claims and liens upon the property.³ A state court cannot enjoin a party from enforcing a decree of the

¹ *Central Nat. Bank v. Stevens*, 169 U. S. 432, 464 (1898). Compare § 84*i*, *infra*.

² Where a foreclosure in the federal court has been completed, and thereafter a suit has been commenced in the state court on a cause of action which arose after the sale and after the purchaser had been put in possession, the federal court may enjoin the prosecution of such action. *Central T. Co. v. Western, etc. R. R.*, 112 Fed. Rep. 471 (1901). The purchaser at foreclosure sale in the federal court may enjoin a subsequent suit in the state court by a stockholder to place the property in the hands of a receiver in disregard of the foreclosure decree. *James v. Central, etc. Co.*, 98 Fed. Rep. 489 (1899).

³ *Julian v. Central T. Co.*, 193 U. S. 93 (1904). Even though a foreclosure was in the federal court, yet an unsecured creditor of the foreclosed corporation may bring suit in the state court against the new corporation, to hold it liable for the debt on the theory that the reorganization was fraudulent in that it protected the stockholders of the old corporation at the expense of the unsecured creditors of the old corporation. *Guardian Trust Co. v. Kansas City, etc. Ry.*, 146 Fed. Rep. 337 (1906). In a foreclosure suit by a second mortgagee in the federal court, even though the third mortgagee is brought in by insufficient notice, yet the decree of foreclosure cannot be attacked subsequently in the state court by such third mortgagee, especially where the trustee of the third mort-

gage appeared in the suit. *Alabama, etc. Ry. v. Thomas*, 86 Miss. 27 (1905). Even though the foreclosure decree in the United States court allows any party to apply for further orders at the foot of the decree, yet thereafter bondholders cannot be enjoined by an additional order at the foot of the decree from instituting a suit in the state court to foreclose one of the mortgages, which has already been foreclosed, they not being parties to the first named suit, except as they were represented by a trustee, it appearing that they were given no notice of the application for an injunction, and that the purchaser at the foreclosure sale had not yet been disturbed. *Lewis v. Peck*, 154 Fed. Rep. 273 (1907). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep. 263 (1895).

federal court.¹ Where in a suit in the United States court an attachment has been levied, it attaches to real estate in the district, and even though thereafter a suit is commenced in the state court and receivers are appointed, they cannot restrain the United States marshal from selling the property under an execution on the judgment in the case in the United States court.²

§ 840. *Foreclosure of a mortgage on a railroad that runs into two or more states.*—There has been great doubt whether a court sitting in one state could foreclose the whole of a railroad which extends from that state into an adjoining state. Ordinarily a court cannot foreclose a mortgage on land situated outside of the jurisdiction of the court. And this rule applies to the courts of a state in the foreclosure of an interstate railroad. The foreclosure is good for that part of the railroad which is located within the state where the court is sitting, but usually the courts of the other state will refuse to recognize the foreclosure so far as it applies to that part of the railroad which is in the latter state.³

¹ Central Nat. Bank v. Stevens, 169 U. S. 432 (1898), rev'g Stevens v. Central Nat. Bank, 144 N. Y. 50.

² Beardslee v. Ingraham, 183 N. Y. 411 (1906), rev'g 106 N. Y. App. Div. 506. The question of whether an attachment in the federal court has precedence over a subsequent receiver appointed in a state court was discussed in Ingraham v. National Salt Co., 139 Fed. Rep. 684 (1905); aff'd, 143 Fed. Rep. 805.

³ In Lynde v. Columbus, etc. Ry., 57 Fed. Rep. 993 (1893), where a state court in Ohio had decreed the foreclosure of an entire line of railroad, part of which line was in the state of Indiana the federal court, sitting in Indiana, refused to recognize the validity of the foreclosure so far as that part of the line which was in Indiana was concerned. Muller v. Dows, 94 U. S. 444 (1876), and other cases were distinguished. The court said, however, that if a conveyance or release of the line in Indiana had been compelled by the Ohio court, the Ohio foreclosure would have been sufficient. Where a consolidated company of New York and Pennsylvania issues bonds in New York fictitiously,

such bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void. Pittsburgh, etc. R. R. v. Rothschild, 4 Cent. Rep. 107 (1886). In Eaton, etc. R. R. v. Hunt, 20 Ind. 457 (1863), the Indiana court refused to recognize a judgment of an Ohio court wherein the Ohio court foreclosed a consolidated railroad running into both states, so far as such judgment affected an underlying mortgage on the Indiana end of the road. It was so held, although the Ohio court had personal jurisdiction over the trustee of this underlying mortgage. The court said that if the trustee had refused to sell, the court could not appoint a person to sell for him. The pendency of a foreclosure suit in the courts of another state is no bar. The courts of one state have no power to foreclose and cause a foreclosure sale of real estate in other states, even though such property consists of a telegraph system which runs into several states, including the one where the suit is brought. The reason of the rule is that the court cannot

Where, however, the trustee of the mortgage is within the jurisdiction of the court, the court may compel him to exercise the power of sale given by the mortgage. In this way the whole property may be foreclosed at once.¹ Where a railroad runs into two states and into two circuits of the United States courts, a suit to

give possession after the foreclosure sale. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). The court said: "The courts of this state cannot by its decree, or by a sale made by an officer appointed by it, or by a conveyance executed by such officer, affect the title to property without the limits of the state, and therefore, by a sale under the decree entered in this action by the referee therein named, no title could possibly be conveyed to such of the mortgaged property as is situate in other states." Where a mortgage covers a railroad running into New York, Pennsylvania, and Ohio, and three suits of foreclosure are commenced, one in each state for the part in that state, the New York court, in passing upon rolling-stock contracts, is not bound by the Ohio decision on the same question in the Ohio suit. *Re U. S. Rolling-Stock Co.*, 55 How. Pr. 286 (1878). The complaint was subsequently amended so as to make the New York case collateral or ancillary to that pending in Ohio. See *Taylor v. Atlantic R. R.*, 57 How. Pr. 9 (1878). Yet the court held that this did not essentially modify the character of the New York suit. *Re U. S. Rolling-Stock Co.*, 57 How. Pr. 16 (1878). A branch line cannot be decreed not to be subject to a mortgage where the suit is brought in a county other than the county where the branch road is, and the bondholders are not parties to the suit. *Central T. Co. v. Florida, etc. Co.*, 43 Fed. Rep. 751 (1890). A state statute regulating the foreclosure of mortgages is not applicable to a railroad mortgage when such statute is not adequate to secure to all parties their rights and adjust the equities between them.

Hence, in foreclosing the usual railroad mortgage, the court may in one suit order a sale of the entire property covered by the mortgage, although the property is located in various counties. *Old Colony T. Co. v. Great, etc. Co.*, 178 Mass. 92 (1901); s. c., 181 Mass. 413.

1 A court in one state having jurisdiction over the mortgagor and the trustee may decree foreclosure of a railroad running into two states. *McTighe v. Macon Const. Co.*, 94 Ga. 306 (1894). Where the mortgaged property consists of telegraph lines running into various states, the courts of one of the states will not foreclose and sell the part in that state, but will compel the trustee to adopt a remedy whereby the whole system may be sold at one time. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 44 Hun, 400 (1887). In *McElrath v. Pittsburg, etc. R. R.*, 55 Pa. St. 189 (1867), the court ordered the sale on foreclosure of the whole road, although a part of it was in West Virginia, the trustee being within the jurisdiction. The court did by its decree, "operating upon the trustee himself, authorize and compel him to sell and convey whatever interest of the railroad company will pass under the terms of the mortgage." Where foreclosure on a railroad running into two states is commenced in one state, and an ancillary bill is filed in the other state, intervening creditors or lienholders may intervene in either one of the two suits. *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 32 W. Va. 244 (1889). But in *Central T. Co. v. East Tennessee, etc. R. R.*, 30 Fed. Rep. 895 (1886), the court said the application should be made where the principal suit is being carried on.

foreclose a mortgage on the whole line may be brought in one of those circuits and a foreclosure of the whole line will be decreed.¹ The power of the court, however, to authorize its receiver to take possession of real estate situated in another district is very limited.² Hence, the approved practice in the federal courts is to file an independent bill in each circuit into which the railroad runs. An "ancillary bill" in the adjoining circuit is not proper. If foreclosure suit is instituted in both circuits, both bills should be original, independent bills.³ It is sometimes called an "auxiliary" bill.⁴ The court in the circuit where an ancillary or second bill is filed has the power to remove the receivers appointed in the other circuit, so far as that part of the railroad which is in the former circuit is concerned.⁵ A holder of equipment bonds issued by an interstate

1 *Muller v. Dows*, 94 U. S. 444 (1876). A foreclosure sale may include such part of the railroad as is out of the state. *Craft v. Indiana*, etc. Ry., 166 Ill. 580 (1897). The circuit court of the United States in Pennsylvania may foreclose a mortgage on a railroad property running from New York into Pennsylvania. *Woodbury v. Allegheny*, etc. R. R., 72 Fed. Rep. 371 (1895). "Of the propriety of a foreclosure in one court operating upon the entire property running through several states, and of the validity of a sale made in pursuance of that foreclosure, and the completeness of the title which will pass by such sale, there can be now no longer a question. In *Muller v. Dows*, 94 U. S. 444 (1876), that question was put at rest." *Central T. Co. v. Wabash*, etc. Ry., 29 Fed. Rep. 618 (1886); *Farmers' L. & T. Co. v. Chicago*, etc. Ry., 27 Fed. Rep. 146 (1886). The United States court sitting in Pennsylvania may foreclose a railroad running through Pennsylvania and Maryland. *Randolph v. Wilmington*, etc. R. R., 11 Phila. 502 (1876); s. c., 20 Fed. Cas. 264.

2 *Baltimore, etc. Assoc. v. Alderson*, 90 Fed. Rep. 142 (1898). The United States court sitting in a district through which a railroad runs has no power to appoint a receiver of the entire road, although it runs into

other districts and states, the mortgage being on the whole line. *Wilmer v. Atlanta*, etc. Ry., 2 Woods, 409, 419 (1875); s. c., 30 Fed. Cas. 73; *Wilmer v. Atlanta*, etc. Ry., 2 Woods, 447, 453 (1876); s. c., 30 Fed. Cas. 80. The case of *Muller v. Dows*, 94 U. S. 444 (1876), was distinguished in *Atkins v. Wabash*, etc. Ry., 29 Fed. Rep. 161 (1886), the latter case being one where no foreclosure of the railroad in the adjoining state, but only a receiver thereof, was prayed for, and ancillary bills were filed in such adjoining state. The court refused to recognize a receiver appointed in the adjoining circuit so far as such receivership extended beyond that circuit.

3 In the foreclosure of an interstate railroad running into two circuits, an "ancillary bill" in one circuit, referring to the principal bill of foreclosure in the other circuit, is not allowable. If the foreclosure is sought in both circuits, the bills in equity in each must be independent and complete. *Mercantile T. Co. v. Kanawha*, etc. Ry., 39 Fed. Rep. 337 (1889).

4 A bill filed in another circuit court after the main bill has been filed is an auxiliary bill and not an ancillary bill. *Coltrane v. Templeton*, 106 Fed. Rep. 370 (1901).

5 *Atkins v. Wabash*, etc. Ry., 29 Fed.

road may enforce his lien against the road in one state.¹ Where mortgaged property runs into different states and consists of a lease and of rolling-stock, and there are prior liens in some of the states, the court may apportion the proceeds according to mileage in the different states.²

§ 841. *State statutes relative to foreclosure may be, but need not be, followed by the federal courts.*—Where the statutes of the state in which mortgaged property is located prescribe a period within which a mortgagor may redeem the property from foreclosure, they apply to a foreclosure in the federal courts.³ But in the case of a railroad or other quasi-public property, the court has power to order the property sold free from the statutory right to redeem.⁴ Thus, a statute that a foreclosure sale of real estate shall be had on notice published where the land lies, and that the sale should be made where it lies, does not apply to a foreclosure sale of a railroad.⁵ The Iowa statute of redemption does not apply to a foreclosure sale of a water-works property in the federal court, although the rule is different as to ordinary land. Such a property may be sold as an entirety and without redemption, it being a quasi-public prop-

Rep. 161 (1886). In *Ellis v. Boston*, etc. R. R., 107 Mass. 1 (1871), a receiver appears to have been appointed of a road running into several states.

1 *Compton v. Jesup*, 68 Fed. Rep. 263 (1895); s. c., 167 U. S. 1.

2 *Thomas v. Cincinnati, etc. Ry.*, 91 Fed. Rep. 195 (1898). See also § 836, *supra*.

3 *Brine v. Insurance Co.*, 96 U. S. 627 (1877); *Singer Mfg. Co. v. McCulloch*, 24 Fed. Rep. 667 (1884). The length of time within which the mortgagor may redeem may be determined by the law of the state in which the foreclosure is decreed. *Jackson, etc. Co. v. Burlington, etc. R. R.*, 29 Fed. Rep. 474 (1887). See also *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889); *rev'd sub nom. Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895). In *Indiana* the equity of redemption may be sold out by a judgment creditor. *Coe v. McBrown*, 22 Ind. 252 (1864). See also on this subject § 850, *infra*. As to whether a state statute requiring the production and cancellation of

notes upon the discharge of a mortgage applies to a railroad mortgage, see *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900).

4 *Hammock v. Loan & Trust Co.*, 105 U. S. 77 (1881). No redemption is allowed in foreclosure sales of railroads. The statute was not intended to apply to such property. *Peoria, etc. R. R. v. Thompson*, 103 Ill. 187 (1882). There is no redemption from the sale of railroad property under foreclosure proceedings in the federal courts. *Turner v. Indianapolis, etc. Ry.*, 8 Biss. 380 (1878); s. c., 24 Fed. Cas. 367. The right of the mortgagor to redeem cannot be destroyed by a new law that the mortgage has been foreclosed, or will be foreclosed if payment is not made within a year. *Ashuelot R. R. v. Elliot*, 52 N. H. 387 (1873); s. c., 58 N. H. 451. The Iowa statute of redemption does not apply to a sale of railway property. *Sioux, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899).

5 *Craft v. Indiana, etc. Ry.*, 166 Ill. 580 (1897).

erty.¹ A statute that land shall be appraised before it is foreclosed, and giving a year's time to redeem, does not apply to a railroad.² But a statute that the sale shall not take place until six months after decree applies;³ as also a state law authorizing ejectment as a remedy.⁴ The fact that the foreclosure decree did not comply with the statute, that such a sale should be at least one year after the decree, cannot be raised in a subsequent creditor's bill.⁵ The statutes of Pennsylvania giving a stay of one year in realizing upon a mortgage do not apply to a bill of foreclosure in the United States court.⁶ A statute requiring an appraisement where sale is made under a power of sale does not apply to a sale under foreclosure decree.⁷ The foreclosure of a railroad mortgage need not be made in accordance with a statute for the foreclosure of ordinary real-estate mortgages.⁸ The mode of sale as required by act of congress is considered elsewhere,⁹ as is also the question of the amount to be paid on redemption.¹⁰

§ 842. *Claim of title in opposition to the mortgagor's title cannot be tried in a foreclosure suit—Priority of liens may be tried.*—This is a rule applicable to all foreclosure suits, whether the mort-

¹ Farmers' L. & T. Co. v. Iowa Water Co., 78 Fed. Rep. 881 (1897).

² Columbia, etc. Trust Co. v. Kentucky Union Ry., 60 Fed. Rep. 794 (1894). A state statute to the effect that, in an action by an employee against a railroad for damages, the railroad shall not set up the defense of negligence of a co-employee, applies to receivers appointed by the federal court. Peirce v. Van Dusen, 78 Fed. Rep. 693 (1897).

³ A federal court, in foreclosing a railroad in Kansas, will apply the Kansas statute, which forbids a sale until six months after the decree of foreclosure. A receiver will be appointed to operate the road during these six months. Benedict v. St. Joseph, etc. R. R., 19 Fed. Rep. 173 (1883).

⁴ The federal court foreclosing a railroad mortgage in Arkansas will follow Arkansas law. If the state law authorizes ejectment by the mortgagee upon default, the federal court will apply the same rule. Instead of ejectment, however, a suit in equity may be instituted and a receiver put

in charge, where the property is real, personal, and mixed, and the remedy at law is inadequate, inasmuch as ejectment does not lie for personalty, rolling-stock, etc. Dow v. Memphis, etc. R. R., 20 Fed. Rep. 260 (1884).

⁵ Andrews v. National, etc. Works, 77 Fed. Rep. 774 (1897).

⁶ Woodbury v. Allegheny, etc. R. R., 72 Fed. Rep. 371 (1895).

⁷ Southwestern, etc. Ry. v. Hays, 63 Ark. 355 (1897).

⁸ Ten Eyck v. Pontiac, etc. Co., 114 Mich. 494 (1897). A state statute regulating the foreclosure of mortgages is not applicable to a railroad mortgage when such statute is not adequate to secure to all parties their rights and adjust the equities between them. Hence, in foreclosing the usual railroad mortgage, the court may in one suit order a sale of the entire property covered by the mortgage, although the property is located in various counties. Old Colony T. Co. v. Great, etc. Co., 178 Mass. 92 (1901); s. c., 181 Mass. 413.

⁹ See § 850, *infra*.

¹⁰ See § 850, *infra*.

gage was given by a corporation or an individual.¹ But all conflicting rights as between co-defendants, their rights all arising from the mortgagor corporation's title, may be passed upon and decided.² Hence, the priority of liens originating from or under the same owner of the property may be litigated in a foreclosure suit on one of such liens.³ The question of who may attack the validity of a mortgage is considered elsewhere.⁴ The title obtained at a receiver's sale is only such title as the corporation had and is subject to all valid liens thereon.⁵ A decree of foreclosure cannot

1 *Farmers' L. & T. Co. v. Green Bay, etc. R. R.*, 6 Fed. Rep. 100 (1881). A contractor claiming title to part of the street railroad which is being foreclosed, the claim being based on the terms of the deed of that part from himself to the company, cannot litigate that question by filing a cross-bill in the foreclosure suit to which he is not a party. Adverse claims to the title cannot be adjudicated in a foreclosure suit. *Farmers' L. & T. Co. v. San Diego, etc. Co.*, 40 Fed. Rep. 105 (1889). If, however, the claim of the adverse title is really subsequent to the title of the mortgagee, he may make the claimant a party and have the question litigated. The receiver is not the proper party to institute such a suit. If the claimant shows that his title is really adverse to the mortgagor's, then the bill is dismissed as to him. *Harland v. Bankers', etc. Tel. Co.*, 33 Fed. Rep. 199 (1887). The legality of a tax sale made after the execution of a mortgage may be contested in the foreclosure of the mortgage. *Appleton, etc. Co. v. Central Trust Co. etc.*, 93 Fed. Rep. 286 (1899). Claims adverse to the mortgagor cannot be litigated and determined in a foreclosure suit, but claims originating under the mortgagor may be so litigated. *Savings & T. Co. v. Bear Valley, etc. Co.*, 112 Fed. Rep. 693 (1902). The claim of a rival lienor may be adjudicated in a foreclosure suit where such rival lienor claims under the mortgagor and by a

transaction subsequent to the mortgage. *Metropolitan T. Co. v. Dolgeville, etc. Co.*, 34 N. Y. Misc. Rep. 354 (1901).

2 *Corcoran v. Chesapeake, etc. Co.*, 94 U. S. 741 (1876); *Jerome v. McCarter*, 94 U. S. 734 (1876). *Cf. Bronson v. Railroad Co.*, 2 Black, 524 (1862), where the court said that, where each of two mortgagees claims priority, the question cannot be litigated in a foreclosure suit brought by one of them, the other one not being a party to such suit.

3 The priority of mortgages may be contested in a foreclosure suit, even though the question of title cannot. *Iowa County v. Mineral Point R. R.*, 24 Wis. 93 (1869). But see *Turner v. Indianapolis, etc. Ry.*, 8 Biss. 380 (1878); s. c., 24 Fed. Cas. 367; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). If there is any question as to which is the first and which is the second lien, the court will decide that question before the sale, in order that the parties may know how much they will have to bid in order to protect their own lien. *Campbell v. Texas, etc. R. R.*, 2 Woods, 263 (1872); s. c., 4 Fed. Cas. 1188. Alleged titles and liens prior to a mortgage may be litigated in the foreclosure suit if the court so permits. *Converse v. Michigan, etc. Co.*, 45 Fed. Rep. 18 (1891). See also ch. L, *infra*.

4 See § 848, *infra*.

5 *Matter of Coleman*, 174 N. Y. 373 (1903).

be annulled by an independent suit on the ground that it included property not included in the mortgage or complaint.¹

§ 843. *Parties complainant in a suit for foreclosure*.—A suit in equity for the foreclosure of a corporation mortgage should be instituted by the trustees of the mortgage.² The trustees sue alone, and none of the bondholders should be joined either as parties complainant or defendant.³ If the trustees refuse to bring suit, any bondholder may bring it and make the trustees parties defendant.⁴

§ 844. *Parties defendant in a suit for foreclosure*.—The corporation itself that gave the mortgage is a necessary party defendant, unless it has parted with its entire interest, in which case it is a proper but not a necessary party.⁵ If the foreclosure is by the first mortgagee, the second mortgagee is a proper although not a necessary party defendant. It is culpable negligence on the part of the complainant's attorney, however, not to join the junior mortgagees in order to cut off their right to redeem.⁶ Where the junior mort-

1 Venner v. Denver, etc. Co., 90 Pac. Rep. 623 (Col. 1907).

2 See § 821, *supra*.

3 See § 821, *supra*.

4 See § 825, *supra*.

5 Jones, Mortgages (4th ed.), § 1402. The only necessary parties to the foreclosure suit are the mortgagor and the mortgagee. Tug, etc. Co. v. Brigel, 86 Fed. Rep. 818 (1898). In a foreclosure suit the grantor of the company that holds the legal title need not be made a party. Mercantile T. Co. v. Missouri, etc. Ry., 41 Fed. Rep. 8 (1889). A mortgagor is not a necessary party if he has disposed of his interest. The officers of the mortgagor are neither necessary nor proper parties. Johnes v. Outwater, 55 N. J. Eq. 398 (1897). A decree of foreclosure is void if the owner of the equity of redemption is not made a party, and a purchaser at such a foreclosure sale is not even a mortgagee in possession. Beebe v. Richmond Light, etc. Co., 6 N. Y. App. Div. 187 (1896). If the mortgagor company has parted with the equity of redemption it is not a necessary party. Skiddy v. Atlantic, etc. R. R., 3 Hughes, 320 (1879); s. c., 22 Fed. Cas. 274. Nor

is a grantee of a part of the road a necessary party, the grant being subject to the first mortgage only. Bronson v. Railroad Co., 2 Black, 524 (1862). In a foreclosure suit by a second mortgagee, the mortgage being on a lessee's interest, and the suit being a part of another suit in which the property is in the hands of a receiver, neither the mortgagor nor the prior mortgagee nor the lessor are necessary parties, their rights not being affected. Grand Trunk Ry. v. Central Vermont R. R., 88 Fed. Rep. 622 (1898). Where a corporation is incorporated in two states by the same name and with the same officers and incorporators, each state giving the corporation certain riparian rights on a river, a mortgage given by one of the corporations, without stating which one, when foreclosed, must be foreclosed as against both corporations in order to convey complete title. Alabama, etc. Co. v. Riverdale, etc. Mills, 127 Fed. Rep. 497 (1904); *aff'd*, 198 U. S. 188.

6 If they are made parties their rights are cut off. Chicago, etc. R. R. v. Fosdick, 106 U. S. 47, 68 (1882). After the commencement of a fore-

gagagee is not made a party defendant and has no notice of the foreclosure sale, and did not by silence or conduct lead the prior mortgagee to suppose that the junior mortgage did not exist, such junior mortgage having been duly recorded, the junior mortgagee may afterwards bring a suit to foreclose his mortgage and have a sale subject to prior liens.¹ Although a foreclosure decree and sale does not cut off the rights of a junior mortgagee, a party defendant, yet seven years' delay may be fatal to redemption by such junior mortgagee.²

Even though in the foreclosure of the mortgage a subsequent lessee is not made a party defendant, yet such lessee cannot hold the purchaser at the foreclosure sale liable for the value of the unexpired term, such purchaser having forcibly taken possession of the property. The lessee's remedy is ejectment.³ All subsequent mortgagees, grantees, lessees, judgment creditors claiming liens, and

closure suit by the first mortgagee, making the second mortgagee a party defendant, the latter cannot institute an independent suit of foreclosure. *Sutherland v. Lake Superior, etc. Co.*, 23 Fed. Cas. 459 (1874). Where subsequent incumbrancers are made parties defendant, their rights are cut off, even though the bill does not correctly state their interest. *Benjamin v. Elmira, etc. R. R.*, 49 Barb. 441 (1867). Where upon the foreclosure of the first mortgage the second mortgagee is not made a party to the suit, the second mortgagee's rights are not cut off, and he may redeem the property by tendering the amount due on the first mortgage, and, if only the interest is due, may redeem by tendering that. But the second-mortgage bondholders in such a case cannot enjoin the foreclosure sale, inasmuch as the second mortgagee is not a party to the suit. If a purchaser at an execution sale is in possession, however, the court will not disturb that possession by a receiver until such party in possession is made a party to the suit. Where a sale is made by the trustees of the first mortgage in accordance with the terms of the mortgage and of the statutes, the second mortgagees and all other parties are cut off. *Searles v.*

Jacksonville, etc. R. R., 2 Woods, 621 (1873); s. c., 21 Fed. Cas. 929. Second mortgagees are not necessary parties. *Brooks v. Vermont Cent. R. R.*, 14 Blatchf. 463 (1878); s. c., 4 Fed. Cas. 308. Although a second mortgagee is made a party defendant, yet he may be dropped out if the foreclosing first mortgagee desires to do so. *Richards v. Chesapeake, etc. R. R.*, 1 Hughes, 28 (1876); s. c., 20 Fed. Cas. 692, where the jurisdiction was imperiled by the second mortgagee being a party. Yet the court allowed the case to be dismissed because it was desirable to retain this party as a party defendant for other reasons.

1 *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126 (1896). If, in a foreclosure suit by the first mortgagee, the second mortgagee is not made a party, the second mortgagee may at any time foreclose and sell the equity of redemption subject to the first mortgage, and the purchaser at the sale will be entitled to possession and the right to redeem. *Memphis, etc. R. R. v. State*, 37 Ark. 632 (1881).

2 *Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895), rev'g *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889).

3 *Sprague Nat. Bank v. Erie R. R.*, 22 N. Y. App. Div. 526 (1897).

lienors generally should be made parties defendant in order to cut off their interest in the property.¹ Where a mechanic's lien is fore-

1 *Beekman v. Hudson, etc. R. R.*, 35 Fed. Rep. 3 (1888). In the foreclosure suit in *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105 (1879), there were joined as parties defendant chattel mortgagees, judgment creditors, holders of liens for labor, etc., purchase-money mortgagees, vendor's lien holders, parties claiming specific performance of contracts, and subordinate mortgagees. The lien of a judgment creditor is eliminated by foreclosure. *Bronson v. La Crosse R. R.*, 2 Wall. 283 (1863). A grantee subsequent to the giving of the mortgage is a necessary party if his rights are to be cut off. *Terrell v. Allison*, 21 Wall. 289 (1874). In foreclosing a mortgage given by a consolidated company it is not necessary to make the companies so consolidated parties to the suit. But where one of these companies is about to institute a suit in the state court to attack the validity of the consolidation and mortgage, the complainants in the foreclosure suit take a grave risk in not making the constituent companies parties defendant. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 360 (1879); s. c., 22 Fed. Cas. 274. In the foreclosure of a railroad mortgage a telegraph company which has constructed its line on the railroad right of way by contract with the railroad is not a necessary party defendant. *Western Union Tel. Co. v. Ann Arbor R. R.*, 90 Fed. Rep. 379 (1898). Where a West Virginia corporation is building a hotel in Maryland and there are lien claimants in Maryland, the United States court in West Virginia has no power to issue receiver's certificates to finish the hotel, such lien claimants being necessary parties and of the same state as the complainant. *Baltimore, etc. Assoc. v. Alderson*, 90 Fed. Rep. 142 (1898). The largest stockholder in a corporation may, as the

holder of its purchase-money bonds and mortgage, foreclose the same, and may join as party defendant the person to whom the corporation subsequently to the execution of the mortgage contracted to sell the property. *Blair v. Silver Peak Mines*, 93 Fed. Rep. 332 (1899). In a foreclosure suit by a second mortgagee in the federal court, even though the third mortgagee is brought in by insufficient notice, yet the decree of foreclosure cannot be attacked subsequently in the state court by such third mortgagee, especially where the trustee of the third mortgage appeared in the suit. *Alabama, etc. Ry. v. Thomas*, 86 Miss. 27 (1905). A lien holder who is not made a party defendant in the suit of another lien holder to foreclose, is entitled to redeem within a reasonable time, but is not entitled to another sale of the property. *Crouch v. Dakota, etc. R. R.*, 18 S. D. 540 (1904). Where, subsequently to the foreclosure decree, the equity of redemption is sold, the purchaser at such sale need not be brought into the foreclosure suit, and will not be allowed to intervene. *Beebe v. Richmond Light, etc. Co.*, 6 N. Y. App. Div. 187 (1896). Where leases are made subject to a mortgage, and the lessees have the right to payment for improvements, or the right to remove them, the assignees of the lessees are not necessary parties to a suit to foreclose the mortgage. *Tyler v. Hamilton*, 62 Fed. Rep. 187 (1894), holding also that the foreclosure evicted them by title paramount. Where a mortgage foreclosure suit is commenced, and then mechanic's lien foreclosure suits are commenced, and then the foreclosure sale under the mortgage takes place, the purchaser is not affected by the mechanic's lien foreclosure. *Andrews v. National, etc. Works*, 77 Fed. Rep. 774 (1897). In *Framers' L. & T. Co.*

closed without joining a subsequent mortgagee, and in a subsequent litigation the question of priority between the mechanic's lien and the mortgage arises, the court is free to adjudge priority to the mortgage.¹ Where a judgment creditor, having a lien upon a railroad, is not made a party to the foreclosure suit, such judgment creditor may subsequently foreclose his lien and have a resale of the whole property, even though his lien covers only a part of the property. The purchaser at his sale may be subrogated to the rights of the mortgagee to the extent of the purchase-money paid. The surplus proceeds of the resale are applied first to liens prior to his judgment and then to his judgment.² Judgment creditors having a lien by statute are not necessary parties, but if they are not joined their lien continues upon the equity of redemption. If they petition to come in after suit has been commenced the jurisdiction of the federal court is not thereby affected.³

The foreclosing junior mortgagee need not make the senior mortgagee a party defendant unless he wishes to.⁴ But if the amount

v. Forest Park, etc. R. R., 65 Fed. Rep. 882 (1895), a mortgagee, who had not been made a party defendant in the foreclosure of mechanics' liens, attempted to foreclose its mortgage and claim that the mechanic's lien foreclosure sale was subject to the mortgage. The mortgage was illegal when issued, because it exceeded the amount of the capital stock, in violation of the statute. Resolutions to increase the capital stock had been passed, but the papers had not been filed, nor the statutory fees to the state paid, until after the foreclosure of the mechanics' liens. The company had received nothing from the bonds. The purchasers at the first foreclosure sale had expended large sums of money. Speculators who long afterwards bought the bonds with knowledge of the facts bought them for a small sum in order to bring this suit. The suit failed.

¹ *National, etc. v. Oconto, etc. Co.*, 183 U. S. 216 (1902). Even though by statute a contractor has a lien, yet a foreclosure thereof, without bringing in as a party defendant a subsequent mortgagee, does not affect the rights of such mortgagee. *Fidelity,*

etc. Co. v. Schenley, etc. Ry., 189 Pa. St. 363 (1899).

² *Stewart v. Wheeling, etc. Ry.*, 53 Ohio St. 151 (1895). The only necessary parties to the foreclosure are the mortgagor and the mortgagee. If judgment creditors who are citizens of the same state as the complainant are joined in the bill, the complainant may drop them out of the suit by amendment, and by such amendment the jurisdiction of the federal court is maintained. The fact that after the filing of the bill one of the complainants becomes a citizen of the state wherein the defendant resides does not destroy the jurisdiction. *Tug, etc. Co. v. Brigel*, 86 Fed. Rep. 818 (1898). See also § 827, *supra*.

³ *Sioux, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); *aff'd*, 173 U. S. 99 (1899).

⁴ Prior incumbrancers, the validity of whose incumbrances is not drawn in question, are not necessary parties. *Carey v. Houston, etc. Ry.*, 161 U. S. 115 (1896). Junior mortgagees may foreclose without making the prior mortgagees parties. The prior mortgagees can be made parties only by

of the first mortgage or of a prior lien is uncertain, the prior mortgagee may be made a party in order to ascertain that amount, so that the purchaser may know what the prior debt is.¹

pearance. A general notice calling on them to present their claims is insufficient. *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. A general mortgagee instituting foreclosure proceedings need not join prior mortgagees as parties defendant. If he does make them parties the court will dismiss the bill as to them with costs. *Wabash, etc. Ry. v. Central T. Co.*, 22 Fed. Rep. 138 (1884). A prior mortgagee on the part of the property coming into a foreclosure suit brought by the junior mortgagee on all the property is not entitled to be paid out of the funds realized by the sale. The prior mortgage remains and may be foreclosed. Prior mortgagees and lienors are not necessary parties. *Woodworth v. Blair*, 112 U. S. 8 (1884). In a foreclosure suit by a junior mortgagee it is not necessary to make the senior mortgagee a party. *Jerome v. McCarter*, 94 U. S. 734 (1876). Where the prior mortgage is on a part of the system it may be foreclosed separately, and application may be made to the court to have the receiver of the second mortgage give up possession of it. *Central T. Co. v. Wabash, etc. Ry.*, 25 Fed. Rep. 693 (1885). To same effect, *Olyphant v. St. Louis, etc. Co.*, 23 Fed. Rep. 465 (1885). The prior mortgagee need not notice the bill, though made a party. He is not a necessary party, and may disregard the bill and file his own bill for foreclosure. *Gihon v. Belleville White Lead Co.*, 7 N. J. Eq. 531 (1849).

1 Prior mortgagees may be made parties defendant for the purpose of determining the amount of their lien—"an excellent practice"—but the property itself cannot be foreclosed against them. *Bound v. South Carolina Ry.*, 59 Fed. Rep. 509 (1894). A junior mortgagee in his suit for fore-

closure is at liberty to make the senior mortgagees parties defendant so as to have the amounts secured by their mortgages ascertained and determined by the judgment, that they might be paid out of the proceeds of the sale, and their lien discharged, or that the sale might be made subject to the known amount of their liens. *Metropolitan T. Co. v. Tonawanda, etc. R. R.*, 43 Hun, 521 (1887); aff'd, 106 N. Y. 673. A second mortgagee may foreclose and make the first mortgagee a party where a receiver is appointed, but the income of the receiver goes to the first mortgagee. *Miltener v. Logansport Ry.*, 106 U. S. 286 (1882). Where there is doubt as to the exact amount owing on a prior mortgage, the trustees of that mortgage should be made parties for the purpose of ascertaining such amount. Otherwise a purchaser at the sale will not know how much to bid for the equity of redemption. *Richards v. Chesapeake, etc. R. R.*, 1 Hughes, 28 (1876); s. c., 20 Fed. Cas. 692; *Sutherland v. Lake Superior, etc. Co.*, 23 Fed. Cas. 459 (1874), where there was also doubt as to the property covered by the various mortgages. A trustee in foreclosing may bring in lessees where the lease was recited in the mortgage and rent is still due. *Jesup v. Illinois Cent. R. R.*, 43 Fed. Rep. 483 (1890). A contractor's lien prior in time to the issuing and recording of a mortgage is not cut off by the foreclosure of the mortgage unless the holder of the lien is made a party to the foreclosure suit. *Pittsburgh, etc.*

4 A mortgagee of one property But where the contractors having a prior lien are made parties to the mortgagee's foreclosure suit, and they do not defend, an independent proceeding by them eleven years later to enforce their lien will fail. *Woods v.*

Ordinarily, however, the second mortgagee has no right to bring in the first mortgagee as a party. The first mortgagee, if brought in, may object and be relieved from the suit with costs. A prior mortgagee, however, who is not made a party to the foreclosure suit of the second mortgage is not bound by the proceedings in such suit, nor by receiver's certificates issued therein.¹ The prior mortgagee may intervene and file a cross-bill for foreclosure if he wishes.² Where a bond issued by a state recites that it is secured by an equal amount of stock in a railroad company, the holder of such bond may file a bill to foreclose on that amount of stock and need not join other bondholders as parties defendant.³ A bondholder who buys prior liens on the property does so for the benefit of other bondholders, who, within a reasonable time after they know of such purchase, offer to contribute such part of the sum paid by him as the par value of the bonds held by the contributing bondholder bears towards all the bonds.⁴

General creditors are not proper parties to the said suit,⁵ nor the stockholders of the mortgagor corporation,⁶ nor the officers,⁷ nor a guarantor of the mortgage bonds.⁸ But a general creditor holding guaranteed bonds may intervene and attack the good faith of the fore-

Pittsburgh, etc. R. R., 99 Pa. St. 101 (1881).

¹ Third Street, etc. Ry. v Lewis, 79 Fed. Rep. 196 (1897). In the case of Harris v. Youngstown Bridge Co., 90 Fed. Rep. 322 (1898), the property was ordered to be sold subject to the first mortgage, but the first mortgagee was joined as a party defendant in order to be heard on its claim of priority as to the whole property.

² See § 845, *infra*.

³ South Dakota v. North Carolina, 192 U. S. 286 (1904).

⁴ Booker v. Crocker, 132 Fed. Rep. 7 (1904).

⁵ General creditors not having any lien on the property need not be made parties defendant. *McMurtry v. Montgomery, etc. Co.*, 86 Ky. 206 (1887). Unsecured creditors are not necessary or proper parties to an action of foreclosure and have no right to intervene therein, and any adjudication made against the mortgagor is binding upon them. Nor is the temporary receiver, in an action by the state to

dissolve the corporation, a necessary party defendant, nor is the state itself, but they may be allowed to come in. *Herring v. New York, etc. R. R.*, 105 N. Y. 340 (1887). General creditors are bound by the decree. *Stout v. Lye*, 103 U. S. 66 (1880).

⁶ See § 848, *infra*, and § 750, *supra*; *Foster v. Mansfield, etc. R. R.*, 36 Fed. Rep. 627 (1888); *aff'd*, 146 U. S. 88 (1892); *Railroad Co. v. Howard*, 7 Wall. 392 (1868). Stockholders are not proper parties defendant. *Godchaux v. Morris*, 121 Fed. Rep. 482 (1903).

⁷ The president of the mortgagor is not a necessary party defendant in a foreclosure suit, even though he negotiated the bonds. *Unity Co. v. Equitable T. Co.*, 204 Ill. 595 (1903).

⁸ A guarantor of the interest on the bonds is not a necessary party to the foreclosure suit, since he is not entitled to subrogation until the whole debt for which he is liable is paid. Otherwise the guaranty would be useless. *Columbia, etc. Trust Co. v. Ken-*

closure proceedings.¹ The bondholders under the second mortgage need not be joined as parties defendant, although the trustee is the same for both mortgages.² In a suit to foreclose a mortgage a receiver in possession is not a proper party.³ The mortgagee of another piece of property is not a necessary party defendant, although he may be a proper party.⁴ In foreclosing, the mortgagee may claim property which never stood in the name of the mortgagor, but stood in the name of an agent or trustee of the mortgagor.⁵ A purchaser at foreclosure sale has a right to intervene in another foreclosure suit brought by an unencumbered lien-holder.⁶ Where, subsequently to the foreclosure decree, the equity of redemption is sold, the purchaser at such sale need not be brought into the foreclosure suit, and will not be allowed to intervene.⁷

§ 845. *Cross-bills—Independent suit to foreclose where a receiver is already in possession.*—A cross-bill may be filed by a defendant in the foreclosure suit, but only by leave of the court.⁸ The cross-bill

tucky Union Ry., 60 Fed. Rep. 794 (1894). The guarantor of mortgage bonds is not a necessary party to a foreclosure suit. "If the guarantor would be subrogated to the rights of the creditor or purchaser, he should pay the debt or offer to redeem." *Owen v. Potter*, 115 Mich. 556 (1898).

¹ *Louisville, etc. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 674 (1899), rev'g 84 Fed. Rep. 539. Cf. *Bronson v. Railroad*, 2 Black, 524 (1862).

² *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 303 (1881). See also §§ 819, 821, *supra*.

³ *Continental T. Co. v. Toledo*, etc. R. R., 82 Fed. Rep. 642 (1897). Receivers are not necessary parties defendant. *Grand Trunk Ry. v. Central Vermont R. R.*, 88 Fed. Rep. 622 (1898).

⁴ A mortgagee of one property owned by a corporation is a proper party defendant to a foreclosure suit on another property owned by that company, but the former may institute separate foreclosure proceedings on his mortgage and may have a separate sale. *Olyphant v. St. Louis*, etc. Co., 23 Fed. Rep. 465 (1885). A mortgagee of one part of a railroad is not

a necessary party to a foreclosure suit brought by a mortgagee of another part of the road. *Bronson v. Railroad Co.*, 2 Black, 524 (1862). Where a party claims land which is not included in the foreclosure suit, he cannot come into the suit. *Cutting v. Florida Ry., etc.*, 45 Fed. Rep. 444 (1891).

⁵ *Metropolitan Trust Co., etc. v. Columbus*, etc. R. R., 93 Fed. Rep. 689 (1899). See also § 857, *infra*.

⁶ *Connor v. Tennessee*, etc. Ry., 109 Fed. Rep. 931 (1901).

⁷ *Beebe v. Richmond Light, etc. Co.*, 6 N. Y. App. Div. 187 (1896).

⁸ *Bronson v. La Crosse*, etc. R. R., 2 Wall. 283 (1863). A bill filed by a defendant, on leave, in order to a complete decree upon the whole matter in dispute, is properly styled a cross-bill; and where, on the bill of the original complainant, possession of property has been taken by a circuit court of the United States, the jurisdiction of the court in passing upon such a cross-bill in the disposition of the property does not depend upon the citizenship of the parties. *Morgan's*, etc. Co. v. *Texas*, etc. Ry., 137 U. S. 171 (1890). See also § 827, *supra*.

may be by a senior mortgagee asking foreclosure,¹ or may be filed to determine priority of liens,² but not to determine matters which will be eliminated by the foreclosure,³ or to hold the trustee liable for negligence,⁴ nor in cases where other defendants have already filed sufficient cross-bills.⁵ The court may dismiss the original bill and sustain the cross-bill.⁶

Where foreclosure has been commenced by the second mortgagee, and the first mortgagee is properly made a party, and a receiver appointed, the first mortgagee will not be allowed to file an independent bill for foreclosure.⁷ He should file a cross-bill for fore-

1 When the senior mortgagee is made a party defendant to the junior mortgagee's suit for foreclosure, such defendant may file a cross-bill to foreclose the senior mortgage. *Metropolitan T. Co. v. Tonawanda, etc. R. R.*, 43 Hun, 521 (1887); *aff'd*, 106 N. Y. 673. See also *American L. & T. Co. v. East, etc. R. R.*, 37 Fed. Rep. 242 (1889). Where a prior mortgagee is made a party defendant and files a cross-bill for foreclosure, and declares the principal sum due, and asks that the sale be free from all liens, the bondholders themselves cannot intervene and have a sale made subject to the first lien unless they offer to bid enough to pay the arrearages of interest and costs of the suit. *Bound v. South Carolina Ry.*, 58 Fed. Rep. 473 (1893).

2 Where a judgment creditor files a bill to reach the equity of redemption and determine the validity of prior liens, the defendant bondholders may file cross-bills against each other to determine priority. *Morton v. New Orleans, etc. Ry.*, 79 Ala. 590 (1885).

3 The defendant company will not be allowed to file a cross-bill for an accounting, cancellation of lease, etc., between it and another company, where such lease is second to the mortgage and will be wiped out by the foreclosure. *Mercantile T. Co. v. Missouri, etc. Ry.*, 41 Fed. Rep. 8 (1889).

4 In *Fidelity, etc. Co. v. Mobile St. Ry.*, 53 Fed. Rep. 850 (1893), it was (181)

held that bondholders may intervene as quasi-parties, but cannot set up a new cause of action by way of cross-bill. Hence they cannot, in the foreclosure suit, hold the trustee liable for neglect of duty. A bondholder may, in a suit of foreclosure, ask that parties be compelled to account for earnings illegally diverted. *Linder v. Hartwell R. R.*, 73 Fed. Rep. 320 (1896). In a foreclosure suit being carried on by the trustee, a bondholder cannot file a "petition and cross-bill" charging misconduct on the part of the trustee and asking relief. A cross-bill cannot introduce new matter or new parties. *Thruston v. Big Stone, etc. Co.*, 86 Fed. Rep. 484 (1898).

5 If entire relief may be obtained under the original bill and the answer, or under a cross-bill filed by other defendants, a new cross-bill will not be allowed. *Gilman v. New Orleans, etc. R. R.*, 72 Ala. 566 (1882). If possible so to do and preserve all rights, the court will not allow cross-bills, petitions, etc., but will direct all claimants to file their claims and thereby become quasi-parties. *Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567, 601 (1879).

6 *Railroad Co. v. Chamberlain*, 6 Wall. 748 (1867), holding that the federal court, having jurisdiction of the original bill, thereby acquired jurisdiction to go on with the cross-bill.

7 *Mercantile Trust Co. v. Atlantic &*

closure. On the other hand it has been held that although a receiver is in charge of a railroad system at the instance of a judgment creditor, the court will not enjoin a mortgagee from instituting a foreclosure suit based on a default in the payment of interest which occurred after the receivership,¹ and a first mortgagee may, with the court's consent, file a bill to foreclose, and join as a party defendant a receiver already appointed by the court in another foreclosure suit.²

§ 846. *Miscellaneous defenses to the foreclosure—Validity of incorporation—Statute of limitations.*—Where the corporation or its stockholders are contesting a foreclosure, their object being to force a compromise from the bondholders so that on the reorganization the stockholders shall still have an interest in the property, all kinds of defenses are set up. The defenses that the bonds were illegally issued or irregularly issued, and that the mortgage was unauthorized or illegal or irregular, and many other defenses, have already been considered. In addition to all these many other defenses are set up. The courts are bound to give them a hearing, but are not inclined to sustain them unless clearly required by law and equity. Thus, the defense that the corporation which executed the mortgage was not properly incorporated is not a good defense,³ nor that the consolidated company which gave the mortgage was not legally consolidated,⁴ nor that a construction company had agreed to pay the interest in default,⁵ nor that a lease of the road has been made,⁶ nor that the corporation has other assets to pay the mortgage.⁷ A mortgagor of land to a national

Pac. R. R., 70 Fed. Rep. 518 (1895); American L. & T. Co. v. Central Vt. R. R., 84 Fed. Rep. 917 (1898); Sutherland v. Lake Superior, etc. Co., 23 Fed. Cas. 459 (1874). Cf. Third St., etc. Ry. v. Lewis, 79 Fed. Rep. 196 (1897). As to the jurisdiction of the federal court to entertain a cross-bill, see § 827, *supra*, and note 2, p. 2862.

1 Mercantile Trust Co. v. Baltimore & O. R. R., 89 Fed. Rep. 606 (1898).

2 American Surety Co. v. Worcester, etc. Co., 90 Fed. Rep. 773 (1898).

3 See § 637, *supra*. It is no defense to a foreclosure that the mortgagor was not legally organized, and a stockholder will not be allowed to intervene to set up that defense. Gunderson v. Illinois, etc. Bank, 100 Ill. App. 461 (1902). It is no defense to a mortgage that in the incorporation of

the company most of its subscriptions were made by irresponsible parties. Gunderson v. Illinois, etc. Bank, 199 Ill. 422 (1902).

4 Coe v. New Jersey Mid. Ry., 31 N. J. Eq. 105 (1879). A mortgage deed of trust and the bonds given by a consolidated company, the consolidation being unauthorized, cannot be enforced and do not bind even the constituent companies. American L. & T. Co. v. Minnesota, etc. R. R., 157 Ill. 641 (1895). See § 637, *supra*.

5 Foster v. Mansfield, etc. R. R., 36 Fed. Rep. 627 (1888); *aff'd*, 146 U. S. 88 (1892).

6 Hale v. Nashua, etc. R. R., 60 N. H. 333 (1880), holding also that the mortgagee cannot prevent a lease being made.

7 It is no defense to a foreclosure

bank cannot defend against it on the ground that the bank had no power to take the mortgage.¹ It is no defense to a mortgage that it was given by a trust or combination in restraint of trade.² Where a mortgagee, at the request of the mortgagor corporation, withholds the mortgage from the record to deceive the public until the mortgagor becomes insolvent, the mortgage may be set aside for fraud.³ Although it is a general rule that a tender of a mortgage debt discharges the mortgage if not accepted, the debt, however, continuing to exist as an unsecured debt, yet the courts are inclined to allow excuses to be given, for not accepting the tender, and to enforce the mortgage.⁴ But the defense that the mortgagee as lessee has been paid the interest by rental is good if true.⁵ An agreement between various bondholders not to enforce payment of their coupons for ten years is no defense to a foreclosure by the trustee, the agreement never having been considered alive by any of the parties to it.⁶ Where the mortgage is not sealed, and in order to cure the defect another mortgage is executed, no debts having been incurred in the meantime, both mortgages may be foreclosed as one.⁷ A foreclosure of a mortgage will not be enjoined to await the result of other litigation between the mortgagor and the bondholder, the latter's title to the bonds being indisputable.⁸ The statute of limitations or an equivalent delay in commencing a suit in equity may be a bar.⁹

suit that the unpaid subscriptions of stockholders, if collected, would be sufficient to avoid the necessity of foreclosure. *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903).

¹ *Camp v. Land*, 122 Cal. 167 (1898). See also §§ 690, 695, *supra*.

² *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). See also ch. XXIX, *supra*.

³ *Curtis v. Lewis*, 74 Conn. 367 (1902). A mortgage securing bonds is not fraudulent by reason of the fact that it was agreed that it should not be recorded in order that the credit of the company might not be impaired. *Am. Trust & Savings Bank, etc. v. McGettigan*, 152 Ind. 582 (1899). See also § 811, *supra*.

⁴ *Union, etc. Ins. Co. v. Union, etc. Co.*, 37 Fed. Rep. 286 (1889).

⁵ Where the owner of all the bonds is also lessee of the property under an agreement to apply all profits to the coupons, the company may set up that

the profits have been sufficient to pay the coupons. *Chamberlain v. Connecticut Cent. R. R.*, 54 Conn. 472 (1886).

⁶ *Farmers' L. & T. Co. v. Rockaway Valley R. R.*, 69 Fed. Rep. 9 (1895).

⁷ *Robinson v. Piedmont Marble Co.*, 75 Fed. Rep. 91 (1896).

⁸ *National, etc. Co. v. Rhode Island, etc. Co.*, 33 Atl. Rep. 254 (R. I. 1895). A suit in Kentucky between rival claimants to office to have an adjudication as to the same and to have a receiver does not prevent one of the parties from foreclosing a mortgage on the corporate property in another state and having a receiver thereof appointed. *Schmidt v. Mitchell*, 98 Ky. 218 (1895). In legal proceedings for voluntary dissolution the court will not enjoin another suit for the foreclosure of a mortgage. *Re Hamilton Park Co.*, 1 N. Y. App. Div. 375 (1896).

⁹ See § 772, *supra*.

Fraud in the issue of the bonds is a frequent defense; especially that the bonds were issued for no value received. This defense is considered elsewhere.¹ Where, by reason of collusion, such defenses are not made, other parties may intervene.² A state cannot file and sustain a bill to declare void watered stock and bonds and enjoin a foreclosure sale, and to have the property sold and the proceeds applied to the moneys actually expended by the corporation. "The state has no authority to protect such private rights by suit."³ "The court exercises a large discretion in passing on questions of multifariousness."⁴

§ 847. *Allegations and proof in foreclosure suits—Title to certain bonds cannot be there tried—Defaults.*—The question whether a demand of payment is necessary before commencing foreclosure proceedings turns upon the provisions of the mortgage.⁵ The description of the property in the bill of foreclosure in the same language as is used in the mortgage is sufficient.⁶ Service of summons in a foreclosure suit against a foreign corporation must be made in strict accordance with the statute.⁷ In a suit to foreclose a corporate mortgage the complainant should prove the giving of the mortgage; the issue of the bonds, including the number

¹ See § 766, *supra*, and § 848, *infra*.

² See § 848, *infra*.

³ *State v. Guaranty, etc. Co.*, 73 Fed. Rep. 914 (1896). See also § 848*f*, *infra*.

⁴ *Metropolitan Trust Co., etc. v. Columbus, etc. R. R.*, 93 Fed. Rep. 689 (1899). See also § 739, *supra*.

⁵ No demand of payment of bonds need be made before foreclosure proceeding if an allegation is made that the company is insolvent and such demand would have been useless. *Shaw v. Bill*, 95 U. S. 10 (1877). No demand of payment of interest is necessary before the commencement of foreclosure proceedings. The defendant must prove payment or readiness to pay. *Marlor v. Texas, etc. Ry.*, 21 Fed. Rep. 383 (1884). Presentation and demand of payment of coupons need not be shown in order to prove that the company had failed for more than six months to pay the interest. *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878). A demand of payment of coupons is necessary in order to set running a provision of the mortgage

that the principal shall become due and a remedy become available six months after default. *Potomac Mfg. Co. v. Evans*, 84 Va. 717 (1888). See also § 800, *infra*. Non-payment of coupons is no cause for foreclosure where no demand of payment is shown. *Davies v. New York Concert Co.*, 41 Hun, 492 (1886). See also *Union, etc. Ins. Co. v. Union, etc. Co.*, 37 Fed. Rep. 286 (1889). Where the principal is to become due thirty days after default in the payment of interest and after demand thereof, a written demand is sufficient, even though the coupons are not presented. *New Jersey, etc. Co. v. Security, etc. Co.*, 42 Atl. Rep. 746 (N. J. 1899).

⁶ *Grand Trunk Ry. v. Central Vermont R. R.*, 88 Fed. Rep. 622 (1898).

⁷ *Venner v. Denver, etc. Co.*, 15 Colo. App. 495 (1900). A decree of foreclosure based upon service accepted by the acting president, who was really the agent of the mortgagee, may be set aside as fraudulent. *Fox v. Robbins*, 62 S. W. Rep. 815 (Tex. 1901).

of bonds and the character of them; the default on the coupons; that the default has not been waived; and if the principal has been declared due and payable, the declaration as provided for in the mortgage.¹ A trustee of a mortgage in foreclosing makes a *prima facie* case by introducing the trust deed and the bonds secured thereby.² In a suit for the foreclosure of a mortgage securing an issue of bonds, it is not necessary that the bonds should be produced before the court or a master before the entry of a decree of sale.³ Where the bill for foreclosure alleges the issue of the bonds and the answer admits the same, it is not necessary to prove the bonds before decree and sale.⁴ Even though all the bonds are not formally proved in the foreclosure suit, yet if their existence is not disputed, a decree in behalf of all the bonds will not be disturbed.⁵ The ownership of bonds need not be determined before a decree of foreclosure, a default and the amount of the default having been proved.⁶ The question of the ownership of bonds as between a pledgor and pledgee and subsequent holders cannot be contested in the foreclosure of the mortgage securing the same, prior to the decree, but on the distribution of the proceeds of the foreclosure sale that question can then be litigated.⁷ It is proper for the court to direct the referee in the foreclosure proceedings to take proof as to the ownership of the bonds, the validity of some of the bonds being questioned.⁸ The referee in a mortgage foreclosure suit should take evidence in regard to each and every bond, so as to pass upon the actual indebtedness irrespective of what the corporation or its directors may admit.⁹ A bondholder will not be allowed to intervene, prior to decree for sale, to enable him to

1 *Coe v. East, etc. Co.*, 52 Fed. Rep. 531, 559 (1892). Evidence in a foreclosure suit may be given of the issue and existence of more bonds than are alleged in the complaint. *Peck v. New York, etc. Ry.*, 85 N. Y. 246 (1881).

2 *Ording v. Burnett*, 178 Ill. 28 (1899).

3 *Dickerman v. Northern Trust Co.*, 176 U. S. 181 (1900), *aff'g* 80 Fed. Rep. 450 (1897), *aff'g* Northern Trust Co. v. Columbia, etc., 75 Fed. Rep. 936 (1896); *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). See also § 881, *infra*.

4 *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900).

5 *Cutter v. Iowa Water Co.*, 128 Fed. Rep. 505 (1904); *rev'd* on another point in 140 Fed. Rep. 916. The bonds

need not all be proved before decree of foreclosure. *Weed v. Gainesville, etc. R. R.* 119 Ga. 576 (1904). Where the creditors secured by the mortgage are not direct creditors of the mortgagor, but hold certificates of the trustee, it is sufficient if the trustee proves the entire debt, and the court may then refuse to receive proof of individual certificates. *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903).
6 *Central T. Co. v. California, etc. R. R.*, 110 Fed. Rep. 70 (1901); *aff'd*, 182 Fed. Rep. 882.

7 *Sioux City, etc. Ry. v. Manhattan T. Co.*, 92 Fed. Rep. 428 (1899).

8 *Knickerbocker Trust Co. v. O., C. & R. S. R. Co.*, 188 N. Y. 38 (1907).

9 *Cochran v. Anglo-American, etc. Co.*, 69 Hun, 168 (1893).

litigate priority of her bonds over other bonds, which were illegally issued to promoters and are still held by them.¹

Where a mortgage on its face has been regularly executed, it is not necessary in a foreclosure suit to prove a resolution of the board of directors authorizing it, proof of delivery and of the payment of the consideration to the corporation having been given.²

Where the master finds that all bonds were duly issued and were valid, a party desiring to contest the validity of certain bonds must file a specific exception, instead of a general exception to the general finding.³ A supplementary bill of foreclosure may be filed and will be sufficient to sustain the suit, even though the original bill was not sufficient, where the original bill was the outgrowth of a prior creditor's action.⁴ A foreclosing mortgagee cannot attack the validity of prior mortgages which are expressly recognized in his mortgage.⁵ Although the company defaults in putting in its answer, yet it will be allowed to put one in if it has a substantial defense.⁶ Where judgment has been taken against a corporation by default in the state court, and the company has made every effort to open it and have a new trial, and has failed, a non-resident stockholder cannot, by a bill of equity in the federal court, cause the judgment to be

¹ *Mercantile Trust Co. v. United States, etc. Co.*, 130 Fed. Rep. 725 (1904). See also §§ 725, 808, 809, *supra*.

² *United States Rubber Co. v. American, etc. Co.*, 181 U. S. 434 (1901).

³ *New York Security, etc. Co. v. Lincoln Street Ry.*, 77 Fed. Rep. 525 (1896).

⁴ See § 848, *infra*.

⁵ Although the corporation has defaulted for a year and a half in the foreclosure suit, yet it may apply for leave to put in an answer. *Central T. Co. v. Texas, etc. Ry.*, 23 Fed. Rep. 846 (1885). The corporation will not be permitted to file an answer setting up irrelevant defenses after default, and fifteen months after a receiver has been appointed, where the only excuse for the delay is that reorganization proceedings had been going on, but had failed. *Central T. Co. v. Texas, etc. Ry.*, 24 Fed. Rep. 151 (1885). Nor will a bondholder, under the same circumstances, be allowed to intervene. *Central T. Co. v. Texas, etc. Ry.*, 24 Fed. Rep. 153 (1885).

⁶ *Reed v. Helois, etc. Co.*, 64 N. J.

set aside.¹ The court may not allow a discontinuance of the case if some of the parties object.²

§ 848. *Fraudulent bonds and fraudulent foreclosures—Who may complain: (a) The trustee; (b) Bondholders; (c) Second mortgage bondholders; (d) Judgment creditors; (e) General creditors; (f) The state; (g) The corporation mortgagor; (h) A receiver; (i) Stockholders; (j) The purchaser; (k) No relief if no benefit—Subsequent creditors cannot complain—Purchasers of bonds with notice cannot complain—Stock voting in favor of issue cannot be basis of suit—Decree may not be for benefit of all creditors—Invalidity of part of bonds does not invalidate mortgage—Laches as a bar to relief.*—Fraudulent bonds and mortgages and fraudulent foreclosures have been a prolific source of litigation. The question of what constitutes fraud in the issue of bonds has been considered elsewhere, especially where bonds have been issued for property or construction work;³ and also where bonds have been issued in excess of a statutory limitation on the amount of bonds which the corporation is authorized to issue.⁴

Fraud affecting the mortgage may also exist where the vendor of property of the corporation was induced to sell by fraudulent misrepresentations. He then sues to recover the title to the property free from the mortgage.⁵ Or a creditor of the vendor of

¹ *Hendrickson v. Bradley*, 85 Fed. Rep. 508 (1898).

² Where a mortgage is connected with a lease of property in such a manner as to obligate the lessee to apply the income to the interest and a sinking fund, but a foreclosure takes place, the lessee cannot stop the foreclosure, even though the lessee owns all the bonds, inasmuch as the stockholders of the mortgagor company have an interest in the suit. A stockholder will not be allowed to intervene so long as the trustee continues to prosecute the suit. *Phillips v. Southern*, etc. R. R., 110 Ky. 33 (1901). See also § 748, *supra*, and § 848*k*, *infra*.

³ See § 766, *supra*.

⁴ See § 760, *supra*.

⁵ Even though a large number of owners of paper mills are induced to turn their property in to a single corporation in exchange for bonds and stock of the latter, and the promoters

secretly receive a large quantity of additional profit, and even though the total amount of bonds and stock issued is about twice the price actually paid to the owners for the properties, yet this does not invalidate the mortgage securing the bonds, and the remedy of the parties who so turned in their properties is against the promoters and not in defense of a suit to foreclose the mortgage. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant and serves them by publication, and, two of the trustees having died, causes successors to be appointed by the court, and obtains decree against the corporation and the trustees of the mortgage canceling their title to the land, the decree is effective, and,

the property to the corporation may claim that the transfer was a fraud on him.¹ But the subject now particularly under consideration is the remedy for fraud in the giving or foreclosure of a mortgage; fraud in the origin of the mortgage, or fraud in the failure of the parties of record to set up the proper defenses, or fraud in the purpose of the foreclosure itself. The failure of the corporation to defend against a foreclosure is not fraud, unless good defenses actually exist. In fact, a corporation which has become hopelessly insolvent may consent to a foreclosure of its mortgage;² and where the mortgage provides that the bonds shall become due in case of an execution issuing against the company and being unpaid, it is legal for a holder of coupons to obtain judgment and issue such execution, and the mortgage may thereby become due, even though the judgment on the coupons was obtained by consent for the purpose of having the mortgage become due.³ But where good defenses to a mortgage

even though the mortgage is afterwards foreclosed, the purchaser at such sale takes no title to such land, he having delayed thirty years before attacking such decree. *Bump v. Butler County*, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality, whereby it conveyed land to a corporation, the court will not grant it any relief. *Rummel v. Butler County*, 93 Fed. Rep. 304 (1899). Where the president of the mortgagor corporation allows the property to be sold for non-payment of taxes, and buys in the property himself, the mortgagee may recover such property from him. *Appleton, etc. Co. v. Central Trust Co. etc.*, 93 Fed. Rep. 286 (1899). Where a creditor of an insolvent corporation reorganizes it, and then by fraudulent representations induces another company to sell its property to the reorganized company in exchange for stock of the latter, and a mortgage is at the same time placed upon the combined properties, and default takes place and foreclosure is commenced, the parties so selling the property may still rescind unless innocent bondholders' rights have intervened, in which case money damages may be

had against the parties bringing about the reorganization and making the misrepresentations. Such misrepresentations may consist of statements as to what will be done in the way of improvements out of the bonds, as well as statements as to the current net profits. *Old Colony Trust Co. v. Dubuque, etc. Co.*, 89 Fed. Rep. 794 (1898). The owner of property which a corporation includes in its mortgage without right cannot enjoin the issue of the mortgage bonds *pendente lite* where he can have full relief on the final decree. *De Neufville v. New York & N. Ry.*, 84 Fed. Rep. 391 (1898).

¹ See ch. XL, *supra*.

² *Dickerman v. Northern T. Co.*, 176 U. S. 181, 191 (1900), the court saying: "If the company had become insolvent, and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of the stockholders cannot question their right to do so."

³ *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900).

actually exist, and the corporation as defendant in the foreclosure suit fails to set them up, or where the trustee as complainant is not protecting the interests of the mortgage bondholders whom he represents, then difficult questions arise and they are peculiar to corporation law. The question then arises: Who can complain and what is his remedy? The clearest method of treating this subject is perhaps to consider the status of each party, separately from the others, as follows:

§ 848. (a) The *trustee* of the mortgage is the legal representative of all the bondholders, and the trustee's action binds all the bondholders, relative to the conduct of the litigation, except in special instances referred to below. Ordinarily the bondholders are not parties to the litigation and are not allowed to intervene. They are represented by the trustee.¹ But there are exceptions to this rule, as follows:

§ 848. (b) *Bondholders* in certain cases will be permitted by the court to intervene and become parties to the suit. Thus in the foreclosure suit, if the trustee is acting collusively or fraudulently, any bondholder may apply to the court to intervene and may be allowed to become a party thereto in order to remove the wrong.

The bondholders or any of them may apply to the court to be allowed to come into the suit as parties, and the weight of authority holds that such application should be granted where substantial justice requires that they be given a standing in court.² But after the

¹ See § 817, *supra*.

² The majority bondholders may be admitted to set up that there can be no foreclosure without the consent of the majority. *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). The court may allow antagonistic reorganization committees to intervene and become parties. *Farmers' L. & T. Co. v. Cape Fear, etc. Ry.*, 71 Fed. Rep. 38 (1895). Bondholders will not be allowed to intervene where the fitness and honesty of the trustee in conducting the case is not questioned. *Bowling Green, etc. Co. v. Virginia, etc. Co.*, 132 Fed. Rep. 921 (1904), holding also that even though some of the directors of the trustee are also bondholders and stockholders in a defendant corporation in a foreclosure suit, yet this is not sufficient to enable bondholders to intervene, but the

court may hear them as to any action to be taken by the trustee prejudicial to their interest. Stockholders and bondholders may be permitted to intervene in a foreclosure suit. *Central Trust Co. v. Washington, etc. R. R.*, 124 Fed. Rep. 813 (1903). A bondholder will not be allowed to intervene in order to litigate questions with a reorganization committee, the committee not being parties to the suit. *Land, etc. Co. v. Asphalt Co.*, 121 Fed. Rep. 587 (1902). A bondholder will not be allowed to intervene, prior to decree for sale, to enable him to litigate priority of her bonds over other bonds, which were illegally issued to promoters and are still held by them. *Mercantile Trust Co. v. United States, etc. Co.*, 130 Fed. Rep. 725 (1904). A promoter's possible liability and the liability of

foreclosure is completed, the bondholder has more difficulty, and he must seek his remedy in the court that decreed the foreclosure,

stockholders on unpaid stock will not be adjusted and offset in the distribution among bondholders after foreclosure sale, even though the bondholders were promoters and stockholders. Independent suits must be instituted for that purpose, especially as general creditors are interested. *Land, etc. Co. v. Tatnall*, 132 Fed. Rep. 305 (1904). *Cf.* § 847, *supra*. After a foreclosure sale has been confirmed, a bondholder cannot maintain a bill to set it aside on the ground that the receiver was interested in the purchase and caused the property to be sold for less than its value, no fraud on the part of the trustee being alleged. *Fletcher v. Ann Arbor R. R.*, 116 Fed. Rep. 479 (1902). A bondholder successfully attacked a reorganization scheme whereby the stockholders obtained the benefit to the detriment of the bondholders, in the case of *Louisville, etc. Ry. v. Louisville T. Co.*, 174 U. S. 674 (1899). In the case of *Belden v. Burke*, 147 N. Y. 542 (1895), a bondholder sued for damages due to bonds having been issued without consideration and sold to him. The suit failed. In the case of *Farmers', etc. Co. v. Rockaway, etc. R. R.*, 69 Fed. Rep. 9 (1895), a bondholder petitioned in a foreclosure suit to have the decree of sale opened and to allow him to file an answer. The application was refused. In the case of *Thomson, etc. Co. v. Capitol, etc. Co.*, 65 Fed. Rep. 341 (1894), a bondholder intervened in the foreclosure suit to establish the validity of his bonds, but failed to do so. A bondholder intervened and successfully attacked other bonds in the distribution upon foreclosure, in the case of *Central T. Co. v. California, etc. R. R.*, 110 Fed. Rep. 70 (1901), on the ground that such other bonds were not issued for purposes authorized by the mortgage and were not held by *bona fide* holders; *aff'd*, 128 Fed. Rep. 882. Some of the bondholders may intervene and cause to be excluded from participating in the proceeds of sale bonds which have been pledged to secure certain obligations. *Atlantic Trust Co. v. Woodbridge, etc. Co.*, 79 Fed. Rep. 842 (1897). An intervening petition may be allowed even after the sale, but prior to its confirmation. *State v. Quintard*, 80 Fed. Rep. 829 (1897). Where, in a foreclosure suit in the federal court by a consent decree, the trustee is put in possession, and by a subsequent decree a sale is ordered, and the trustee files a report of a sale having been made, and then long subsequently the trustee forecloses the same mortgage in a state court and the purchaser takes possession, the federal court will oust him from possession and put in a receiver, on the application of a bondholder, the trustee being charged with a misapplication of the funds. The court is not bound by the foreclosure in the state court. *Bill v. New Albany, etc. Ry.*, 2 Biss. 390 (1870); *s. c.*, 3 Fed. Cas. 379; but see § 839, *supra*. A bondholder may intervene in a foreclosure suit, and may prevent the foreclosure by proving that the foreclosure is a scheme to pay off the seven per cent. bonds in order to enable the mortgagor to issue new bonds at a lower rate of interest. He must, however, stand ready to buy all bonds which are presented for payment. The trustees' suit to foreclose will then be stayed. *Tillinghast v. Troy, etc. R. R.*, 48 Hun, 420 (1888); *affirmed*, 121 N. Y. 649. See also § 838, *supra*. A bondholder as an intervenor carried on the litigation in *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 119 N. Y. 15 (1890). Bondholders or stockholders who are allowed to intervene will not be allowed to intervene and file a cross-bill to set aside the pro-

where his complaint is not for fraud, but for errors in the foreclosure

ceedings or interpose obstacles to the suit. They may intervene, however, to contest the claims of creditors or show that the suit is collusive. *Forbes v. Memphis, etc. R. R.*, 2 Woods, 323 (1872); s. c., 9 Fed. Cas. 408. In *Farmers' L. & T. Co. v. Kansas City, etc. R. R.*, 53 Fed. Rep. 182, 186 (1892), the court held that "unless fraud or bad faith is alleged against the trustee, the individual bondholders will not be permitted to intervene, and will not be heard to complain of any action of the court based upon the consent of the trustee acting in good faith. . . . When any unfounded or fraudulent claim shall be presented, and the trustee shall fail to make a proper defense thereto, or whenever it fails in any other respect to discharge its trust honestly and faithfully, it will be time to consider the question of making the bondholders parties for their own protection." Concerning fraudulent foreclosures and bonds, see also § 766, *supra*, and *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 350 (1879); s. c., 22 Fed. Cas. 274, refusing to allow bondholders to come into a suit which the trustees were carrying on; *Williamson v. New Jersey, etc. R. R.*, 25 N. J. Eq. 13 (1874), admitting the bondholders as co-defendants on their application; s. c., on appeal, 29 N. J. Eq. 311. Intervention will not be allowed unless it is necessary to preserve rights. *Sands v. Greeley, etc. Co.*, 80 Fed. Rep. 195 (1897). See also §§ 735, 828, *supra*.

A bondholder has no right to intervene in a suit where the corporation, as defendant, is moving to dissolve a temporary injunction forbidding it to lay its tracks in a street. *Re Ferris*, 56 Conn. 396 (1888). "The bondholders, if not parties to the suit, were quasi-parties, and had the right at any time to intervene and become actual parties." *Campbell v. Railroad Co.*, 1 Woods, 368 (1871); s. c., 4 Fed. Cas.

1178, per Bradley, J.; *Re Chickering*, 56 Vt. 82 (1883), holding also that although the bondholders may prove their claims without becoming parties, yet that the better practice is to have them become parties where the foreclosure is by the bondholders. The trustees are the only necessary parties plaintiff to the foreclosure suit. The bondholders might, *pro interesse suo*, become parties thereto; it is not essential that they should. *Savannah, etc. R. R. v. Lancaster*, 62 Ala. 555 (1878). But in *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320, 351 (1879); s. c., 22 Fed. Cas. 274, the court refused to allow the bondholders to become parties to the suit, although the trustees favored a plan of reorganization which was proposed by a part of the bondholders. In *Adelbert College v. Toledo, etc. Ry.*, 47 Fed. Rep. 836 (1891), it appears that certain equipment bonds had been adjudicated not to be a lien, while the supreme court of Ohio decided directly the contrary. The removal of a new case by bondholders from the state court to the federal court was held not valid. Trustees of mortgages which have been foreclosed are merely nominal parties and cannot remove the case. Bondholders under the first mortgage will not be allowed to come in as defendants in a foreclosure suit by the second mortgagee, where the first mortgagee is not a party to that suit and the first-mortgage bonds are fully protected. Such is the rule, even though the trustee in both mortgages is the same trust company. *McHenry's Petition*, 9 Abb. N. Cas. 256 (1878). A second-mortgage bondholder cannot attack a foreclosure suit brought on both the first and second mortgages, even though there was no defense, and the same parties controlled both the complainant and defendant and put in a receiver by consent. *Farmers' L. & T. Co. v. Green Bay, etc. R. R.*, 6 Fed. Rep. 100 (1881). A bondholder

proceedings.¹ The foreclosure decree can be attacked collaterally only when the decree was obtained by collusion and fraud.²

who knows that a foreclosure is going on cannot have it opened on the ground of surprise, even though the foreclosure does not take the exact course that he expected. *Peck v. New York, etc. Ry.*, 85 N. Y. 246 (1881). Where bondholders move to intervene on the ground that the foreclosure was unnecessary, the court may compel them to make their proof before the referee who is taking testimony as to the amount due. *Central Trust Co. v. Unadilla, etc. R. R.*, 35 N. Y. Misc. Rep. 604 (1901). Where the trustee forecloses in behalf of all the bondholders who may desire to become parties to the suit it is proper to allow them to intervene. *Rumsey v. People's Ry.*, 154 Mo. 215 (1899). A stockholder and bondholder will not be allowed to intervene in a suit against an insolvent corporation to distribute its effects, even though he claims that the receivers in charge will not properly administer the estate. His remedy is to wait until the receivers are guilty of fraud or negligence and then to apply to the court. *Land & C. Co. v. Asphalt Co.*, 114 Fed. Rep. 484 (1902). Where a foreclosure is pending, a few of the bondholders cannot bring a suit to have other bonds declared void. *Sickles v. Richardson*, 23 Hun, 559 (1881). *Contra*, *Harrisburg, etc. R. R.'s Appeal*, 36 Am. & Eng. R. R. Cas. 249 (Pa. 1888). *Cf. Des Moines, etc. Co. v. West*, 44 Iowa, 23 (1876).

¹ Bondholders seeking to set aside a foreclosure on the ground of fraud must seek their remedy in the court which rendered the decree and confirmed the sale. *Kent v. Lake Superior, etc. Co.*, 144 U. S. 75 (1892); *Robinson v. Iron Ry.*, 135 U. S. 522, 531 (1890). See also §§ 209, 839, *supra*.

² *Kurtz v. Philadelphia & R. R. R.*, 187 Pa. St. 59 (1893). A bondholder

may file a bill in the federal court to impeach a collusive decree establishing liens prior to the mortgage securing such bonds, where such bondholder was not a party to the first suit. A bondholder's suit is ancillary to the first suit for the purpose of jurisdiction, but the record in the first suit is not a part of the record in the second suit except as expressly made so. *Richardson v. Loree*, 94 Fed. Rep. 375 (1899). In a bondholders' and stockholders' bill to set aside an amicable foreclosure and reorganization, the parties charged with participating therein must be made defendants. *Ribon v. Railroad Cos.*, 16 Wall. 446 (1872). The holder of a part of the mortgage bonds may attack the validity of other bonds of that issue. *Farmers', etc. Bank v. Waco, etc. Ry.*, 36 S. W. Rep. 131 (Tex. 1896). In a bill filed by a bondholder to set aside a foreclosure, a federal court has no jurisdiction even though the foreclosure involved over \$2,000, where the bondholder's interest is less than that amount. *Cowell v. City, etc. Co.*, 121 Fed. Rep. 53 (1903). Where the foreclosure sale is conducted as secretly as possible and advertised as quietly as possible in accordance with an agreement between the receiver and the trustee of the mortgage and third persons, for the purpose of enabling such third persons to buy the property at a low figure, the sale will be set aside in a suit brought by a bondholder for that purpose. *Atkins v. Judson*, 33 N. Y. App. Div. 42 (1898). Where trustees hold stock as security for various debts of various parties, the stock to be sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustees to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price

There is no appeal in the federal court from an order denying the petition of a bondholder to intervene.¹ A decree at the instance of a corporation declaring void a trust agreement is not a bar to a holder of one of the bonds, secured thereby, collecting his bonds.² A suit at law does not lie against a receiver at the instance of a bondholder to hold the former liable for fraud in managing the property so that it brought a small price at foreclosure sale, even though such a suit might lie in equity.³ A bondholder cannot, with general creditors, maintain a suit to have illegally issued bonds annulled and the corporate property sold to pay the legally issued bonds, it appearing that the mortgaged property is more than sufficient to pay all the bonds.⁴ Where all the bonds, together with stock, are issued for property, and the mortgage is foreclosed, one of the bondholders cannot complain that a part of the bonds held by the others are illegal. He is estopped by reason of the fact that his bonds were issued under the same contract.⁵ A federal court may entertain a suit in equity to

for the benefit of himself and the other trustees. The sale will be set aside at the instance of one of the creditors. *Jenkins v. Hammerschlag*, 38 N. Y. App. Div. 209 (1899). See also *Wetmore v. St. Paul, etc. R. R.*, 3 Fed. Rep. 177 (1880). Cf. *Shaw v. Railroad Co.*, 100 U. S. 605 (1879); *Kropholler v. St. Paul, etc. R. R.*, 2 Fed. Rep. 302 (1880). Where the trustee has commenced foreclosure on two mortgages, and then, by reason of a reorganization agreement of most of the bondholders, he drops the foreclosure of the first mortgage and proceeds with the other, but intends to allow certain receivers' indebtedness to come in and affect the first-mortgage bonds, the minority bondholders, who object to all this and claim that the trustee is acting in a way hostile to their interests, may file a bill for the removal of the trustee, and an accounting of all outstanding bonds, and for foreclosure. *Farmers' L. & T. Co. v. McHenry*, 9 Abb. N. Cas. 235 (1878); see also *Campbell v. Railroad Co.*, 1 Woods, 368 (1871); s. c., 4 Fed. Cas. 1178, where a bondholder was allowed to sue to set aside a fraudulent foreclosure under a prior mort-

gage which the trustees under the second mortgage had not opposed; *Ribon v. Railroad Cos.*, 16 Wall. 446 (1872), where a similar suit failed because the trustees were not made co-defendants. Bondholders, after foreclosure has been commenced by the trustee, may by consent of the court file a bill attacking the validity of other bonds which are out. *Grant v. East, etc. R. R.*, 50 Fed. Rep. 795 (1892). But see §§ 845, 839.

¹ *Land, etc. Co. v. Tatnall*, 132 Fed. Rep. 305 (1904). The court is not bound to allow a bondholder to intervene in order to take an appeal. *Fink v. Bay Shore, etc. Co.*, 144 Fed. Rep. 837 (1906).

² *National Salt Co. v. Ingraham*, 143 Fed. Rep. 805 (1906).

³ *Fletcher v. Burt*, 126 Fed. Rep. 619 (1903).

⁴ *Keystone Nat. Bank v. Palos, etc. Co.*, 43 S. Rep. 570 (Ala. 1907).

⁵ *Farmers', etc. Co. v. Madison Mfg. Co.*, 153 Fed. Rep. 310 (1906). Even though a corporation sells \$161,500 of bonds and \$130,000 of its stock for \$145,350, yet the remaining bondholders cannot complain on the foreclosure, and even if there was any lia-

annul a decree in a state court where such decree was obtained by fraud.¹

§ 848. (c) A *second mortgage bondholder*, seeking to set aside or avoid a foreclosure under a first mortgage, on the ground that the purchaser was disqualified, must tender reimbursement of the full amount of their bonds to the first-mortgage bondholders who have bid in the property, even though it was bid in for less than the first-mortgage debt. It is the duty of second-mortgage bondholders to attend the sale and raise the bid, if they wish to protect their interests.²

Moreover a second mortgagee, or bondholders secured by a second mortgage, cannot attack the first mortgage where the second mortgage expressly states that it is subject to the first mortgage.³

bility on the stock as an unpaid subscription the statute of limitations may be a bar, and the same is true as to any forfeiture on account of usury. *Weed v. Gainesville, etc. R. R.*, 119 Ga. 576 (1904).

¹ *Davenport v. Moore*, 74 Fed. Rep. 945 (1896). Although a railroad has been foreclosed and sold by suit in a state court, yet a bondholder may file a bill in the federal court to re-establish the lien of the mortgage on the ground that the foreclosure was collusive, fraudulent, and void. He may sue to reach the stock for which the road was sold by the purchasers to a new corporation. He need not obtain a judgment at law on his bonds before resorting to this suit in equity. The court overruled a demurrer, but reserved decision as to the jurisdiction of the federal court. *Massachusetts, etc. Ins. Co. v. Chicago, etc. R. R.*, 13 Fed. Rep. 857 (1882). Cf. § 839, *supra*.

² *Cunningham v. Macon, etc. R. R.*, 156 U. S. 400 (1895). See also *Robinson v. Iron Ry.*, 135 U. S. 522 (1890), where the second-mortgage bondholders complained that the same trustee was trustee for both mortgages.

³ Where a railroad purchases another railroad subject to a mortgage which it agrees to pay, it cannot afterwards attack that mortgage on the ground that it was fictitious and fraudulent. *Old Colony, etc. Co. v.*

Allentown, etc. Co., 192 Pa. St. 596 (1899). Where a second mortgage recites the existence of the first mortgage, the second mortgagee cannot question the validity of the first mortgage. *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898). The holder of a chattel mortgage expressly subject to a prior mortgage cannot attack the latter. *Singer, etc. Co. v. Barnard, etc. Co.*, 113 Iowa, 664 (1900). The trustee of the second mortgage cannot attack the first mortgage where the second mortgage expressly provides that part of the bonds issued under it shall be used to pay off the first mortgage. *Whitney v. Union Trust Co.*, 65 N. Y. 576 (1875). See also, in general, *Jerome v. McCarter*, 94 U. S. 734 (1876); *Minnesota Co. v. St. Paul Co.*, 6 Wall. 742 (1867). A foreclosing mortgagee cannot attack the validity of mortgages which his mortgage expressly recognizes. *Gow v. Collin, etc. Co.*, 109 Mich. 45 (1896). A vendee of corporate property cannot attack the power to give mortgages already upon the property, where the deed to him expressly recognizes those mortgages. *American Waterworks Co. v. Farmers' L. & T. Co.*, 73 Fed. Rep. 956 (1896). Where a third mortgage is made expressly subject to a second mortgage, the third mortgagee in his suit to foreclose cannot attack the validity of the second-

Aside from this, however, the second mortgagee may attack the first mortgage.¹

§ 848. (d) A *judgment creditor* may attack a mortgage or mortgage bonds on the ground that they are illegal, and may file a bill for that purpose, or may intervene in a foreclosure suit.²

mortgage bonds. *Bronson v. La Crosse, etc. R. R.*, 2 Wall. 283 (1863).

¹ Where the trustees of a second mortgage allow a decree of foreclosure of the first mortgage to be entered by default, one or more of the second-mortgage bondholders for themselves and others may file a bill to set aside the decree as fraudulent and unjust in not settling the priority of liens, and may enjoin the sale under the foreclosure, and may attack the foreclosure decree for various erroneous decisions. This is a bill of review with a bill for relief against a fraudulent decree. Another remedy is for the bondholder to intervene and become a party to the first suit. *Campbell v. Railroad Co.*, 1 Woods, 368 (1871); s. c., 4 Fed. Cas. 1178; *Commonwealth v. Smith*, 92 Mass. 448 (1865). A subsequent mortgagee cannot set up that the first mortgagee foreign corporation had not complied with the law, he taking subject to such mortgage. *Pratt v. Nixon*, 91 Ala. 192 (1891). Where one telegraph corporation holds the bonds of another and exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and mortgage on the property of the second corporation. *Boston, etc. Co. v. Bankers', etc. Co.*, 36 Fed. Rep. 288 (1888); *aff'd sub nom. United Lines Tel. Co. v. Boston, etc. Co.*, 147 U. S. 431 (1893). A delay of ten years on the part of a third mortgagee attacking a foreclosure sale by the second mortgagee is fatal. *Alabama, etc. Ry. v. Thomas*, 86 Miss. 27 (1905). Although certain persons, being directors and owners and in control of a railroad company, cause it to make a

construction contract with a company which they also control, yet, if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below par and was fraudulently and illegally issued. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). A second mortgagee failed in its effort to obtain priority over the first-mortgage bonds, in the case of *Buffalo, etc. Co. v. Medina, etc. Co.*, 162 N. Y. 67 (1900). A second mortgagee cannot cause the first mortgage to be canceled, even though there was no consideration for the first mortgage, the second mortgagee having no knowledge of that fact when he took his mortgage. *First Nat. Bank v. Winchester*, 119 Ala. 168 (1898). *Cf. Singer, etc. v. Barnard, etc. Co.*, 113 Iowa, 664 (1900). A second mortgagee failed in his attempt to defeat the foreclosure of the first mortgage on the ground that the first mortgage was *ultra vires*, in the case of *Central T. Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898). But see § 848 (k), *infra*, to effect that subsequent creditors cannot complain.

² Judgment creditors may bring an action to set aside a mortgage and to restrain a foreclosure, where the bonds secured thereby were issued to the stockholders for purposes foreign to the corporate purposes, in fraud of corporate creditors, the object being to close out the property and organize a new corporation for the purpose of going on with the business. *Phenix Nat. Bank v. Cleveland Co.*, 11 N. Y. Supp. 873 (1890). The deed of trust and bonds may be declared invalid in a suit instituted against the trustee and all known bondholders. Other bondholders cannot afterwards follow

But where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company who seeks to set the sale aside on the ground that the mortgage was invalid is in the position of one who asks to be let in to redeem from a mortgagee in possession under an unforeclosed mortgage. He cannot in the same action ask that the purchaser at foreclosure sale, who is about to bond the

the property into other hands. *Beals v. Illinois, etc. R. R.*, 27 Fed. Rep. 721 (1886); *aff'd*, 133 U. S. 290. A judgment creditor cannot attack consolidated bonds on the ground that the old bonds which have been taken up were informally and illegally issued. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). In *Drury v. Cross*, 7 Wall. 299 (1868), a person who was a general creditor at the time of the foreclosure sale, but became a judgment creditor after the sale, caused the sale to be set aside as fraudulent on the ground that most of the bonds were issued without consideration, and for the purpose of "wrecking" the company for the benefit of the directors, who were indorsers of the company's paper. The case of *James v. Railroad*, 6 Wall. 752 (1867), was to the same effect. The court, at the instance of judgment creditors, set aside the sale because, of the \$2,000,000 of bonds on which the foreclosure was obtained, only \$200,000 were *bona fide* and enforceable.

A foreclosure and reorganization, the latter being agreed upon before the foreclosure, by the terms of which the bondholders and stockholders buy the property at the foreclosure sale, and then organize a new company to own it, is fraudulent as against the unsecured creditors of the company, and they may cause the stockholders' interest to be applied to their debts. *Railroad v. Howard*, 7 Wall. 392 (1868). On this point see § 886, *infra*. Although a mortgage and a foreclosure thereof, and a purchase thereunder by the mortgagee, are declared void as a fraud on creditors of the company, except as to *bona fide* hold-

ers of the bonds, yet it is merely voidable, and a sale of the property to satisfy another debt bars the right of such mortgagee to recover for liens which it had paid. Such payment was a payment of liens on its own property. *Barnes v. Chicago, etc. R. R.*, 8 Biss. 514 (1879); *s. c.*, 2 Fed. Cas. 862; *aff'd*, 122 U. S. 1. See also § 828, *supra*. In the case of *Continental, etc. Co. v. Toledo, etc. R. R.*, 86 Fed. Rep. 929 (1898), judgment creditors intervened and attacked the validity of certain bonds. An ancillary bill by a judgment creditor to have certain bonds declared void, a foreclosure suit being then pending, was dismissed in *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). Where a judgment obtained in one state can be sued upon in another, it is no defense that it was obtained by collusion whereby no defense was interposed, especially where it does not appear that there was any defense. *Union Trust Co. v. Rochester, etc. R. R.*, 29 Fed. Rep. 609 (1886). Where an association has given a mortgage and it has been foreclosed, a judgment creditor of the association cannot attack the mortgage as being *ultra vires*. *Beels v. N. Nebraska, etc. Assoc.*, 54 Neb. 226 (1898). A corporation cannot retain the benefits of a mortgage and at the same time claim that it is illegal because not authorized by two-thirds of its stockholders, and because it exceeded two-thirds of the value of the corporate property, and junior judgment creditors have no greater rights than the corporation in this respect. *Hamilton T. Co. v. Clemes*, 17 N. Y. App. Div. 152 (1897); *aff'd*, 163 N. Y. 423.

property, shall pay the judgment creditor's claim out of such bonds.¹ An attaching creditor of a corporation cannot intervene in a foreclosure suit to attack the mortgage, his attachment being on the equity of redemption.² A judgment creditor, who obtained judgment after foreclosure was commenced, cannot intervene and set up that the stockholders had not authorized the mortgage and that it had not been recorded.³

Where several suits by judgment creditors are pending to set aside corporate mortgages, the court will enjoin all except the one by the receiver.⁴

The right of a judgment creditor to object to frauds and *ultra vires* acts of the corporation is considered elsewhere.⁵

§ 848. (e) *General creditors* may be allowed to intervene in a foreclosure suit in order to enable them to attack the validity of the bonds and mortgages.⁶

Even though a bonus of stock is given by the corporation upon the

1 *Merriman v. Chicago, etc. R. R.*, 64 Fed. Rep. 535 (1894).

2 *Lombard Inv. Co. v. Seaboard Mfg. Co.*, 74 Fed. Rep. 325 (1895).

3 *Farmers' L. & T. Co. v. Chicago, etc. R. R.*, 68 Fed. Rep. 412 (1895).

4 *Brower v. Baucus*, 14 N. Y. Supp. 462 (1891).

5 See § 735, *supra*.

6 *Louisville T. Co. v. Louisville, etc. Ry.*, 174 U. S. 674 (1898), rev'g 84 Fed. Rep. 539. *Contra*, *Thompson v. Huron Lumber Co.*, 4 Wash. St. 600 (1892); *Herring v. New York, etc. R. R.*, 105 N. Y. 340 (1887). A corporate mortgage may be attacked by a general creditor of the insolvent corporation. *Mellen v. Moline, etc. Works*, 131 U. S. 352 (1889). Where a promoter purchases all the stock of a corporation for \$75,000 and then purchases and transfers to it options on the business and property of other companies at a cost to him of about \$17,500 and receives therefor \$90,000 of bonds, and \$200,000 of stock in the first named company, which then becomes insolvent, the bonds are illegal under the Pennsylvania statute that mortgage bonds shall not exceed one-half the capital stock, the issue of the stock itself being illegal, the court re-

fusing to allow anything for a prospective and problematical removal of competition, the basis of the decision being that the value of the property was so slight compared with the par value of the stock and bonds, that the bonds and stocks were void, under the constitution of Pennsylvania. Creditors may object to such bonds in the hands of original holders, except to the extent that the money was actually advanced thereon, and hence such bonds cannot be turned in in part payment of the purchase price on the foreclosure sale. *In re Wyoming, etc. Co.*, 153 Fed. Rep. 787 (1907). A general creditor has an equitable lien upon the property of a corporation, and therefore has a right to contest the question of priority of other asserted liens. He may contest the validity of an issue of bonds. *Farmers' L. & T. Co. v. San Diego, etc. Co.*, 45 Fed. Rep. 518 (1891). A general creditor may intervene and contest the validity and priority of claims. *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560 (1898). General creditors who have proved their claims may attack the legality of an issue of mortgage bonds. *Vanderveer v. Asbury Park, etc. Ry.*, 82 Fed. Rep. 355 (1897).

sale of bonds, yet creditors cannot complain thereof unless they were deceived thereby.¹ A mortgage given by a corporation to secure the debts of its principal stockholder and manager is void as against corporate creditors.² General creditors whose suit against the company has been consolidated with a foreclosure suit may contest the validity of the bonds.³ An injunction is not the proper remedy of the creditors.⁴ Persons having an unexpired contract with a corporation cannot intervene to prevent a foreclosure, even though they allege that the foreclosure is collusive and fraudulent.⁵ General creditors may intervene in the foreclosure suit, and attack the foreclosure itself, as being a device to eliminate their claims for the benefit of the stockholders; in other words, a fraudulent reorganization scheme to cut off all parties except the bondholders and stockholders.⁶ Thus, even though a foreclosure was in the federal court, yet an unsecured

1 *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903), the court saying (p. 329): "This right is one existing not in favor of all creditors of a corporation, but in favor of a particular class of creditors only, namely, those creditors who were defrauded by said transaction;" *aff'd*, 198 U. S. 561. Bond purchasers who receive an equal amount of stock, the entire price being the par value of the bonds only, are liable on the stock if they had notice of the fact that it had been issued for worthless property, and it is immaterial that some of them after signing the contract accepted the bonds without taking the certificate of stock. *Gillett v. Chicago Title & T. Co.*, 82 N. E. Rep. 891 (Ill. 1907). *Cf.* § 42, *supra*.

2 *American, etc. Co. v. Norment*, 157 Fed. Rep. 801 (1907). See also §§ 546, 691-693, *supra*.

3 *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897).

4 A general creditor cannot enjoin a sale of the property and obtain a receivership on the general allegations that a conspiracy exists to have the property sold under the existing mortgage for the purpose of depriving the general creditors and stockholders of their rights, the sale being public and to the highest bidder. No allegation

was made as to default on the bonds or of the conduct and facts relied on to show fraud. The stockholders and directors had voted to sell the property at public auction. *Fort Payne Furnace Co. v. Fort Payne Coal, etc. Co.*, 96 Ala. 472 (1892).

5 *Wightman v. Evanston, etc. Co.*, 217 Ill. 371 (1905), the court holding that the right to intervene is very limited and the powers of the intervenor still more limited.

6 *Louisville T. Co. v. Louisville, etc. Ry.*, 174 U. S. 674 (1898). See also § 886, *infra*. A reorganization agreement whereby the bondholders are to receive new bonds and the stockholders new stock, to the exclusion of general creditors of the old corporation, is illegal and may be set aside at the instance of creditors of the old corporation, it being shown that the principal owners of the bonds were also the principal owners of the stock, and hence that in the foreclosure the rights of creditors were not protected and that the stockholders paid nothing for the new stock. The court held that the creditor had an equitable lien on the property subject only to the new mortgage. *St. Louis T. Co. v. Des Moines, etc. Ry.*, 101 Fed. Rep. 632 (1900).

creditor of the foreclosed corporation may bring suit in the state court against the new corporation to hold it liable for the debt on the theory that the reorganization was fraudulent in that it protected the stockholders of the old corporation at the expense of the unsecured creditors of the old corporation.¹ And, in general, the court has discretionary power to allow general creditors to intervene where substantial justice requires it.² Even though a mortgage, by reason of not being recorded as a chattel mortgage, does not cover personal property, cash, and accounts receivable, yet if the receivers take possession of all these and a decree of foreclosure is entered and a sale had, it is too late for general creditors to then intervene.³ A creditor who intervenes *after* decree is bound by the decree, and hence cannot set up the claim that the bonds secured by the mortgage on which the foreclosure decree was based were issued without consideration.⁴ A general creditor will not be allowed to intervene in a foreclosure suit, even though he alleges that the mortgage was fraudulent and void, where he has not proven his claim, nor even filed the same with the receiver for allowance.⁵

§ 848. (f) The *state* cannot intervene in a foreclosure suit in

1 Guardian Trust Co. v. Kansas City, etc. Ry., 146 Fed. Rep. 337 (1906).

2 The general creditors who file their claims will not be allowed to intervene after decree has been entered except by leave of the court. Continental, etc. Co. v. Toledo, etc. R. R., 99 Fed. Rep. 171 (1900). After foreclosure of a mortgage other creditors cannot attack a mortgage on the ground that the mortgagee had not complied with the state statutes. Miller v. Gates, 22 Mont. 305 (1899); State Trust Co. v. Kansas City, etc. R. R., 120 Fed. Rep. 398 (1903). Neither the mortgagor nor creditors of the mortgagor can attack its mortgage on the ground that it was for more than one-half the cost of the company's property, in violation of the statute. International, etc. Co. v. Davis, etc. Co., 70 N. H. 118 (1900). Even though the owner of a majority of the bonds agrees that a certain debt shall come in ahead of the mortgage, the person entitled to the benefit of such agreement cannot intervene in a fore-

closure suit by minority bonds, inasmuch as they are not bound. First Nat. Bank v. Wyman, 16 Colo. App. 468 (1901). General creditors may intervene and cause to be excluded from participating in the proceeds of sale bonds which have been pledged to secure certain obligations. Atlantic Trust Co. v. Woodbridge, etc. Co., 79 Fed. Rep. 842 (1897). A general creditor intervened in the case of Manhattan T. Co. v. Seattle, etc. Co., 19 Wash. 493 (1898), and attacked the validity of the bonds. A bill filed by a general creditor to have a mortgage and bonds canceled on the ground that they were issued at less than par, failed, in the case of Anderson v. Bullock, etc. Bank, 122 Ala. 275 (1899).

3 State Trust Co. v. Kansas City, etc. R. R., 120 Fed. Rep. 393 (1903).

4 Seaboard, etc. Ry. v. Knickerbocker Trust Co., 125 Ga. 463 (1906).

5 Hindman v. Great, etc. Co., 92 Pac. Rep. 139 (Wash. 1907).

order to attack the mortgage and bonds.¹ Neither can the state maintain a suit for an injunction in such a case.²

1 The state will not be allowed to intervene in a foreclosure suit for the purpose of preventing it on the ground that the bonds are illegal and void, and that on a reorganization a greater issue will be made. *State v. Farmers', etc. Co.*, 81 Tex. 530 (1891).

2 Injunction is not the proper remedy for the state in objecting to *ultra vires* acts of corporations. *Quo warranto* is its remedy. See §§ 37, 635, *supra*. A state cannot file and sustain a bill to declare void watered stock and bonds and enjoin a foreclosure sale, and to have the property sold and the proceeds applied to the moneys actually expended by the corporation. "The state has no authority to protect such private rights by suit." *State v. Guaranty, etc. Co.*, 73 Fed. Rep. 914 (1896). Even though a person who has a contract with a street railway company, that the latter will lease its street railway on certain terms, turns over such contract to a new corporation for \$900,000 of stock of the latter, and the latter then assumes the lease, and even though such stock is illegal under the constitution and statutes of Pennsylvania, yet where the state delays three years in filing a bill to declare it void, and meanwhile the stock has passed into *bona fide* hands, and not until five years thereafter are the real owners of the stock made parties defendant, the bill will be dismissed. *Commonwealth v. Reading, etc. Co.*, 204 Pa. St. 151 (1902). In *State v. Janesville Water Co.*, 92 Wis. 496 (1896), the court refused leave to the attorney-general to bring suit to forfeit the charter of a water-works company, although it was alleged that watered stock and bonds had been issued, it being shown in opposition that there had been eight years' delay. In the case of *Columbus, etc. Ry. v. Burke*, 19 Week. L. Bull. 27 (Ohio, 1887);

20 Week. L. Bull. 287 (1888), the arbitrators said: "The theory that a corporation, even when exercising public franchises, holds its property upon any trust in favor of the public, was met and unqualifiedly denied by Chancellor Kent in his luminous and learned opinion in the great case of *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371 (1817), where it was held that equity had no jurisdiction of a bill filed by the attorney-general to enjoin the defendant from carrying on the business of banking in violation of the statute. In adverting to the class of cases in which the English court of chancery had exercised control over corporation for breach of trust, Chancellor Kent pointed out that in every instance the jurisdiction had been confined to charitable institutions. He cited with evident approval the case of *Colchester v. Lotten*, 1 Ves. & B. 226 (1813), which was a bill to set aside a mortgage of corporate property as unduly made by an officer of the corporation, under the corporate seal, for purposes not corporate, in which he said the lord chancellor had held that there was no instance of a trust attaching upon the ground of misapplication of funds by corporations, except in the case of corporations holding to charitable uses. 'The charge of a breach of trust,' continued Chancellor Kent, 'ought to come from, or on behalf of, the *cestuis que trustent* or stockholders of the company. If they are satisfied, no other person is entitled to complain. If they approve of the act of their trustees in instituting banking operations, there is no ground of any allegation of a breach of trust.'" A state cannot maintain a suit to declare illegal and void an issue of mortgage bonds by a railroad. *State v. Guaranty, etc. Co.*, 73 Fed. Rep. 914 (1896). Where \$100,000 of bonds and \$125,000

§ 848. (g) The corporation itself that gave the mortgage may defend against it on many grounds; for instance, that the mortgage was never authorized.¹ So also it may defend on the ground that the bonds were fraudulently issued, although this defense by the corporation is not favored by the courts.² A corporation mortgagor may file a bill to enjoin the foreclosure of a mortgage and to obtain a cancellation of certain bonds which had been fraudulently issued.³

The federal court has jurisdiction of a suit by a corporation to cancel certain bonds and stock as illegal, even though the trustee of the mortgage is made a party defendant and resides in the same state as the complaining corporation. The trustee in such a suit is merely a formal party.⁴

Where the corporation refuses to pay the interest on certain bonds on the ground that they were issued for property concerning which misrepresentations were made, the court will not foreclose the mortgage at the instance of such bondholder, unless the bondholder first brings a suit at law on the coupons and has the question of fraud determined.⁵

In a suit brought to have bonds declared illegal and void, the of stock are issued in payment for construction work of the value of \$121,000, the bonds are valid and may be enforced by *bona fide* purchasers. *Wood v. Corry, etc. Co.*, 44 Fed. Rep. 146 (1890). In this case the court held also that only the state could object to watered stock and bonds issued upon the organization of the company in violation of the statutes. See also § 37, *supra*.

¹ See chs. XLIII and XLVII, *supra*.

² See §§ 38, 637, 729 and 766, *supra*. *Columbus, etc. R. R. v. Burke*, 19 Week. L. Bull. 27 (Ohio, 1887); 20 Week. L. Bull. 287 (1888). *Cf. New Castle Northern Ry. v. Simpson*, 21 Fed. Rep. 533 (1884). In a suit between the corporation and bondholders to test the validity of the bonds, stockholders are not proper parties. *Des Moines Gas Co. v. West*, 50 Iowa, 16 (1878). Where a trustee sells at great sacrifice, and at the sale makes statements disparaging the title, and the purchaser is a former trustee of the mortgage, the court will set the sale aside. *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (1883). The legis-

lature has no power to validate a foreclosure sale which is invalid by reason of fraud. *White Mountains R. R. v. White Mountains R. R.*, 50 N. H. 50 (1870).

³ A corporation may file a bill in equity to enjoin the foreclosure of a mortgage securing bonds, which have been issued to the stockholders as a dividend illegally, and to compel the surrender of the bonds for cancellation, it appearing that no other rights have intervened. *Gunnison, etc. Co. v. Whitaker*, 91 Fed. Rep. 191 (1898); *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552 (1899). A corporation may maintain a suit in equity to have its bonds canceled, if it can prove fraud in the issue thereof, and may obtain a temporary injunction against the parties selling the bonds in the meantime. *Pere Marquette R. R. v. Bradford*, 149 Fed. Rep. 492 (1906). See also §§ 725, 775, *supra*.

⁴ *Lake, etc. R. R. v. Ziegler*, 99 Fed. Rep. 114 (1900).

⁵ *Nashua, etc. Bank v. Burlington, etc. Co.*, 99 Fed. Rep. 14 (1900).

bondholders whose bonds are attacked need not be made parties defendant if the trustee is a party defendant.¹ A mortgage may be held to be void in foreclosure proceedings.²

Where a foreclosure was collusive and fraudulent, the corporation itself may, subsequently to the sale, file an original bill in the nature of a bill of review to redeem and to have a resale.³ The United States court which granted foreclosure has jurisdiction of such a bill to set aside the foreclosure as fraudulent, irrespective of citizenship in the latter case.⁴

A fraudulent decree of foreclosure may subsequently be attacked by the corporation itself after it has passed into other hands, even though the officers, directors and stockholders who were such at the time of the foreclosure acquiesced therein.⁵

Where the trustee sells at public sale without a judicial foreclosure and the property is purchased by a corporation in which the trustee is a stockholder and director, the mortgagor may have the sale set aside and may claim the profits of a resale by such corporation.⁶

Although a foreclosure sale through a receiver was fraudulent, yet the company cannot regain possession by ejectment as to a part of the property. The remedy is in equity to set aside the sale.⁷ A mortgage deed of trust and the bonds given by a consolidated company, the consolidation being unauthorized, may not be enforceable and may not bind even the constituent companies.⁸

¹ See § 817, *supra*.

² *Farmers' L. & T. Co. v. Oregon, etc. Ry.*, 24 Fed. Rep. 407 (1885); *Union Trust Co. v. N. Y. etc. R. R.*, 17 Weekly L. Bull. 176 (Ohio, 1887).

³ *Northern, etc. Co. v. Young*, 12 Fed. Rep. 809 (1882). The trustee of the trust deed is a necessary party to a suit to set aside the foreclosure as fraudulent. *Harwood v. Railroad Co.*, 17 Wall. 78 (1872). Also other parties to the fraud. *Ribon v. Railroad Cos.*, 16 Wall. 446 (1872). The usual and proper method of having a sale set aside for fraud is by motion or petition, and not by a separate and new suit. *Terbell v. Lee*, 40 Fed. Rep. 40 (1889).

⁴ *Pacific R. R. of Mo. v. Missouri Pac. Ry.*, 111 U. S. 505 (1884), *rev'd*

12 Fed. Rep. 641; *Northern, etc. Co. v. Young*, 12 Fed. Rep. 809 (1882).

⁵ *Pacific R. R. of Mo. v. Missouri, etc. Ry.*, 111 U. S. 505 (1884).

⁶ *Herbert Craft Co. v. Bryan*, 68 Pac. Rep. 1020 (Cal. 1902).

⁷ *New Castle, etc. Ry. v. New Castle, etc. R. R.*, 152 Pa. St. 96 (1892).

⁸ *American, etc. Co. v. Minnesota, etc. R. R.*, 157 Ill. 641 (1895). *Cf.* § 637, *supra*. But it is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. *Farmers' L. & T. Co. v. Toledo, etc. Ry.*, 67 Fed. Rep. 49 (1895).

Various instances of a defense or attack by the corporation itself, as affecting bonds issued by it, are given in the notes below.¹

§ 848. (*h*) The *receiver* of the corporation may defend against or sue to set aside a mortgage which is fraudulent or otherwise illegal.²

¹ *Beals v. Illinois, etc. R. R.*, 27 Fed. Rep. 721 (1886); *aff'd*, 133 U. S. 290,—the mortgagor in this case having given a mortgage to secure the bonds of another company. A release, by the board of directors of a corporation mortgagor, of the equity of redemption to the mortgagee, is not binding on the corporation. *Brinkerhoff, etc. Co. v. Boyd*, 192 Mo. 597 (1905). Where a plan of reorganization provides for the issue of bonds and such issue is made, a *bona fide* holder of such bonds is protected against the defense that the parties to the reorganization had been fraudulently induced to believe that no bonds would be issued. *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904). It is no defense to a foreclosure suit that the unpaid subscriptions of stockholders if collected would be sufficient to avoid the necessity of foreclosure. *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903). The case of *Arthur v. Commercial, etc. Bank*, 17 Miss. 394 (1848), holds that only the state can object to an *ultra vires* mortgage, but this is clearly not the law. The corporation cannot defend against a mortgage on the ground that it had no power to purchase the property. *Butterworth, etc. v. Kritzer, etc. Co.*, 115 Mich. 1 (1897). A mortgagor of land to a national bank cannot defend against it on the ground that the bank had no power to take the mortgage. *Camp v. Land*, 122 Cal. 167 (1898). As against a *bona fide* holder of bonds the corporation cannot defend on the ground that they were originally issued fraudulently. *Long Island, etc. Co. v. Columbus, etc. Ry.*, 65 Fed. Rep. 455 (1895); *Pittsburgh, etc. Ry. v. Long Island, etc. Co.*, 172

U. S. 493 (1899). A corporation issuing bonds was held to be estopped from denying the validity of the issue in *Trask v. Jacksonville, etc. R. R.*, 124 U. S. 515 (1888). A corporation may defend against a construction contract on the ground that the directors were secretly interested in the profits therefrom. *Wardell v. Railroad Co.*, 103 U. S. 651 (1880). See also § 649, *supra*. As against *bona fide* holders of the bonds the mortgagor corporation cannot set up in the foreclosure suit the defense that the bonds were illegally issued. *Railroad Cos. v. Schutte*, 103 U. S. 118 (1880). A corporation mortgagor cannot set up that the foreclosure is for the purpose of freezing out the minority stockholders. *Guardian, etc. Co. v. White Cliffs, etc. Co.*, 109 Fed. Rep. 523 (1901). A corporation is estopped from defending against foreclosure on the ground that the bonds were issued to the directors below par. *Union, etc. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 840 (1892). A corporation may defend against a foreclosure suit brought by a bondholder whose bonds were fraudulently issued, the court saying that the bondholder must first establish in a suit at law the validity of his bonds. *Nashua, etc. Bank v. Burlington, etc. Co.*, 99 Fed. Rep. 14 (1900).

² A receiver may bring an action to determine the validity of bonds. See *v. Heppenheimer*, 55 N. J. Eq. 240 (1897); *aff'd*, 56 N. J. Eq. 453; *Hubbell v. Syracuse, etc. Works*, 42 Hun, 182 (1866). After a receiver has been appointed for a corporation its creditors cannot sue to set aside mortgages by the corporation. *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352 (1895); *Brower v. Baucus*,

A receiver may sue to set aside a mortgage fraudulent as to creditors, although it is not fraudulent as to the corporation.¹

A contract, however, between a corporation and all its stockholders, relative to payment for their stock, cannot be attacked by the corporation or its receiver, and can be attacked only by creditors who have been actually defrauded thereby.²

Neither the corporation itself nor a receiver of the corporation can hold a stockholder liable for stock issued to the stockholder at less than par by agreement.³

The right of a receiver to bring suit in a foreign jurisdiction to hold a stockholder liable for stock and bonds illegally issued is limited.⁴

§ 848. (i) The remedy of *stockholders* against a collusive or fraudulent foreclosure of a corporate mortgage has been a prolific source of litigation. A frequent fraud on stockholders, and one which it is difficult to detect and prove, is where there is a valid defense to the mortgage, but the directors collusively neglect to defend against a suit of foreclosure, in consequence of which a default is taken and the corporation speedily deprived of all its assets. It is a fraud

14 N. Y. Supp. 462 (1891). A receiver of a corporation may institute suit to set aside a mortgage executed by it without the assent of stockholders as required by statute. *Vail v. Hamilton*, 85 N. Y. 453 (1881). A receiver may attack the validity of mortgages given by the corporation. *Astor v. Westchester, etc. Co.*, 33 Hun, 333 (1884). A receiver may bring an action to determine the validity of bonds issued by the corporation of which he is receiver. All the parties having the bonds which were issued under the mortgage are necessary parties. A creditor's action to enforce the bonds will be stayed. A foreclosure had been commenced prior to this time. *Hubbell v. Syracuse, etc. Works*, 42 Hun, 182 (1886). A receiver appointed at the instance of a judgment creditor may question the validity of a mortgage. *State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 381 (1896). See also § 869, *infra*. An assignee in insolvency of the mortgagor corporation in the case, *Central T. Co. v. Worcester, etc. Co.*, 110 Fed. Rep. 491 (1901), failed in the

defense that the bonds were issued for property taken at an overvaluation. A receiver has no power to file a bill to set aside a mortgage securing outstanding bonds on the ground that it was concealed and not recorded. Upon distribution all the creditors become parties and may implead and have their equity defined, including any claim to priority by reason of the mortgage. *Am. Trust & Savings Bank, etc. v. McGettigan*, 152 Ind. 582 (1899).

¹ *Curtis v. Lewis*, 74 Conn. 367 (1902).

² *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561.

³ *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903), the court saying (p. 329): "A contract between a corporation and its stockholders that they should not be called on to pay therefor in full is good between the corporation and its stockholders;" *aff'd*, 198 U. S. 561.

⁴ *Great Western, etc. Co. v. Harris*, 198 U. S. 561 (1905).

difficult to detect, since ordinarily there is no defense to foreclosure suits and the defenses which should have been set up by the corporation are difficult of proof themselves. At an early day the leading case of Koehler against Black River Falls Iron Company¹ established the principle that a stockholder in such a case may be allowed to come in as a defendant, and set up the defenses which the corporation ought to have set up. Thus, where a railroad purchases a majority of the stock and bonds of another railroad, and then causes the mortgages securing the bonds to be foreclosed and no defense to be set up by the corporation, the minority stockholders, who allege that the former corporation has diverted the business of the latter and prevented the latter from doing its regular business, and that the purpose of the former corporation is to get the property at less than its value, are entitled to have those issues tried. The minority stockholders are entitled to prove that traffic from other roads was declined by the mortgagor railroad at the instigation of the corporation that controlled the mortgagor corporation, and that the income

1 2 Black, 715 (1862), where the directors took a mortgage to themselves to secure debts due to them from the corporation, and then foreclosed. The foreclosure was defeated. So also in *Bayliss v. Lafayette, etc. R. R.*, 8 Biss. 193 (1878); s. c., 2 Fed. Cas. 1079, where the directors were silent partners with the construction company mortgagees. The court, on the application of a stockholder, directed that the mortgagees be allowed only the amount honestly due them. Although a foreclosure of a railroad is brought about by another railroad which desires and thereby obtains the former road through the foreclosure proceedings, and the directors, trustees in the trust deed, attorneys, and stockholders of the two companies are practically the same in interest, yet the proceedings will not be set aside in the absence of actual fraud. *Leavenworth County v. Chicago, etc. R. R.*, 25 Fed. Rep. 219 (1885); *aff'd*, 134 U. S. 688. But in *Samuel v. Holladay, Woolw. 600* (1869); s. c., 21 Fed. Cas. 306, where a sale under foreclosure had been made after an advertisement of five weeks, the court refused to set it aside at the instance of a

stockholder for fraud in the foreclosure proceedings, although on the sale only one-fifth of the value of the property was realized. In *Drury v. Cross*, 7 Wall. 299 (1868), and *James v. Railroad Co.*, 6 Wall. 752 (1867), foreclosures and sales were set aside where they were obtained by fraudulent issue of bonds in pledge, and the purchase of them by the directors at the pledgee's sale. See also *Bronson v. La Crosse, etc. R. R.*, 2 Wall. 283, 302 (1863), clearly sustaining the stockholder's right. That at common law a stockholder cannot defend, even though the corporation is in no position to do so, see the discussion in *Kelley v. Mississippi Cent. R. R.*, 1 Fed. Rep. 564 (1880). See *Pittsburgh, etc. R. R. v. Rothschild*, 4 Cent. Rep. 107 (Pa. 1886), where a stockholder intervened and successfully attacked a mortgage. A stockholder may enjoin a proposed *ultra vires* issue of bonds. *Taylor v. Philadelphia, etc. R. R.*, 7 Fed. Rep. 386 (1881). See chs. XXXIX and XL, *supra*, where the right of a stockholder to attack fraudulent or *ultra vires* contracts of the company is fully explained.

of the company was diverted.¹ Stockholders will be allowed to intervene and defend where a default has been allowed, and the stockholders allege collusion and show an apparently good defense.² A stockholder may enjoin an issue of bonds or cause it to be set aside where such issue is fraudulent or beyond the powers of the corporation.³

Individual stockholders may intervene in a trustee's foreclosure suit and attack the validity of certain bonds on the ground that such bonds had been issued for construction work which had not been finished, and had subsequently been issued in payment for services by officers, the mortgage providing that bonds should be issued only for construction work, and the bonds not being in *bona fide* hands.⁴ A stockholder will be allowed to intervene and object to a reckless sale of the property of an insolvent corporation by the receiver thereof, where the corporation itself is not protect-

1 Farmers' L. & T. Co. v. New York, etc. Ry., 150 N. Y. 410 (1896). Although a foreclosure of a railroad is brought about by another railroad which desires and thereby obtains the former road through the foreclosure proceedings, and the directors, trustees in the trust deed, attorneys, and stockholders of the two companies are practically the same in interest, yet the proceedings will not be set aside in the absence of actual fraud. Leavenworth County v. Chicago, etc. R. R., 25 Fed. Rep. 219 (1885); *aff'd*, 134 U. S. 688. Where the officers of a corporation fraudulently cause mortgages on its property to be foreclosed and they buy it in and form a new corporation to take over the assets, all for the purpose of eliminating preferred stockholders and certain creditors in the old corporation, a preferred stockholder may hold the new corporation liable for the value of an equal amount of preferred stock in the new corporation, including dividends already paid. Sparrow v. Beament & Sons, 142 Mich. 441 (1905); *s. c.*, 146 Mich. 326.

2 Guarantee, etc. Co. v. Duluth, etc. R. R., 70 Fed. Rep. 803 (1895).

3 Chs. XXXIX, XL, and §§ 659 and 828, *supra*. A stockholder may object to the payment of bonds issued to

other stockholders for construction work which was never performed. But *bona fide* holders of the bonds are protected. State v. Brown, 64 Md. 199 (1885). Where bonds have been illegally or fraudulently issued and stockholders may object, the court will allow those bonds which are in the hands of the guilty parties or persons taking with notice to be collected only for such amounts as were actually received therefrom by the corporation. *Bona fide* holders may collect their investment. Thomas v. Brownville, etc. R. R., 109 U. S. 522 (1883). In Graham v. Boston, etc. R. R., 118 U. S. 161 (1886), a stockholder filed a bill to set aside an alleged invalid mortgage. A stockholder may enjoin the issue of bonds by way of a dividend to the stockholders or any reduction of the capital stock in violation of a statute. Merz v. Interior, etc. Co., 87 Hun, 430 (1895). A stockholder may maintain a suit to set aside a decree foreclosing a vendor's lien where service of process in the suit was fraudulently obtained and concealed. Fox v. Robins, 62 S. W. Rep. 815 (Tex. 1901).

4 Central T. Co. v. California, etc. R. R., 110 Fed. Rep. 70 (1901); *aff'd*, 128 Fed. Rep. 882.

ing the interests of the stockholder.¹ Various decisions on this subject of intervention are given in the notes below.²

1 *State v. Holmes*, 60 Neb. 39 (1900). A foreclosure sale will not be set aside at the instance of minority stockholders on the ground that it was not sufficiently advertised and that the price was inadequate and that it should have been sold in a different way, where the majority are satisfied. *Bond v. Gray Imp. Co.*, 102 Md. 426 (1906).

2 A stockholder was allowed to intervene and attack the validity of certain bonds in *Farmers' L. & T. Co. v. Toledo etc. Ry.* 67 Fed. Rep. 49 (1895), the court stating, however, that such attack must be made at the time of the distribution of the proceeds and not in opposition to the foreclosure. Stockholders and bondholders may be permitted to intervene in a foreclosure suit. *Central Trust Co. v. Washington, etc. R. R.*, 124 Fed. Rep. 813 (1903). Stockholders intervening and contesting the validity of a mortgage on the ground that it was fraudulently represented that there would be no mortgage, stand upon the right of the corporation itself. *Heyman v. Swift*, 91 N. Y. App. Div. 352 (1904). Where the receiver does not oppose the foreclosure suit the court will not stay it at the instance of a stockholder, there being no question as to the default, even though the stockholder claims that the collection of unpaid subscriptions would avoid the necessity of foreclosure. *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903). Where a stockholder of a railroad which has been foreclosed and reorganized attacks the foreclosure on the ground of fraud, he cannot on appeal change his complaint and claim that inasmuch as the plan of reorganization allowed the majority stockholders to come in on a more favorable basis than the minority, he was entitled to come in on the same

terms as the majority. *MacArdell v. Olcott*, 189 N. Y. 368 (1907). The dissenting opinion to the effect that on the merits the majority stockholders should have allowed the minority stockholders to come in on the same basis as the former came into the reorganization has much force. Stockholders are not generally allowed to intervene, but a committee representing them usually will be. *Pennsylvania Steel Co. v. New York, etc. Ry.*, 160 Fed. Rep. 222 (1908). Where a corporation is defendant and is represented by counsel and a committee of stockholders is also represented, an individual stockholder will not be allowed to intervene and be represented. *Thomasson v. Guaranty T. Co.*, 159 Fed. Rep. 126 (1908). A stockholder may intervene in a foreclosure suit to set up the defense that the earnings had been diverted for the purpose of bringing about a default or foreclosure. *Farmers' L. & T. Co. v. N. Y. etc. Ry.*, 150 N. Y. 410 (1896), rev'g 78 Hun, 213 (1894). A stockholder was allowed to intervene in *Mussina v. Goldthwaite*, 34 Tex. 125 (1870), and to prove that the mortgage bonds were fraudulently issued. A stockholder will be allowed to intervene and defend a suit pending against the corporation on a note where he alleges that the note is fraudulent, and the directors, by a conspiracy, do not intend to defend. *Majors v. Taussig*, 20 Colo. 44 (1894). Stockholders have a right to intervene in a foreclosure suit and set up defenses against an illegal claim where by a fraud and collusion the directors fail to do so; but a mere allegation by the stockholders that the bonds were issued at a large discount is no defense, unless it is shown that the bonds were sold for less than their value, and are still held by original holders or purchasers with notice. *Gunderson v.*

A stockholder's remedy during the pendency of the foreclosure

Illinois, etc. Bank, 199 Ill. 422 (1902). It is no defense to a foreclosure that the mortgagor was not legally organized, and a stockholder will not be allowed to intervene to set up that defense. *Gunderson v. Illinois, etc. Bank*, 100 Ill. App. 461 (1902). In the case of *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest. See also § 735, *supra*. Concerning the subject of interventions in the federal courts, see an article in 31 Am. L. Rev. 377 (1897). Stockholders may intervene in the foreclosure suit to set up defenses which the directors have refused to set up. *Farmers' L. & T. Co. v. Toledo, etc. Ry.*, 67 Fed. Rep. 49 (1895). Instead of filing an original bill, a stockholder may ask to be allowed to come in and defend a suit brought against the corporation by parties in collusion with the president, no defense having been made by the corporation, it being in default. *Morrill v. Little Falls Mfg. Co.*, 46 Minn. 260 (1891). It is discretionary with the court as to whether it will allow a stockholder to intervene in a litigation in which a corporation and its receiver are parties, even though the receiver refuses to appeal. *Re Fontana*, 85 Hun, 219 (1895). A stockholder will not be

allowed to intervene, although no defense is made to a foreclosure, the stockholder not alleging any facts which prove fraud and collusion, and his answer not being sworn to, and many of the allegations as to fraud being contradicted by record evidence. *Stradley v. Pailthorp*, 96 Mich. 287 (1893).

Even though the corporate property is sold on an execution obtained in a suit against the corporation, yet the stockholders cannot make a motion in such suit to set aside the sale, unless it is made to appear that the corporate officers have been wilfully and fraudulently neglectful. *Home, etc. Co. v. McKibben*, 60 Kan. 387 (1899). A stockholder cannot enjoin the foreclosure sale two years after the decree of sale has been rendered, even though he alleges breaches of trust on the part of the trustee, it being shown in opposition that the stockholders' suit may continue for several years and that the mortgagor is hopelessly insolvent, and that the breaches of trust will be no defense to the foreclosure suit, and that the bondholders had not complained. *Robinson v. Guaranty T. Co.*, 51 N. Y. App. Div. 134 (1900). Even though one railroad company owns the majority of the stock of another railroad company and purchases the property of the latter at a foreclosure sale thereof, yet, if there was no actual fraud, the minority stockholders of the insolvent company cannot complain, especially where they waited seventeen months and allowed large expenditures to be made in reliance on the sale. *Rothchild v. Memphis, etc. R. R.*, 113 Fed. Rep. 476 (1902). A stockholder in one railroad corporation cannot maintain a suit at law against another railroad corporation for damages to his shares of stock on account of the latter railroad corporation owning a majority of the stock of the former and so managing the

suit is in that suit and not by an independent suit.¹ Although

former as to cause a mortgage to be foreclosed resulting in a purchase of the property by the latter railroad corporation. *Niles v. N. Y. etc. R. R.*, 35 N. Y. Misc. Rep. 69 (1901); *aff'd*, 69 N. Y. App. Div. 144. Where the plaintiff stockholder delays unreasonably in trying the case, the court may allow another stockholder, who has intervened and been made a party, to proceed with the trial, upon his giving a bond to the original plaintiff to secure payment to him of a ratable part of the entire expense of the suit, whenever that should be determined. *Manning v. Mercantile T. Co.*, 37 N. Y. Misc. Rep. 215 (1902). Where a mortgage is connected with a lease of property in such a manner as to obligate the lessee to apply the income to the interest and a sinking fund, but a foreclosure takes place, the lessee cannot stop the foreclosure, even though the lessee owns all the bonds, inasmuch as the stockholders of the mortgagor company have an interest in the suit. A stockholder will not be allowed to intervene so long as the trustee continues to prosecute the suit. *Phillips v. Southern, etc. R. R.*, 110 Ky. 33 (1901). Where the bondholders control the corporation, a stockholder will be allowed to intervene in a foreclosure suit in order to set up the defense that the bonds are not a valid lien. *Henry v. Travelers' Ins. Co.*, 16 Colo. 179 (1891). Where there are defenses to the bonds and the officers are in collusion with the foreclosing trustee and make no defense, a stockholder may intervene, but not unless he shows clearly that the officers are not making the proper defenses and refuse to make them. *Alexander v. Searcy*, 81 Ga. 536 (1889).

A majority of the stockholders cannot intervene and have a dismissal of an appeal which a corporation has taken. *Woodbury v. Nevada Southern Ry.*, 115 Cal. 85 (1896). Where a

mortgage is being foreclosed, given by the corporation in settlement of an accounting, a stockholder cannot re-open the accounting unless fraud and collusion are shown. *Van Kirk v. Adler*, 111 Ala. 104 (1896). The court will not allow every stockholder to intervene in a suit by a creditor in behalf of himself and all other creditors and stockholders for a receiver. *Fowler v. Jarvis, etc. Co.*, 64 Fed. Rep. 279 (1894). Bondholders or stockholders who are allowed to intervene will not be allowed to intervene and file a cross-bill to set aside the proceedings or interpose obstacles to the suit. They may intervene, however, to contest the claims of creditors or show that the suit is collusive. *Forbes v. Memphis, etc. R. R.*, 2 Woods, 323 (1872); *s. c.*, 9 Fed. Cas. 408. Where a corporate creditor is suing the corporation, a stockholder cannot intervene in a suit and set up a counter-claim or set-off due from such corporate creditor to such intervening stockholder. *Gallagher v. Germania Brewing Co.*, 53 Minn. 214 (1893). Stockholders cannot intervene in corporate suits except where there is fraud or collusion. *Heggie v. People's Bldg. etc. Assoc.*, 107 N. C. 581 (1890). Stockholders are not allowed to intervene in the ordinary suits by or against the company. *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52 (1893). Although the corporation does not set up the statute of limitations to a creditor's claim, a stockholder cannot intervene and set it up. *Davis v. Gemmell*, 73 Md. 530 (1891). A stockholder will be allowed to appear and defend in behalf of the corporation where the directors fraudulently refuse to defend. *Kanawha, etc. Co. v. Ballard, etc. Co.*, 43 W. Va. 721 (1897).
¹ *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886).

"A stockholder of a corporation is so far a privy to a judgment against

there are decisions that after decree the remedy is by an independent suit.¹ Intervention is rarely allowed after the entry of a final decree.² A stockholder's suit to set aside a foreclosure on the ground of fraud is a continuation of the main suit and is ancillary thereto, so far as the jurisdiction of the federal court is concerned.³ In Pennsylvania⁴ and New Jersey⁵ it has been doubted whether the stockholder should be allowed to intervene in a fraudulent foreclosure suit, the court saying that his remedy is to have the judgment set aside for fraud. In New York, by statute, the courts have power to allow the stockholder to come in as a party defendant.⁶

the corporation that he cannot attack the judgment in any collateral proceeding." *Nat. Foundry, etc. Works v. Oconto Water Co.*, 68 Fed. Rep. 1006 (1895). See also § 209, *supra*. A judgment that the after-acquired property clause applies to a consolidated company into which the mortgagor is merged cannot be attacked collaterally. The remedy of a stockholder attacking the judgment is to intervene, or after judgment to vacate it and be allowed to defend. *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899). See also § 848*b*, *supra*.

1 In *Blackman v. Central R. R. etc. Co.*, 58 Ga. 189 (1877), the court said: "That the action is groundless and collusive, and that, from motives of fraud or favor on the part of the officers, the corporation fails or refuses to defend, will make no difference. The stockholders may protect all their rights by instituting a proper action of their own." In *Central Trust Co. v. Wabash, etc. R. R.*, 23 Fed. Rep. 858 (1885), the application of a stockholder to have the receiver institute certain suits was denied. In *Forbes v. Memphis, etc. Ry.*, 2 Woods, 323 (1872); s. c., 9 Fed. Cas. 408, the court said: "It is questionable whether, in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit, and seek to defend or con-

trol the proceedings. An original bill would rather seem to be the proper mode of proceeding. . . . It is in the discretion of the court whether or not to permit a stockholder to become a party defendant in any case where he is not made such by the bill." Stockholders in one of three consolidating corporations cannot intervene in a mortgage foreclosure suit against the consolidated company, there being no allegation of fraud or collusion. Their remedy is by an independent suit. *Central Trust Co. v. Marietta, etc. R. R.*, 48 Fed. Rep. 14 (1891). A stockholder may bring an independent suit in equity to set aside a fraudulent decree foreclosing a mortgage, the complainant's motion in the foreclosure suit itself to set aside the decree having been defeated by a further fraud, and a delay of three years is not a bar where the complainant lived in another state and had no notice of the decree or of the fraud. The directors should first be requested to bring such suit. *Whitney v. Hazzard*, 18 S. D. 490 (1904).

2 *United States v. Northern, etc. Co.*, 128 Fed. Rep. 808 (1904).

3 *Carey v. Houston, etc. Ry.*, 161 U. S. 115 (1896).

4 *Gravenstine's Appeal*, 49 Pa. St. 310 (1865); *Tazewell County v. Farmers' L. & T. Co.*, 12 Fed. Rep. 752 (1882).

5 *Brown v. Vandyke*, 8 N. J. Eq. 795 (1853).

6 Code Civ. Proc., § 452. See *Ithaca*

A stockholder may intervene to vacate a foreclosure decree entered on consent of the president without authority where there is no board of directors to defend.¹ A stockholder cannot file a bill to enjoin a pending suit of foreclosure on the ground that the bonds were fraudulently issued. The proper remedy is for the corporation to set up this defense, and if it declines to set it up then the stockholder may intervene.² From a decree refusing leave to a preferred stockholder to intervene and become a party to a foreclosure suit no appeal lies.³ Stockholders of course have no right to intervene in the ordinary litigation of the corporation, where no collusion or negligence on the part of the board of directors is shown.⁴ The motive of the trustee in foreclosing is immaterial, even though such motive is to close out the minority stockholders.⁵ Where stockholders seek to stop a foreclosure, they must furnish the money or point out a reasonable prospect of the company's resuming business and meeting interest charges.⁶

The remedy of the stockholders is not necessarily confined to intervention. Thus where the directors of a corporation have misappropriated the funds of the company, created fraudulent debts, levied assessments upon the stock, caused the stock to be forfeited for non-payment, and judgment to be entered on said debts and the property to be sold out, a stockholder may file a bill to set aside all the transactions and to compel the directors to account and to wind up the company.⁷ The stockholders may sue the directors for gross mismanagement, and for damages where fraudulent mortgages have been placed by them on the corporate property.⁸

Another remedy of the stockholder is to redeem the property before the foreclosure sale, and then give the corporation a reasonable time to redeem the property from him or be forever barred from its rights therein.⁹

Gas-Light Co. v. Treman, 93 N. Y. 660 (1883).

¹ Frederick Milling Co. v. Frederick, etc. Co., 106 N. W. Rep. 298 (So. Dak. 1906).

² Waymire v. San Francisco, etc. Ry., 112 Cal. 646 (1896).

³ Toledo, etc. R. R. v. Continental Trust Co., 95 Fed. Rep. 497 (1899). An order denying the application of a stockholder to intervene is not appealable. Land Title, etc. Co. v. Asphalt Co., 127 Fed. Rep. 1 (1903).

⁴ See § 750, *supra*. See also Dickerman v. Northern T. Co., 176 U. S. 181, 188 (1900), citing the text herein.

⁵ Guardian, etc. Co. v. White Cliffs, etc. Co., 109 Fed. Rep. 523 (1901).

⁶ Carey v. Houston, etc. Ry., 45 Fed. Rep. 438 (1891). See also note 2, p. 2913, and note 6, p. 2439.

⁷ Jellenik v. Huron, etc. Co., 177 U. S. 1 (1899). A stockholder may enjoin the treasurer from enforcing a fraudulent judgment which he has obtained against a corporation. Cross v. Johnson, 20 Wash. 124 (1898).

⁸ Landis v. Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

⁹ Wright v. Oroville Min. Co., 40 Cal. 20 (1870), where the court, on the stockholder's application, fixed the

A stockholder cannot cause a foreclosure suit to be set aside on the ground of corrupt motives of the directors who allowed the default to be taken, unless he can show collusion between them and the purchaser at the foreclosure sale.¹ It is no defense to foreclosure that the property—shares of stock—is unduly depressed and will soon be worth more, and that parties in interest are depressing it in order to buy the stock for a rival company.² Where the corporation brings a suit to redeem its property from a foreclosure sale, a stockholder has no right to come in as a party complainant.³

Where a corporation has a leasehold and a director has the fee, and the board of directors, at the instigation of such director, allow the lease to be forfeited for non-payment of rent, the company being in funds to pay such rent, a stockholder may set aside the forfeiture.⁴

Where the directors have instituted suits against the company for fictitious claims, and have directed the secretary to accept service and waive notice in any suit by creditors, and have speculated with the company's property and refused to carry on the business, a stockholder may obtain an injunction against the suits and may have relief against the directors.⁵

In England it is held that although none of the stockholders and creditors of a company, which is in difficulties, object to a new issue of bonds and stock for contract work, a part of the bonds and stock being then given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company the scheme is illegal, and innocent purchasers of stock may hold the directors who did the act liable for the stock and bonds thus given as a bonus.⁶ Such a purchaser's remedy, however, is not to have the whole issue set aside as illegal.⁷

§ 848. (j) The *purchaser* at a foreclosure sale cannot attack the

time within which the corporation must redeem, if at all.

¹ *Harpending v. Munson*, 91 N. Y. 650 (1883). The motive of the trustee in foreclosing is immaterial, even though such motive is to close out the minority stockholders. *Guardian, etc. Co. v. White Cliffs, etc. Co.*, 109 Fed. Rep. 523 (1901).

² *Toler v. East Tenn. etc. Ry.*, 67 Fed. Rep. 168 (1894).

³ *Kennebec, etc. R. R. v. Portland, etc. R. R.*, 54 Me. 173 (1866); s. c., 59 Me. 9. If a collusive judgment for

an ordinary cause of action has been entered against the corporation it may be set aside. *Whittlesey v. Delaney*, 73 N. Y. 571 (1878).

⁴ *Hannerty v. Standard Theatre Co.*, 109 Mo. 297 (1892).

⁵ *Birmingham, etc. Co. v. Mutual L. & T. Co.*, 96 Ala. 364 (1892).

⁶ *London Trust Co. v. Mackenzie*, 68 L. T. Rep. 380 (1893). Cf. §§ 46-48, *supra*.

⁷ *Church v. Citizens' Street R. R.*, 78 Fed. Rep. 526 (1897).

validity of the mortgage which has been foreclosed, nor the bonds secured thereby, and it is doubtful whether he will even be allowed to question the validity of prior mortgages on the property.¹

§ 848. (*k*) There are some very important incidental principles of law which bear upon this subject and which apply equally to several of the classes of claimants referred to above.

Thus it is a settled principle of law that a foreclosure will not be set aside, even for fraud, unless the complaining party shows that the relief will be of some benefit to him.

If it appears that the legitimate mortgage debt is more than the value of the property the court will not set the sale aside merely to satisfy an abstract principle of law.²

¹ A purchaser of real estate at a judicial sale, who is neither a stockholder nor creditor, cannot question a corporate mortgage on the property where he had notice thereof and there was no fraud. *Darst v. Gale*, 83 Ill. 136 (1876). Where under the New Jersey statute the court orders corporate property to be sold free and clear of liens excepting the first mortgage, the purchaser cannot set up that the bonds secured by the first mortgage should not be enforced for their full amount because they were sold at less than par. *Camden, etc. Co. v. Citizens', etc. Co.*, 65 Atl. Rep. 980 (N. J. 1907). A reorganized company may be charged with notice of the reorganization agreement, and may be estopped from complaining that a part of the securities issued by the old corporation were overissues. *Davidson v. Mexican Nat. R. R.*, 11 N. Y. App. Div. 28 (1896). When a foreclosure sale is subject to chattel mortgages, and the sale is confirmed, the purchaser cannot attack such chattel mortgages on the ground that the mortgagor was insolvent at the time. *Richards v. Halliday*, 112 Fed. Rep. 86 (1901). Where subsequently to the foreclosure decree, the equity of redemption is sold, the purchaser at such sale need not be brought into the foreclosure suit, and will not be allowed to intervene. *Beebe v. Rich-*

mond Light, etc. Co., 6 N. Y. App. Div. 187 (1896). A purchaser at the foreclosure sale may contest the validity of a prior mortgage. *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883).

² The supreme court of the United States, in *Foster v. Mansfield, etc. R. R.*, 146 U. S. 88 (1892), held that the court would not interfere to set aside a foreclosure on the ground of fraud where the plaintiff does not show at least a probability of personal advantage to himself by its being done. The court said: "A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice or to compel the defendants to buy their peace; and if it appear that the parties really in interest are content that the decree shall stand, it should not be set aside at the suit of one who could not possibly obtain a benefit from such action." To same effect, *Carey v. Houston, etc. Ry.*, 52 Fed. Rep. 671 (1892); *Aron v. De Castro*, 13 N. Y. Supp. 372 (1891); *aff'd*, 131 N. Y. 648. See also § 735, *supra*. *Cf. Harlow v. La Brum*, 151 N. Y. 278 (1897). A stockholder will not be allowed to intervene three years after judgment of foreclosure has been rendered where it is admitted that the property is not worth the amount due on the mortgage.

Creditors who become such after the bonds were issued cannot attack the validity of the bonds on the ground that they were issued for less than their real value, together with a large amount of stock.¹

Central, etc. Co. v. Peoria, etc. Ry., 104 Fed. Rep. 418 (1900). A purchase by the trustee himself at the sale is voidable and not void, and where the purchaser is a corporation in which the trustee is a director, the sale will not be disturbed if the price paid was a fair one, even though the sale was under the power of sale without a foreclosure, and even though the purchaser was a creditor secured by the mortgage. Moreover, in order to set aside such a claim some injury to the mortgagor must be shown. *Copsey v. Sacramento Bank*, 133 Cal. 659, 663 (1901). In the case of *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

"It seems to be quite well settled that the granting leave to intervene in a case in which the petitioner is not a party is a matter addressed to the discretion of the court, to be exercised upon consideration of all the circumstances of the case. Among other things the court will regard the seasonableness of the application, and the extent to which those already parties to the suit may be injuriously

affected by admitting the new party to assert his claims and have them litigated at that stage of the case. The question for the court will be whether the petitioner has slept upon his rights and unreasonably delayed his application. Another will be whether it will be more convenient that he litigate his rights upon an independent bill. And the court must necessarily, before granting leave, determine whether there is any reasonable ground for believing that the petitioner has any substantial interest to be protected—not, indeed, conclusively whether such interest exists, but *pro hac vice*, whether there is sufficient indication of it to justify the intervention." *Buel v. Farmers' L. & T. Co.*, 104 Fed. Rep. 839 (1900). A bondholder cannot intervene three years after decree of foreclosure in which he took an active part, even though he alleges fraud, where he fails to allege that the property was sold for less than its full value or would have sold for more if the fraud had not existed. *Central, etc. Co. v. Peoria, etc. Ry.*, 104 Fed. Rep. 418 (1900). "Fraud without damage or damage without fraud gives no cause of action." *Stratton's Independence v. Dines*, 135 Fed. Rep. 449, 458 (1905).

¹ *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897); *Central T. Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815, 828 (1898); *Coe v. East, etc. Ry.*, 52 Fed. Rep. 531, 534 (1892); *aff'd sub nom. Grant v. East, etc. Ry.*, 54 Fed. Rep. 569 (1893); *Central T. Co. v. Worcester, etc. Co.*, 110 Fed. Rep. 491 (1901); *Hamilton v. Menominee, etc. Co.*, 106 Wis. 352 (1900).

In the case of *First National Bank, etc. v. Winchester*, 119 Ala. 168 (1898),

A debt contracted in excess of the statutory limit cannot be attacked by subsequent creditors.¹

Thus, a purchaser of bonds, who purchases with notice that an alleged covenant in the mortgage securing the bonds to devote the proceeds of the bonds to the improvement of the property, has been broken, cannot complain of such breach of covenant, even though the entire proceeds of the bonds were, through the medium of sales of property, diverted to the personal benefit of stockholders.²

A decree invalidating the sale does so only as to complaining

where a private corporation had but four stockholders, and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation and secured by mortgage on the corporate property, the court held that the note was not enforceable against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation, who took with notice of the facts. Approving *Swift v. Smith*, 65 Md. 428 (1886). See also § 46, *supra*, and § 692, *infra*.

"A subsequent creditor of the corporation has no right to complain of a fraud upon his debtor which the debtor has waived or refuses to litigate," and hence creditors of an insolvent railroad corporation cannot attack the validity of an alleged issue of stock and bonds for less than their par value in payment for construction work. Creditors of an insolvent railroad corporation who become creditors after the mortgage bonds have been issued cannot attack such bonds as having been issued in violation of the statute prohibiting the issue of bonds to directors at less than the par value thereof. *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899).

¹ *Beach v. Wakefield*, 107 Iowa, 567 (1898). The fact that a mortgage and the bonds secured thereby are for a larger amount than authorized by the stockholders does not enable a sub-

sequent creditor to attack such mortgage. *Anderson v. Bullock, etc. Bank*, 122 Ala. 275 (1899). Subsequent creditors cannot complain that a corporation has incurred debts in excess of the amount allowed by its charter. The state alone can complain. *Central Trust Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898), holding also that under the Ohio statute giving a corporation power to issue bonds and secure them by mortgage not exceeding the amount of its capital stock, an excessive debt is not void as to a subsequent mortgagee with notice. Debts in excess of the charter amount are void as to subsequent creditors without notice, and the recording of a mortgage securing the same is not such notice. *Bell, etc. Co. v. Kentucky, etc. Co.*, 106 Ky. 7 (1899).

² *Belden v. Burke*, 147 N. Y. 542 (1885). The court said that neither on the ground of a breach of covenant—the covenant being a covenant of the corporation only—nor on the ground of fraud could the action be maintained. The court referred to the fact that the plaintiff had not paid more for his bonds than they actually were worth, the interest having been promptly paid, and the bonds having appreciated in market value. If the bondholder charges fraud he cannot obtain relief on other grounds, the charge of fraud not being substantiated. *Spies v. Chicago, etc. R. R.*, 40 Fed. Rep. 34 (1889).

judgment creditors, and not as to other creditors or bondholders or the company itself.¹

Where a suit is brought by creditors to invalidate mortgage bonds and such suit fails, but an appeal is taken by a part of such creditors and the decision reversed, only those creditors who appealed are entitled to have their claims paid in priority to the bonds.²

In a creditor's suit attacking a mortgage, the suit being for himself and other creditors, there being no fund to pay the expense of litigation, the court may require parties coming in to contribute towards such expense or else be excluded from the suit.³

A debenture-holder who brings suit in behalf of himself and other debenture-holders for a receiver may discontinue at his pleasure even after a decree and the appointment of a receiver, no other debenture-holder having come into the case, such decree being different from an administration decree which directs inquiries as to

1 *Barnes v. Chicago, etc. R. R.*, 122 U. S. 1 (1887); aff'g 8 Biss. 514 (1879), and 2 Fed. Cas. 862. Although, after foreclosure and purchase by the trustee and reorganization, the foreclosure is declared fraudulent and void at the instance of judgment creditors, yet it is valid except as to those judgment creditors who attacked it, and hence a new foreclosure need not be had. *Milwaukee, etc. R. R. v. Soutter*, 13 Wall. 517 (1871). "If one creditor objects to the claim of another creditor, and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one inures to the benefit of all." *Duncan v. Mobile, etc. R. R.*, 3 Woods, 567 (1877); s. c., 8 Fed. Cas. 19; aff'd, 96 U. S. 659. Where a corporation owns all of its bonds excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in

settlement from the trustee, yet if that settlement was caused by misrepresentations as to the value of the securities, he is not bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be allowed to participate the same as the bondholder who did not turn in his bonds. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). A judgment creditor who causes fraudulent preferences by an insolvent corporation to be set aside does not thereby himself obtain a preference over other creditors who did not institute proceedings. *Lodi, etc. Co. v. National, etc. Co.*, 41 N. Y. App. Div. 535 (1899). See also §§ 735, 830, *supra*, and note 6, p. 2838, *supra*.

2 *Manhattan Trust Co. v. Seattle, etc. Co.*, 19 Wash. 493 (1898). Even though interest on preferred claims is allowed improperly by the referee and is confirmed by the court, yet if only a portion of the creditors filed exceptions and prosecuted the appeal, the creditors not appealing are not entitled to the benefits of the appeal. *People, etc. v. American, etc. Co.*, 70 N. Y. App. Div. 579 (1902); aff'd, 172 N. Y. 371.

3 *Chick v. Northwestern, etc. Co.*,

debts and also directs that the assets be applied "in due course of administration."¹

The invalidity of a part of the bonds which are secured by the mortgage does not invalidate the mortgage as a security for the remaining bonds.²

Even if the bonds, and hence the mortgage, are held to be invalid, the court may retain jurisdiction in order to distribute the property.³

Under the civil law, even though the sale is set aside for fraud, yet the purchaser is entitled to reimbursement for improvements made by him.⁴

All stockholders who have assented to an issue of bonds, and all transferees of their stock, are estopped from objecting to the bonds.⁵

118 Fed. Rep. 933 (1895). See also § 748, *supra*.

¹ *Re Alpha Co. Ltd.*, 87 L. T. Rep. 646 (1903). See also § 748, *supra*.

² *Graham v. Boston, etc. R. R.*, 118 U. S. 161 (1886). The invalidity of some of the bonds cannot affect the validity of the mortgage or of the proceedings for foreclosure. *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899). Where the foreclosure of a mortgage is contested on the ground that bonds and stock were issued largely in excess of the value of the property, and on the ground that the parties who turned in their property for stock were defrauded by the promoters, the court said in regard to the bonds: "We are clearly of opinion that so far as they were purchased for a valuable consideration by innocent holders, they are not subject to the set-off claimed. The question whether, so far as they are held by parties cognizant of the alleged fraud, they are subject to a set-off, is not one which properly arises in this case, where the bonds must be treated as an entirety, but is a defense applicable to each individual bondholder." *Dickerman v. Northern T. Co.*, 176 U. S. 181, 206 (1900).

³ Although the bonds are held to be invalid, yet the foreclosure suit being started, and receiver's certificates be-

ing out, and all property in the receiver's hands, the court will sell and administer the property, all parties consenting. The phrase all property "intended to be used," in the mortgage, covers material for construction, such as rails, etc. If the receiver has notes belonging to the company the court will administer them also. *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 49 Fed. Rep. 188 (1892). See also § 877, *infra*. A foreclosure sale based on fraudulently-issued bonds may be set aside as against purchasers with notice, and such purchasers held liable for the real value of the road. *Drury v. Cross*, 7 Wall. 299 (1868).

⁴ *Jackson v. Ludeling*, 99 U. S. 513 (1878).

⁵ See ch. XLIV and §§ 730, 735, *supra*. See also cases cited in § 40, *supra*. Even though bonds and stock are issued for the construction of a road, the face value of which is twice the cost of the road, yet if all the stockholders consented and none of the creditors then existing are injured, transferees of such stock cannot complain on the foreclosure of the mortgage securing the bonds. *Wells v. Northern T. Co.*, 195 Ill. 288 (1902).

A subsequent purchaser of the stock cannot complain where the stock which he holds has ratified the transaction. Many cases in the

This is now an established principle of law and applies equally to issues of bonds as well as issues of stock.

sections cited above expressly state this to be the law, and there are other decisions to the same effect. In *Re Syracuse, etc. R. R.*, 91 N. Y. 1 (1883), the court said of the plaintiff stockholder who had purchased his stock after the transaction: "He was not a stockholder or an elector, and if it be claimed that he represents those from whom he acquired his certificate of stock, the answer is that they are the very parties who committed the wrong which the court was asked to redress." Where \$59,000 of stock and \$20,000 of bonds are issued for a gas plant worth \$34,000 besides the franchise, a judgment creditor cannot hold the stockholders liable on the stock where he himself is a stockholder and no charge of fraud is made. *Woolfolk v. January*, 131 Mo. 620 (1895). A stockholder cannot file a bill to enjoin a pending suit of foreclosure on the ground that the bonds were fraudulently issued. The proper remedy is for the corporation to set up this defense, and if it declines to set it up, then the stockholder may intervene. *Waymire v. San Francisco, etc. Ry.*, 112 Cal. 646 (1896). A person who buys mortgage bonds with stock as a bonus from a party to whom the stock and bonds were originally issued cannot be held liable on the stock at the instance of other stockholders, who did not object at the time of the issue, and who now come into the foreclosure suit and attempt to defeat the bonds on the ground that the amount due thereon is not more than the unpaid par value of the stock, the bonds and stock having originally been issued in payment for property. *Northern Trust Co. v. Columbia, etc. Co.*, 75 Fed. Rep. 936 (1896); *aff'd*, 80 Fed. Rep. 450 (1897). In *Stewart v. St. Louis, etc. R. R.*, 41 Fed. Rep. 736 (1887), where a railroad road-bed worth \$2,000 was turned

in to a corporation for \$200,000 of its notes and \$3,600,000 of its stock, the court held that the notes were good and could be collected. The court said: "It does not appear in this case that there was any deception or fraud practiced by the parties. The property was open to inspection, and the approximate cost of constructing it was easily obtainable. Its value to the company for the purpose desired was not difficult to ascertain. I find no evidence of any representations as to its value or cost or purchase price made by the parties selling; but there is record evidence that the board of directors, several months after the sale and with full knowledge of the transaction, formally approved and ratified it, and not only that, but subsequently, at a meeting of all the stockholders, the transaction was again ratified. Now, who was defrauded or deceived? All parties—directors and stockholders—assented to it; and, surely, subsequent purchasers of stock, or the corporation itself, cannot now object to it. It is true the vendors got a very large advance on the price they paid, but that is not alone the test by which the *bona fides* of the transaction is to be tried. To them as individuals the property was of little or no value. To the railroad company it could be made worth the price paid for it; and the vendors bent every energy to make the property useful to the company and to make the enterprise successful, for their chances of making money or any other value for the property depended very largely on the result. As before remarked, parties taking stock afterwards in the company cannot complain of the purchase. The records of the company showed the transaction. It was not kept a secret. There was no law compelling any person or municipality to take stock in the com-

Delay in intervening or in beginning suit to set aside a foreclosure on the ground of irregularity or fraud is a bar to any relief.¹

pany unless they voluntarily chose to do so; and if they were deceived by misrepresentations of the officers, their cause of action rests on that deception and not on an attack on the original contract of purchase." A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state—Pennsylvania. *Wood v. Corry, etc. Co.*, 44 Fed. Rep. 146 (1890). Although the bonds are sold at sixty-five to seventy cents on the dollar, and the purchaser holds a majority of the stock of the company and controls it, yet the bonds cannot be attacked by a stockholder who has acquiesced in their issue for eleven years. *Alexander v. Searcy* 81 Ga. 536 (1889). A purchaser of stock issued to a contractor for work cannot attack the issue on the ground that it was watered stock, even though the contractors immediately sell a part of the stock and bonds at the rate of ninety cents on the dollar for the bonds with nearly an equal amount of stock thrown in. *Drake v. New York, etc. Co.*, 26 N. Y. App. Div. 499 (1898). See also *Central T. Co. v. Columbus, etc. Ry.*, 87 Fed. Rep. 815 (1898). A person who buys mortgage bonds with stock as a bonus from a party to whom the stock and bonds were originally issued cannot be held liable on the stock at the instance of other stockholders who did not object at the time of the issue, and who now come into the foreclosure suit and attempt to defeat bonds on the ground that the amount due thereon is not more than the unpaid par value of the stock, the bonds and stock having originally been issued in payment for property. *Northern Trust Co. v. Columbia, etc. Co.*, 75 Fed. Rep. 936 (1896); affirmed, 80 Fed. Rep. 450, and 176 U. S. 181. A con-

tractor taking pay in stock cannot complain that the property was foreclosed under a mortgage which he assented to. *Kelley v. Collier*, 11 Tex. Civ. App. 353 (1895). A mortgage to secure bonds in excess of the amount allowed in the charter cannot be repudiated by the mortgagor, and not even the *cestui que trust* of the mortgagor can complain, if he has participated in the same. *Union T. Co. v. Mercantile, etc. Co.*, 189 Pa. St. 263 (1899).

1 Seven years' delay in a second-mortgage bondholder's complaining that default and sale was by conspiracy, and that parties acting in a fiduciary capacity bought for themselves, is fatal. *Johnson v. Atlantic, etc. Transit Co.*, 156 U. S. 618, 647 (1895). In *Foster v. Mansfield, etc. R. R.*, 146 U. S. 88 (1892), the court held that, where a stockholder does not complain of a fraudulent foreclosure until ten years after the sale, he is presumed to be guilty of laches. He must not only have been ignorant of fraud, but must have used reasonable diligence to inform himself of the facts. Hence a stockholder, who was a resident near the railroad, and who might have examined all the proceedings in the suit at any time, is chargeable with notice of acts of collusion and fraud which appeared on the face of the papers.

Where a railroad is regularly sold under a judgment which by statute is a lien, a mortgage executed subsequently to the obtaining of such judgment is wiped out by such sale, and, in addition to this, where the mortgagee waits thirty-one years before commencing suit, the suit will be dismissed. *Gunnison v. Chicago, etc. Ry.*, 117 Fed. Rep. 629 (1902); aff'd, 130 Fed. Rep. 259; being the same transaction as was involved in *James v. Railroad Co.*, 6 Wall. 752

§ 849. *The decree and consent decrees—Appeals.*—The decree should declare the fact, nature, and extent of the default, and the amount due, and should give a reasonable time for payment, and

(1867). Such a sale under a judgment carries the franchise as well as the property. Unreasonable delay is ground for the court refusing to allow stockholders to intervene. *Gundersen v. Illinois Trust & Savings Bank*, 100 Ill. App. Rep. 461 (1902); *aff'd*, 199 Ill. 422.

A stockholder's suit to vacate a foreclosure decree seven years after it was entered and three years after a decision that he was entitled to make the application, the property in the meantime having passed into *bona fide* hands, is too late, his claim being that he was a stockholder in a company that was consolidated with another company, and that the property of his corporation was sold on the foreclosure of a mortgage of the latter, which mortgage was executed prior to the consolidation. *Atlantic Trust Co. v. New York, etc. Co.*, 75 N. Y. App. Div. 354 (1902).

Bondholders who delay for three months after the decree is entered for the foreclosure of the mortgage securing their bonds, and then threaten the controlling parties with suit unless their bonds are purchased at par, and then commence suit to enjoin the sale under the decree, cannot have a preliminary injunction against the sale, even though they show that prior to the entry of the decree they co-operated with stockholders who intervened in the suit and set up fraud in the issue of the stock and bonds, but subsequently withdrew their objections and allowed the decree to be entered. *Foley v. Guarantee Trust Co.*, 74 Fed. Rep. 759 (1896). After a decree of sale and the commencement of advertising, it is too late for a bondholder to intervene, where he knew of the proceedings when pending. *Farmers' L. & T. Co. v. Rockaway Valley R. R.*, 69 Fed. Rep. 9

(1895). An intervening petition attacking the validity of the bonds will be stricken from the files, where it was interposed three years after it might have been filed. *Continental T. Co. v. Toledo, etc. R. R.*, 82 Fed. Rep. 642 (1897). In *Sullivan v. Portland, etc. R. R.*, 94 U. S. 806 (1876); 4 Cliff. 212; s. c., 23 Fed. Cas. 351, it was claimed that the process of foreclosure was irregular, without warrant of law, and void. Seventeen years' delay was held to be fatal. In *Coddington v. Railroad Co.*, 103 U. S. 409 (1880), a stockholder's delay for eight years in moving to rescind the contract by which he took stock for his bonds, prior to foreclosure of the mortgage, was held to be a bar. So also where there was five years' delay. *Harwood v. Railroad Co.*, 17 Wall. 78 (1872). The court will not especially favor the application of a bondholder to attack the foreclosure where the application is made just before the sale and after the foreclosure has been going on for nearly three years. *Farmers' L. & T. Co. v. Green Bay, etc. R. R.*, 6 Fed. Rep. 100 (1881). Where a bondholder delays five years after the sale before objecting to an irregularity in the foreclosure which his trustee made, and before objecting to the purchase of the property by the president of the company at the sale, his suit to set aside the sale will fail. *Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882).

A bondholder cannot sustain a bill filed to set aside a foreclosure and reorganization on the ground that the trustee was in collusion with the bondholders' reorganization committee, where such bondholder knew of the facts during the progress of the foreclosure and made no complaint. *Cutter v. Iowa, etc. Co.*, 96 Fed. Rep. 777 (1899). The statute of limita-

if not paid then, that the sale take place.¹ The decree also generally specifies a price which is the lowest price at which the court

tions runs against an action by taxpayers against the officers and promoters of a railroad to which municipal aid was voted, to compel them to account for watered stock and bonds, and to cause the stock, bonds, and mortgage to be canceled. *Allen v. Wisconsin, etc. Ry.*, 90 Iowa, 473 (1894). A stockholder cannot enjoin the foreclosure sale two years after the decree of sale has been rendered, even though he alleges breaches of trust on the part of the trustee, it being shown in opposition that the stockholders' suit may continue for several years, and that the mortgagor is hopelessly insolvent, and that the breaches of trust will be no defense to the foreclosure suit, and that the bondholders had not complained. *Robinson v. Guaranty T. Co.*, 51 N. Y. App. Div. 134 (1900). Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant and serves them by publication, and, two of the trustees having died, causes successors to be appointed by the court, and obtains decree against the corporation and the trustees of the mortgage, canceling their title to the land, the decree is effective, and, even though the mortgage is afterwards foreclosed, the purchaser at such sale takes no title to such land, he having delayed thirty years before attacking such decree. *Bump v. Butler County*, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality, whereby it conveyed land to a corporation, the court will not grant it any relief. *Rummel v. Butler County*, 93 Fed. Rep. 304 (1899). Laches may be a bar to a stockholder's suit to cancel bonds which were issued for property

taken at an overvaluation. *Jutte v. Hutchinson*, 189 Pa. St. 218 (1899). See also ch. XLIV, *supra*.

¹ *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882). The form of a decree of foreclosure and sale of a railroad is given in full in *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 232 (1885). For an approved form of a final decree of foreclosure and sale, see *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 365-381 (1879); s. c., 22 Fed. Cas. 274. It may not be necessary that the decree of sale fix the amount due on the bonds secured by the mortgage which is being foreclosed. *McMurtry v. Montgomery, etc. Co.*, 86 Ky. 206 (1887). A sale will not be decreed before the time for redemption has elapsed, where the security is adequate. *Jackson, etc. Co. v. Burlington, etc. R. R.*, 29 Fed. Rep. 474 (1887). Concerning the judgment, its form, etc., and that informalities are not fatal, and that the referee may make the deed, see *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 119 N. Y. 15 (1890). In regard to the mode of crediting the mortgagor with income, where a redemption is allowed, see *Racine, etc. R. R. v. Farmers' L. & T. Co.*, 49 Ill. 331 (1868). Although by stipulation all the cases are heard together, and the same evidence is used, yet separate decrees may be made. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885). In *Re Tampa, etc. R. R.*, 168 U. S. 533 (1897), the court stated that its decision was not to be taken as holding that a circuit judge has power to grant injunctions and appoint receivers, or enter orders or decrees *in invitum*, outside of his circuit. The act of congress regulating the method of sale on foreclosure does not apply to decrees rendered prior to the act. *Central Trust Co. v. Sheffield, etc. Ry.*, 60 Fed. Rep. 9 (1894). See also § 850, *infra*.

will allow the sale to be made,¹ and should direct the bringing of the fund into court for distribution.² It may allow the purchasers to turn in bonds in payment at their *pro rata* value.³ A provision in the decree that certain claims and the receiver's expenses should be a prior claim upon the property binds the property, and is a lien ahead of all subsequent mortgages and deeds of the property by the purchaser.⁴ After a decree it is too late to object to it on immaterial technicalities, such as that it is not according to the prayer of the bill, or on the ground that prior mortgagees who had filed cross-bills should have filed original bills.⁵

On the other hand, the decree cannot determine matters not involved in the pleadings or proof.⁶ A judgment for a deficiency is not proper if not asked for in the bill and the defendant interposed no answer.⁷ But in the federal courts a decree for a defi-

1 In *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 232 (1885), the court held that, where a railroad is to be sold under a final decree in foreclosure proceedings, the decree should name an upset price large enough to cover costs, and all allowances made by the court, receiver's certificates and interest, liens prior to the bonds, amounts diverted from the earnings, and all undetermined claims which will be settled before the confirmation and sale. The court held also that the statutory liens should be paid before the mortgage bonds, but that equitable liens must come in after the bonds. In the case *Central Trust Co. v. Washington, etc. R. R.*, 124 Fed. Rep. 813 (1903), the court fixed the upset price at an amount about equal to a sum on which the property would pay four per cent. Where the sale is made on an order obtained without all parties being represented, and by a concealment of material facts, the court will set it aside at the instance of minority stockholders. *Strickland v. National Salt Co.*, 43 N. Y. Misc. Rep. 172 (1904). In this case a resale was ordered, but upon such resale the price realized was only \$194,000 as against the first sale at \$338,000. See N. Y. L. J. July 9, 1904.

2 The decree may direct that the fund received on the sale be brought

into court subsequently for directions in regard to distribution. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885).

3 See ch. LII, *infra*.

4 *Continental Trust Co. v. American Surety Co.*, 80 Fed. Rep. 180 (1897). See also § 890, *infra*.

5 *Bound v. South Carolina Ry.*, 53 Fed. Rep. 473 (1893). A person who purchases second mortgage bonds eighteen years after the first mortgage has been foreclosed is not such a *bona fide* purchaser as is entitled to attack the foreclosure sale on the ground of technical irregularities, especially where the property has passed into new hands and been improved at large expense, there being no fraud involved. *Raphael v. Rio Grande, etc. Ry.*, 132 Fed. Rep. 12 (1904).

6 A decree as to a railroad foreclosure cannot determine questions between one party defendant and another party defendant, there being nothing in the pleadings or proof justifying such a decree. *Graham v. Railroad Co.*, 3 Wall. 704 (1865). Even though one of the defendants owns the equity of redemption in several properties, yet the decree cannot foreclose any property not mentioned in the bill of complaint. *Venner v. Denver, etc. Co.*, 15 Colo. App. 495 (1900).

7 *Ohio Central R. R. v. Central T.*

ciency upon the foreclosure of a mortgage may be rendered under the ninety-second equity rule, without a special prayer therefor in the bill, though it is the better practice to insert such a prayer.¹ In a decree foreclosing a pledge of stock the question of judgment for a deficiency may be left open to be determined if there is a deficiency.² Where a party sues to foreclose a mortgage and fails because the mortgage was *ultra vires* of the corporation, he cannot in that action recover on the bonds.³

A decree by consent is not an adjudication. It amounts to a contract and nothing more, but will be enforced by the court between those agreeing to it, the same as all contracts are enforced.⁴ Even after a foreclosure decree has been entered, persons, who were not parties to the suit, but who had made an agreement with the receiver, relative to the abandonment of a strip of street railway and the franchise therefor, which agreement had been confirmed by the city and carried out, may file an independent bill in equity to have the decree modified.⁵ The decree confirming a master's report as to distribution is final and cannot be disturbed after the close of the

Co., 133 U. S. 83 (1890). See also Chicago, etc. R. R. v. Fosdick, 106 U. S. 47 (1882); Mercantile T. Co. v. Southern, etc. Ry., 86 Fed. Rep. 711 (1898).

¹ Seattle, etc. Ry. v. Union Trust Co., 79 Fed. Rep. 179 (1897). Cf. § 836.

² South Dakota v. North Carolina, 192 U. S. 286 (1904). Profits made during the receivership by operation by a third party belong to the mortgagee, even though he opposed such operation. A deficiency judgment is not necessary to entitle the mortgagee to such. Boyce v. Continental Wire Co., 125 Fed. Rep. 740 (1903).

³ Dudley v. Congregation, etc. St. Francis, 138 N. Y. 451 (1893).

⁴ Parties who have withdrawn their answer and consented to a decree cannot afterwards ask to have proceedings on the decree suspended. If the sale by consent is suspended on certain conditions, and the conditions are not complied with, the sale may go on under the consent. Anderson v. Jacksonville, etc. R. R., 2 Woods, 628 (1873); s. c., 1 Fed. Cas. 842. A decree by consent is binding on those who consent thereto or acquiesce

therein during a long time while parties are acting on the decree. Having been executed it will not easily be disturbed. Vermont, etc. R. R. v. Vermont, etc. R. R., 50 Vt. 500, 557, 558 (1877). An appeal lies from a decree entered by consent, but errors which the consent has waived will not be considered. Pacific R. R. v. Ketchum, 101 U. S. 289 (1879). "In the absence of any real adjudication by the court, and by virtue of a consent decree, to which they [bondholders] were not parties, to have the property in which they are interested disposed of, . . . would seem to me not at all in accordance with the principles of equity." Hence the court refused to order a sale pending an appeal by bondholders. Farmers' L. & T. Co. v. Central R. R., 4 Dill. 533 (1877); s. c., 8 Fed. Cas. 1037. A foreclosure suit may be heard and decided outside of the district in which it is pending, but within the circuit, by consent of the parties. Continental, etc. Co. v. Toledo, etc. R. R., 99 Fed. Rep. 171 (1900).

⁵ Thompson v. Schenectady Ry., 119 Fed. Rep. 634 (1903).

term.¹ But even though the term of court at which an order of sale in a foreclosure suit was made has ended,* the court may suspend the same on motion of an intervening creditor, especially where the title to a part of the property is in litigation.² The court sometimes reserves the right, in the decree itself, to modify such decree.³ After a decree of foreclosure sale has been entered, another judge will not grant a motion of the trustee to discontinue the suit as against the objection of bondholders.⁴ Where the first mortgagee forecloses and the proceeds are insufficient to pay his debt, a second mortgagee who is made a party defendant is not entitled to costs.⁵

An appeal lies from a decree which fixes the amount due and which orders a sale if such amount is not paid within a specified time.⁶ But a decree is not final and appealable if it lacks any of these elements.⁷ An appeal lies from the final decree confirming

¹ See § 881, *infra*.

² *United States, etc. T. Co. v. Young*, 101 S. W. Rep. 1045 (Tex. 1907).

³ See § 850, *infra*. Although the court reserves the right to modify the decree, yet seven years' delay by a junior mortgagee in regard to its rights is a bar to a change in the decree. *Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895). A final decree in a foreclosure suit, not appealed from, may, so far as it awards priority to some of the bonds as against others, be subsequently modified to conform to a decision of the supreme court of the United States in another case, and holding differently as to such priority. The second case was for the sole purpose of determining what bonds were legal. *Moran v. Hagerman*, 64 Fed. Rep. 499 (1894). The court may modify the final decree as to paying taxes and as to allowing payment to be made in receiver's certificates. *Farmers' L. & T. Co. v. Oregon Pac. R. R.*, 28 Oreg. 44 (1895).

⁴ *Central, etc. Co. v. United States, etc. Co.*, 113 Fed. Rep. 587 (1901).

⁵ *Re Clayton, etc. Co.*, 90 L. T. Rep. 283 (1904). See also § 879, *infra*.

⁶ *First Nat. Bank v. Shedd*, 121 U. S. 74 (1887), where the decree left open for future decision the question of priority of liens; *Chicago, etc. R. v. Fosdick*, 106 U. S. 47 (1882);

Hinckley v. Gilman, etc. R. R., 94 U. S. 467 (1876), where a receiver appealed from a decree specifying the amount of money he must pay on the settlement of his accounts; *Milwaukee, etc. R. R. v. Soutter*, 2 Wall. 440 (1864); *Blossom v. Milwaukee, etc. R. R.*, 1 Wall. 655 (1863), where the appeal was by the bidder at the sale; *Bronson v. Railroad Co.*, 2 Black, 524 (1862). A decree for costs to a bondholder who sues in behalf of himself and others is final and appealable. *Trustees v. Greenough*, 105 U. S. 527 (1881); *Cowdrey v. Galveston, etc. R. R.*, 93 U. S. 352 (1876). As regards the beginning of the time from which the right to appeal runs, the date of the decree for a sale governs, and not the date when the commissioner executes the decree. *Duncan v. Atlantic, etc. R. R.*, 88 Fed. Rep. 840 (1880). A decree of foreclosure and sale is not a final decree where it leaves undetermined the amount of the claims. *Denison, etc. Ry. v. Ranney-Alton, etc. Co.*, 104 Fed. Rep. 595 (1900).

⁷ *Railroad Co. v. Swasey*, 23 Wall. 405 (1874), where the amount was not fixed nor the property defined. So also in *Grant v. Phoenix Ins. Co.*, 106 U. S. 429 (1882); *Parsons v. Robinson*, 122 U. S. 112 (1887); *Burlington, etc. Ry. v. Simmons*, 123 U. S. 52 (1887). A decree upon an intervening petition

the sale.¹ A purchaser may appeal from an order refusing to confirm the sale.² A purchaser at foreclosure sale may also appeal from orders entered subsequent to his purchase and affecting him.³ As a rule bondholders cannot prosecute an appeal, the trustee not considering an appeal to be advisable.⁴ All parties who will be affected by a reversal of the decree are necessary parties to the appeal.⁵ A foreclosure decree of sale may be reversed, even though a sale has taken place and been confirmed.⁶ Where, after the confirmation of the sale, an appeal is taken, the purchaser being made a party and the judgment is reversed and the sale set aside, the purchaser is liable for the value of the property less the amount of prior liens which have been paid by him, it being shown that he has entirely destroyed the value of the property pending the appeal.⁷

of a claimant of rolling-stock is not a final decree. *McGourkey v. Toledo, etc. Ry.*, 146 U. S. 536 (1892).

1 *Sage v. Railroad Co.*, 96 U. S. 712 (1877).

2 *Magann v. Segal*, 92 Fed. Rep. 252 (1899).

3 *Kneeland v. American L. & T. Co.*, 136 U. S. 89 (1890); *Blossom v. Milwaukee, etc. R. R.*, 1 Wall. 655 (1863). The purchaser may appeal from subsequent adjudications that he pay certain claims. *Louisville, etc. R. R. v. Wilson*, 138 U. S. 501 (1891). A purchaser at foreclosure sale who purchases under an order providing that prior claims thereafter be determined shall be paid by him cannot appeal from such subsequent adjudications. *Central T. Co. v. Grant, etc. Works*, 135 U. S. 207 (1890).

4 See § 817, *supra*.

5 On an appeal by an intervening bondholder and stockholder to set aside a confirmation of the sale, the purchaser as well as the mortgagor are necessary parties. *Davis v. Mercantile Trust Co.*, 152 U. S. 590 (1894). In an appeal from a decree giving priority to a claim, the receiver and all subordinate creditors who were parties to the suit are necessary parties to the appeal. *Illinois, etc. Bank v. Kilbourne*, 76 Fed. Rep. 883 (1896). In an appeal from an order giving pri-

ority to certain claims over the mortgage, the insolvent railroad company is a necessary party. *Farmers L. & T. Co. v. Longworth*, 76 Fed. Rep. 609 (1896). In an appeal from the foreclosure decree, there being nothing left for the stockholders, the corporation need not be joined. *Mercantile Trust Co. v. Kanawha, etc. Ry.*, 58 Fed. Rep. 6 (1893). On an appeal from a decree determining the priority of one security over another, the junior mortgagee may contest the decision below, even though such junior mortgagee had accepted its share of the proceeds in accordance with the decree below. *Hinchman v. Point, etc. Ry.*, 14 Wash. 349 (1896). On an appeal from the decree of distribution the insolvent corporation is not a necessary party; neither are the holders of receiver's certificates, if the receiver himself is a party. *Galveston, etc. Ry. v. House*, 102 Fed. Rep. 112 (1900).

6 *Grape Creek Coal Co. v. Farmers' L. & T. Co.*, 63 Fed. Rep. 891 (1894).

7 *Central Trust Co. v. Hubinger*, 87 Fed. Rep. 3 (1898). Where an appeal is taken from a foreclosure decree and sale of a street railway and the upper court sets aside the sale, but in the meantime the purchaser at the foreclosure sale has abandoned the franchise and dismantled part of the property and relocated other parts so that

Where on appeal a foreclosure decree is reversed, the foreclosure sale that has taken place in the meantime is thereby nullified, and restitution of the property will be ordered upon repayment of the purchase price.¹ Where an appeal is taken from the foreclosure decree without *supersedeas*, and the decree is reversed, and the purchaser is required to pay a further sum, which he does, the mortgagor cannot then institute a suit to set the sale aside.² Even though a foreclosure sale is set aside on appeal, yet where the purchaser is the mortgagee he need account only for the profits made, if there has been no wilful mismanagement, and such profits should be applied to any deficiency judgment that may exist.³ Where, after foreclosure, the decree is reversed, the court may order a resale.⁴ Even though interest on preferred claims is allowed improperly by the referee and is confirmed by the court, yet if only a portion of the creditors filed exceptions and prosecuted the appeal, the creditors not appealing are not entitled to the benefits of the appeal.⁵ The damages payable on the *supersedeas* bond, where the appeal fails, are only those which result from the delay in selling.⁶ The lower

it is impossible to return the property, the trustees of the mortgage may hold him liable in damages for the actual value of the property at the time of the sale less the amount realized from such foreclosure sale. *Hubinger v. Central T. Co. etc.*, 94 Fed. Rep. 788 (1899). In this case the foreclosure proceedings were in the state court, but the suit at law mentioned above was in the federal court.

¹ Where a part of the bonds were held to be good, a resale will be ordered, and an equitable distribution of the proceeds made. *Robinson v. Alabama, etc. Mfg. Co.*, 67 Fed. Rep. 189 (1894). *Cf. Manhattan T. Co. v. Seattle, etc. Co.*, 19 Wash. 493 (1898).

² *Grape Creek Coal Co. v. Farmers' L. & T. Co.*, 80 Fed. Rep. 200 (1897).

³ *Robinson v. Alabama, etc. Co.*, 89 Fed. Rep. 218 (1898). Where the bondholders purchase the property at foreclosure sale and afterwards the decree of foreclosure is reversed on appeal and then a second foreclosure sale takes place, and the bondholders purchase again and a deficiency judgment is entered, the profits realized by the

bondholders between the time of the first sale and the second sale will be applied on the deficiency judgment, the bondholders having had possession during the whole time. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 94 Fed. Rep. 269 (1899).

⁴ *Alabama, etc. Mfg. Co. v. Robinson*, 72 Fed. Rep. 708 (1896).

⁵ *People, etc. v. American, etc. Co.*, 70 N. Y. App. Div. 579 (1902); *aff'd*, 172 N. Y. 371. Where a suit is brought by creditors to invalidate mortgage bonds and such suit fails, but an appeal is taken by a part of such creditors and the decision reversed, only those creditors who appealed are entitled to have their claims paid in priority to the bonds. *Manhattan Trust Co. v. Seattle, etc. Co.*, 19 Wash. 493 (1898). See also §§ 848 (*k*) and 735, *supra*.

⁶ *Supervisors v. Kennicott*, 103 U. S. 554 (1880). See also *Jerome v. McCarter*, 21 Wall. 17 (1874). The bond may be approved at any time during or after the term when the final decree was made. *Sage v. Railroad Co.*, 96 U. S. 712 (1877).

court cannot modify a foreclosure decree after it has been affirmed by the upper court.¹

§ 850. *Sales—Remedies against the purchaser—Redemption—Tender of interest due—Distribution.*—The time of the sale is within the discretion of the court.² This discretion is very broad, and the court has power to delay the sale to such a time as seems best for all interests.³ The marshal or person who makes the sale

¹ *Continental, etc. Co. v. Toledo, etc.* Tennessee, etc. Ry., 67 Fed. Rep. 168 R. R., 99 Fed. Rep. 171 (1900).

² *Chicago, etc. R. R. v. Fosdick*, 106 U. S. 47 (1882). The court may order the sale to take place in four months if payment is not made. This is not unreasonably short. *Columbia, etc. T. Co. v. Kentucky, etc. Ry.*, 60 Fed. Rep. 794 (1894).

³ Where the arrears of interest, costs, etc., will probably be paid within eighteen months, the court will stay the sale in order to give the company an opportunity to pay. *American L. & T. Co. v. Union Depot Co.*, 80 Fed. Rep. 36 (1897). Even though the foreclosing trustee desires to have the sale postponed owing to general business depression, yet the court, at the instance of a bondholder, may order an immediate sale. *Thomas v. San Diego College Co.*, 111 Cal. 358 (1896). The court may order a sale before fixing all priorities or settling the validity and place of any particular lien. *Compton v. Jesup*, 68 Fed. Rep. 263, 289 (1895). The court will not order an immediate sale by the receiver where the purpose of the receivership was to complete a railroad and save certain subsidies and that purpose has not yet been accomplished. *Bibber-White Co. v. White River, etc. R. R.*, 110 Fed. Rep. 472 (1901). The court has power, without notice to the mortgagor, to enter an order adjourning the sale. *Old Colony T. Co. v. Great, etc. Co.*, 181 Mass. 413 (1902). It is no defense to foreclosure that the property—shares of stock—is unduly depressed and will soon be worth more, and that parties in interest are depressing it in order to buy the stock for a rival company. *Toler v. East*

Tennessee, etc. Ry., 67 Fed. Rep. 168 (1894). The court may confirm a sale although it is made at a later time than that specified in the decree. *Farmers' L. & T. Co. v. Oregon Pac. Ry.*, 28 Ore. 44 (1895). The court will delay the sale of a railroad a reasonable time in order to await better times, but will not wait for a prosperous state of earnings. *Duncan v. Atlantic, etc. R. R.*, 88 Fed. Rep. 840 (1880). Although the court has power, during the foreclosure proceedings, to order the sale to be made at once, yet where the final decree may not require a sale, and the validity of some of the bonds and mortgages is disputed, such sale will not be ordered. *Pennsylvania R. R. v. Allegheny, etc. R. R.*, 42 Fed. Rep. 82 (1890). The court may suspend the execution of an interlocutory order that the property be sold, the object being to enable the parties to reorganize if possible. There can be no appeal from this. *Washington, etc. R. R. v. Southern, etc. R. R.*, 55 Md. 153 (1880). Persons who are not parties to the foreclosure suit cannot obtain a stay of the sale unless they are quasi-parties, such as creditors or bondholders whose trustee is a party. *Anderson v. Jacksonville, etc. R. R.*, 2 Woods, 628 (1873); s. c., 1 Fed. Cas. 842. Where an appeal is pending on a foreclosure, and the trustee deems it best not to sell during such appeal, the court will not, on the application of a bondholder, order the trustee to proceed to a sale. *Farmers' L. & T. Co. v. Central R. R.*, 4 Dill. 533 (1877); s. c., 8 Fed. Cas. 1037. During foreclosure proceedings the court will not order a private sale of land subject to the mortgage, but not used

may adjourn it in order to enable the mortgagor to pay the debt, or for any other good cause shown.¹ If a sale is made by the trustee without judicial proceedings at substantially the hour as advertised, this is sufficient, no objection to the delay having been made at the time.² Where the master is authorized to fix the time of sale he may also fix the place of sale.³ Even though by the decree the sale is to be ten days after default, yet, if the sale does not actually take place for two and a half months, it is legal, especially where six months were given to redeem.⁴ The court may order the sale to be made by a special commissioner.⁵ One of the directors may be the auctioneer of the property.⁶ The sale on foreclosure of a mortgage is a public sale, but a sale by a receiver on dissolution or winding-up proceedings may be private, if the court so orders.⁷

for railroad purposes. *Bound v. South Carolina Ry.*, 46 Fed. Rep. 315 (1891). Although in a foreclosure suit by a trustee the court allowed certain bondholders to come in and contest other liens, yet the court may order the sale of the property at once and hold the proceeds to await such contest. *First Nat. Bank v. Shedd*, 121 U. S. 74 (1887). The court has power to postpone a sale where an appeal is pending from the foreclosure decree settling the priority of liens, even though such appeal is without a *supersedeas*. The postponement is granted because the result of the appeal might be disastrous to the purchaser, or, if the sale were incapable of being rescinded, would render nugatory a decision on the appeal. *Bound v. South Carolina Ry.*, 55 Fed. Rep. 186 (1893). A court will refuse to order a sale of the property, although there has been a default in interest, where the income has been applied to improvements at the request of most of the bondholders, and the prospects are that the property will soon prosper; but the court will order a part of the income to be applied to past-due coupons. *Williamson v. New Albany, etc. R. R.*, 1 L. iss. 198 (1857); s. c., 30 Fed. Cas. 12. Individual bondholders cannot compel the trustee to proceed to sell after foreclosure has been decreed. *Farmers' L. & T. Co. v. Central R. R.*, 4 Dill. 533 (1877); s. c., 8 Fed. Cas. 1037.

¹ *Blossom v. Railroad Co.*, 3 Wall. 196 (1865). For the form of an order of the court postponing a sale, see *Duncan v. Atlantic, etc. R. R.*, 4 Hughes, 128 (1882). A receiver has discretion whether to adjourn the sale or not. *Bethlehem Iron Co. v. Philadelphia, etc. Ry.*, 49 N. J. Eq. 356 (1892).

² *Etna, etc. Co. v. Marting, etc. Co.*, 127 Fed. Rep. 32 (1904).

³ *Old Colony T. Co. v. Great, etc. Co.*, 181 Mass. 413 (1902).

⁴ *Wells v. Northern T. Co.*, 195 Ill. 288 (1902).

⁵ *Rumsey v. People's Ry.*, 154 Mo. 215 (1899).

⁶ *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680 (1894), a case where the director agreed also to loan the price bid. The court may order a sale by the receiver, although the statutes prescribe that such a sale shall be made by the register of the court. *Rome, etc. R. R. v. Sibert*, 97 Ala. 393 (1893). The court may have the sale made by the sheriff instead of by a commissioner. *Ellis v. Vernon, etc. Co.*, 86 Tex. 109 (1893). A court selling property through a receiver on foreclosure need not follow a statute requiring property to be sold by the sheriff. *Farmers', etc. Bank v. Waco, etc. Co.*, 36 S. W. Rep. 131 (Tex. 1896).

⁷ *Rogers v. Rogers, etc. Co.*, 62 N. J. Eq. 111 (1901). See s. c., 49 Atl. Rep.

The purchaser is generally required to make a substantial deposit as a part payment at the time of the sale.¹ The mortgagee or bondholders or a stockholder may purchase at the sale,² but a director, as a rule, cannot.³ The trustee may purchase for the bondholders,⁴ but not generally for himself.⁵ The receiver may be interested in the

833. A private sale of the property by a receiver at a small price, made without authority of the court, will be set aside at the instance of the corporation or of the majority stockholders. *So. Baltimore, etc. Co. v. Kirby*, 89 Md. 52 (1899). See also § 872, *infra*.

1 If the railroad is a large and valuable one, the purchaser is generally required to make a deposit of \$50,000. *Turner v. Indianapolis, etc. R. R.*, 8 Biss. 380 (1878); s. c., 24 Fed. Cas. 367. Any application to reduce the amount of cash to be paid at the sale must be made a reasonable time before the sale. *Duncan v. Atlantic, etc. R. R.*, 88 Fed. Rep. 840 (1880).

2 See § 886, *infra*. It seems that a mortgagee may purchase at a foreclosure sale. *Easton v. German Am. Bank*, 127 U. S. 532 (1888). At a public judicial sale either party, as a rule, may bid. *Pewabic Min. Co. v. Mason*, 145 U. S. 349 (1892). A person may purchase at foreclosure, even though he represents the stockholders, and even though the intention may be to organize a new company to continue an illegal combination in trade. *Olmstead v. Distilling, etc. Co.*, 73 Fed. Rep. 44 (1895). The attorney for the foreclosing trustee is disqualified from purchasing for himself and others. A bondholder may set the sale aside within a reasonable time. *Kreitzer v. Crovatt*, 94 Ga. 694 (1894). Even though the owner of a majority of the mortgaged bonds of the corporation owns also a majority of the stock, yet he may purchase the property at foreclosure sale, and minority stockholders cannot hold him liable as a trustee. *MacArdell v. Olcott*, 104 N. Y. App. Div. 263 (1905); *aff'd*, 189 N. Y. 368. Where the purchaser at foreclos-

ure sale purchased for the benefit of stockholders who advance the money for that purpose, a subsequent sale of his stock by one of the stockholders who advanced the money carries his interest in the property so purchased. *Riordan v. Schlicher*, 146 Ala. 615 (1906). Even though a corporation, when it mortgages its mortgage bonds, gives an option to the mortgagee to purchase the bonds, such option cannot be enforced, because a mortgagee is not allowed at the time of making a loan to contract for the purchase of mortgaged property. The rule is different where a day or more intervenes between the two contracts. *Samuel v. Jarrah, etc. Corp. Ltd.*, [1904] A. C. 323. See also § 479, *supra*.

3 See § 653, *supra*. A loan by some of the directors to the corporation secured by mortgage is voidable but not void, where a majority of the directors voting for the loan were not interested in it, even though the loan was made to a person who was a mere figurehead, and the purpose of the directors making the loan was to foreclose the property and buy it in, inasmuch as the directors could only purchase at public sale under a decree of foreclosure the same as other stockholders or third persons. *Schnittger v. Old Home, etc. Co.*, 144 Cal. 603 (1904).

4 See § 885, *infra*.

5 Where the trustee sells under the power of sale and buys the property himself, he having purchased the debt secured by a trust mortgage, the person owning the debt and who knew nothing about the sale may have the sale set aside. *Cheney v. Murto*, 17 Colo. App. 149 (1902). A purchase by the trustee himself at the sale is void-

property sold at public auction by himself, if in good faith.¹ The franchises and property of a railroad may be purchased by an individual on foreclosure sale and transferred by him to a new cor-

able and not void; and where the purchaser is a corporation in which the trustee is a director, the sale will not be disturbed if the price paid was a fair one, even though the sale was under the power of sale without a foreclosure, and even though the purchaser was a creditor secured by the mortgage. Moreover, in order to set aside such a claim some injury to the mortgagor must be shown. *Copsey v. Sacramento Bank*, 133 Cal. 659, 663 (1901). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings, all claims are allowed as of the same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall purchase such securities at a price named. *Bank Com'rs v. New Hampshire, etc. Co.*, 69 N. H. 621 (1899). Where the trustee sells at public sale, a corporation which owns the debt may purchase, especially where the trust agreement allowed the holder of the debt to purchase. The purchase is not invalid, even though the trustees were stockholders and directors in the corporation which purchased. *Herbert Kraft Co. v. Bryan*, 140 Cal. 73 (1903). A person holding second mortgage bonds in trust for another may purchase for himself at a foreclosure sale under the first mortgage. *Yuengling v. Betz*, 120 N. Y. App. Div. 709 (1907). The trustee cannot purchase for himself at the foreclosure sale. Thus, where a bank cashier was one of the trustees, and the bank held some of the bonds, and the bank bought in the property and resold it at a profit, the other bondholders compelled the bank to account

for the profit. *People v. Merchants' Bank*, 35 Hun, 97 (1885).

¹ *Wagner v. Swift's, etc. Works*, 26 S. W. Rep. 720 (Ky. 1894). A person appointed on the sale of the corporate property to sell stock received in payment therefor, cannot sell to himself, neither can he subsequently purchase from one to whom he has sold such stock. *Wing & Evans v. Hartupee*, 122 Fed. Rep. 897 (1903). A receiver is personally liable for loss due to his negligence in wasting the assets and selling the property at an inadequate price, especially where he was interested in the purchase, and the sale was not at public sale, but on offer accepted by the court, and the receiver will not be allowed any commissions. *Pangburn v. American Vault, etc. Co.*, 205 Pa. St. 83 (1903). A receiver is disqualified to purchase, whether the sale is made under decree of court or by the mortgagee without suit. *Nugent v. Nugent*, 98 L. T. Rep. 354 (1908). Under the facts in the case of *Farley v. Hill*, 150 U. S. 572 (1893), the court did not pass upon the question whether the receiver might buy bonds on the market, or whether he could unite with others in bidding at the sale. A sale by a commissioner to a bank in which he is a stockholder and director is invalid, irrespective of whether the sale and price were fair. *McCullough, etc. Co. v. Nat. Bank, etc.*, 111 Ga. 132 (1900). After a foreclosure sale has been confirmed a bondholder cannot maintain a bill to set it aside on the ground that the receiver was interested in the purchase and caused the property to be sold for less than its value, no fraud on the part of the trustee being alleged. *Fletcher v. Ann Arbor R. R.*, 116 Fed. Rep. 479 (1902). If the receiver buys at the sale he is liable for the appraised value

poration.¹ Even though a foreign railroad corporation purchases a railroad at the foreclosure sale, without power so to do, yet only the state can raise that objection.² A prospective purchaser at foreclosure sale may contract in advance to sell the property to another person in case he buys it.³ Where a stockholder agrees with corporate creditors that he will buy the property at foreclosure sale and pay a price sufficient to pay their debts they may hold him liable if he does not do so, even though it is not in writing.⁴ The mere fact that parties combined to purchase at foreclosure sale is not proof of avoiding competition.⁵

Although the property is sold at a very small price, yet the court will not set the sale aside for inadequacy of price, unless there was

of the property. *In re Sheets, etc. Co.*, 52 La. Ann. 1337 (1900). A receiver is disqualified from purchasing at a foreclosure sale, and if he does purchase he holds the property subject to redemption at any time. *Shadewald v. White*, 74 Minn. 208 (1898). A sale of the assets of a bank at public auction with the consent of the stockholders will not be set aside when the price was a fair one and there was no fraud, even though the liquidators were directors in the company that purchased. *In re Liquidation, etc.*, 43 S. Rep. 270 (La. 1907). Even though the assets are purchased by a bank in which the receiver is interested, yet, if the stockholders do not object the sale is legal. *Jackson v. First State Bank*, 13 N. W. Rep. 876 (S. Dak. 1907). In England a receiver is not allowed to purchase for himself at the sale unless the court expressly authorizes him to do so. *Nugent v. Nugent*, 97 L. T. Rep. 279 (1907).

¹ *Parker v. Elmira, etc. R. R.*, 165 N. Y. 274 (1901). Unless the statutes provide otherwise, the purchaser of a railroad at foreclosure sale may be a corporation formed under the laws of another state. *Central Trust Co. v. Western N. C. R. R.*, 89 Fed. Rep. 24 (1898). In the case *McCarter v. Vine-land, etc. Co.*, 65 Atl. Rep. 1041 (N. J. 1907), it appears that at a foreclosure sale of a gas company in 1884 the property was purchased by an individual who operated it for about six

years when it was turned over to a corporation organized under the general act and not under the gas company act. The court held that such a corporation might be enjoined by extending its system into a territory which was claimed by a gas corporation. Where a married woman buys a railroad at foreclosure sale and deeds it to a person who advances part of the purchase price, the deed being really a mortgage, and the mortgagee transfers it to a corporation, the latter is not protected in its title, even though it issued stock to her for her interest. *Texas, etc. Ry. v. Harle*, 101 S. W. Rep. 878 (Tex. 1907). See 70 Atl. Rep. 177 (N. J. 1908).

² *Julian v. Central T. Co.*, 193 U. S. 93 (1904). Where by the terms of the statute authorizing a foreign railroad company to purchase a railroad within the state at foreclosure sale, the foreign railroad company shall thereby become a domestic corporation, such statute has that effect and the company cannot remove a case to the United States court on the ground of its being a citizen of another state. *Carolina, etc. Co. v. Southern Ry.*, 57 S. E. Rep. 444 (N. C. 1907).

³ *Venner v. Denver, etc. Co.*, 90 Pac. Rep. 623 (Col. 1907).

⁴ *Satterfield v. Kindley*, 57 S. E. Rep. 145 (N. C. 1907).

⁵ *Venner v. Denver, etc. Co.*, 90 Pac. Rep. 623 (Col. 1907).

fraud or want of fairness.¹ But while mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it,

¹ Where a valuable property at foreclosure sale is struck off for one-seventh of its value the court may set the sale aside. *Ballentyne v. Smith*, 205 U. S. 285 (1907). A creditor who does not take part in a reorganization, although given an opportunity to do so, cannot afterwards complain that the property was sold to the reorganization committee at an inadequate price, the price being the upset price fixed by the decree. *McEwen v. Harriman, etc. Co.*, 138 Fed. Rep. 797 (1905). Even though the court orders a resale on account of the low price, yet it need not order the sale to be readvertised. *Blanks v. Farmers', etc. Co.*, 122 Fed. Rep. 849 (1903). A sale by a receiver for \$6,000 of hotel assets appraised at \$7,500 will not be set aside, even though a purchaser offers to give a bond to bid \$8,000, and even though the receiver refused to adjourn the sale at the request of 97 per cent. of the creditors. *Fleming v. Fleming, etc. Co.*, 70 N. J. Eq. 509 (1905); s. c., 69 N. J. Eq. 715. A sale at one-half of the value at forced sale was set aside as inadequate in *Strickland v. National Salt Co.*, 43 N. Y. Misc. Rep. 172 (1904). In this case a resale was ordered, but upon such resale the price realized was only \$194,000, as against the first sale at \$338,000. See N. Y. L. J. July 9, 1904. Inadequacy of price is not sufficient ground to set aside a judicial sale unless it is so great as to shock the conscience and excite the suspicion of the court. *Fidelity, etc. Co. v. Mobile, etc. Ry.*, 54 Fed. Rep. 26 (1893). Inadequacy of price is not enough to cause the court to set aside the sale. A want of fair dealing and an honest purchase must be shown. Not only this, but the parties complaining must show that some responsible person is ready to bid more. *Turner v. Indianapolis, etc. R. R.*, 8 Biss. 380 (1878); s. c., 24 Fed. Cas. 367. Foreclosure sales, etc., will not be set aside unless the price is inadequate to such an extent as to shock the conscience. *Graffam v. Burgess*, 117 U. S. 180 (1886). Mere inadequacy of price is no ground for refusing to confirm the sale. Confirmation will not be refused although a party offers to bid twenty-one per cent. more on a resale. *Bethlehem Iron Co. v. Philadelphia, etc. Ry.*, 49 N. J. Eq. 356 (1892). Mere inadequacy of price, unless so great as to shock the conscience, is not ground for setting aside a judicial sale. *Fidelity, etc. Co. v. Roanoke, etc. Ry.*, 98 Fed. Rep. 475 (1899). Although a trust company is a pledgee of bonds for the benefit of many notes of the pledgor in the hands of many holders, and the trust company, after notice by mail to the holders of the notes, is authorized by the court to sell the bonds at ten cents on the dollar, yet a holder of the notes may thereafter question the good faith of the trust company in making such sale. *Minneapolis Trust Co. v. Menage*, 73 Minn. 441 (1898). Mere inadequacy of price is insufficient to set aside the sale, even though a party offers to bid more. *Wesson v. Chapman*, 76 Hun, 592 (1894). The sale will be confirmed where the party objecting to the price or mode of sale did not object to the decree which fixed the mode of sale, and does not show any offer to pay any higher price on a new bidding, even though the party alleges that, if the property were sold in parcels, one parcel would pay the whole debt. *Central Trust Co. v. Sheffield, etc. Ry.*, 60 Fed. Rep. 9 (1894). A sale of \$100,000 may be confirmed although the property is alleged to be worth \$3,000,000. *Farmers' L. & T. Co. v. Oregon Pac. Ry.*, 28 Oreg. 44 (1895).

especially if the inadequacy be so gross as to shock the conscience.¹ The court may order a resale if the rights of third persons have not intervened.²

The remedies for a fraudulent foreclosure or sale are discussed elsewhere.³ The sale on the foreclosure may be confirmed in vacation time.⁴ On a motion to confirm a sale, the validity of the decree directing foreclosure and sale cannot be called in question.⁵ The court may, in its order confirming the sale, reserve the right to make further orders respecting claims, rights, or interests in or

And the court will not readily set the sale aside on the ground that, after the property was struck off, some one offered a higher price. *Pewabic Min. Co. v. Mason*, 145 U. S. 349 (1892). A sale will not be set aside merely because parties offer to pay a higher price. *Wickersham v. Ricker*, 58 Fed. Rep. 282 (1893). Inadequacy of price is not enough to set aside the sale unless it is such as to shock the conscience. *Fidelity Insurance, etc. Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 752 (1897). A sale by the receiver ordered by the court, subject to the approval of the court, will not be confirmed by the court where the sum realized is small. *Merchants' Bank v. Moore*, 68 Minn. 468 (1897). Where a sale authorized by the court at a fixed price turns out to have been based upon misinformation, the court may set it aside and order repayment to the purchaser of the price, and interest, and attorney's fees. *Horse, etc. Co. v. Schofield*, 9 N. Mex. 136 (1897). See §§ 478, 489, *supra*.

¹ *Schroeder v. Young*, 161 U. S. 334 (1896).

² *Stuart v. Gay*, 127 U. S. 518 (1888). A resale will be ordered when consented to by all, and a bond is given that a higher price will be bid. The bidder is not entitled to turn in, in payment of his bid, an alleged contract of purchase of the claims of various creditors, such contract being contested. If on a resale the bidder does not fulfill, the court will confirm the original sale and hold the bidder at the resale respon-

sible for the difference in price. *Mayhew v. West Virginia, etc. Co.*, 24 Fed. Rep. 205 (1885). Where by accident a person who intends to bid does not deposit the sum required to qualify him as a bidder, and as a result there is no competition, and at the sale the property is sold at a very low figure, and the intended purchaser offers to bid twenty-five per cent. more on a new sale, the court will refuse to confirm the sale and will order a new sale. *Magann v. Segal*, 92 Fed. Rep. 252 (1899). Where, upon dissolution, the receiver is authorized to sell the property at private sale and does make such sale subject to confirmation by the court, a subsequent offer by another party at a higher price will not be entertained by the court, even though it was made before the sale was confirmed, there being no great difference in the prices. *Rogers v. Rogers, etc. Co.*, 49 Atl. Rep. 833 (N. J. 1901). Even though a receiver's sale of property is a private sale, and before it is confirmed another party makes a higher bid, nevertheless, if there is no fraud or mistake chargeable against the purchaser, the court will confirm the sale, notwithstanding the objection of a stockholder and of the competing bidder. *Rogers v. Rogers, etc. Co.*, 62 N. J. Eq. 111 (1901).

³ See §§ 766, 828, 848, *supra*.

⁴ *Central Trust Co. v. Sheffield, etc. Ry.*, 60 Fed. Rep. 9 (1894).

⁵ *Central Trust Co. v. Peoria, etc. Ry.*, 118 Fed. Rep. 30 (1902).

liens on the property.¹ An objection that property was sold at judicial sale as a whole, and not in parcels in which it actually existed, and that either of such parcels was of sufficient value to discharge the lien for which the whole was sold, is not available against confirmation of the sale, where neither party objected to the decree which directed its sale as a whole, and where there is no offer to pay a higher price in case the sale be reopened.² Where stock is sold on a mortgage foreclosure, it will be sold "by offering the shares in small blocks, and then as a whole, and taking the bid which aggregates the larger sum."³ An irregular judicial sale neverthe-

¹ See § 849, *supra*; *Farmers' L. & T. Co. v. Newman*, 127 U. S. 649 (1888), reversing *Farmers' L. & T. Co. v. Burlington, etc. Ry.*, 32 Fed. Rep. 805 (1887), where the court held that it was legal to order the property resold in order to pay a prior lien which had not been adjusted. See also *Burnham v. Bowen*, 111 U. S. 776, 782 (1884), where there was a strict foreclosure. A decree that the surplus, after paying such of the bondholders as were known, should be brought into court to be distributed under the direction of the court to such bondholders and lienors as were entitled to it, and reserving all questions not decided for consideration, is proper. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885). For the form of a decree confirming a sale, see *Duncan v. Atlantic, etc. R. R.*, 88 Fed. Rep. 843 (1881); for decree directing payment to the complainants, see s. c., p. 850; and for decree distributing the surplus, see s. c., p. 852. Before delivering possession of the property to the purchasers at foreclosure sale, the court will require part payment, and also require them to comply with future orders of the court. *Central T. Co. v. Wabash, etc. Ry.*, 29 Fed. Rep. 618 (1886). Where a foreclosure sale takes place subject to a subsequent determination of the claims of intervening parties, the party purchasing must be brought in as a party to the whole suit. *Fitzgerald v. Evans*, 49 Fed. Rep. 426 (1892).

² *Central Trust Co. v. Sheffield, etc. Ry.*, 60 Fed. Rep. 9 (1894). See also § 836, *supra*. The auctioneer may offer the whole property, and if he gets no bid may then offer the real and personal property separately. *Southwestern, etc. Ry. v. Hays*, 63 Ark. 355 (1897). A sale of the property as a whole, instead of in parcels, is legal where no objection was made to the decree to that effect and the price realized was a fair one. *Nevada, etc. Syndicate v. National, etc. Co.*, 103 Fed. Rep. 391 (1900); *aff'd*, 106 Fed. Rep. 116. In the case *Strickland v. National Salt Co.*, 43 N. Y. Misc. Rep. 172 (1904), it was held that a provision in the order of sale by which the property was to be offered in parcels and then as a whole, tended to stifle competition and to enable the reorganizing party to purchase it. In the same case it was held that a further provision that the purchaser might offset seventy per cent. of his claims against any bid is illegal, where the reorganizing party is the only one having such claim. In this case a resale was ordered, but upon such resale the price realized was only \$194,000 as against the first sale at \$338,000. See N. Y. L. J. July 9, 1904.

³ *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168, 181 (1894). In the case of *Harris v. Youngstown Bridge Co.*, 90 Fed. Rep. 322 (1898), where there were different mortgages on a bridge and terminals and a railroad,

less passes to the purchaser all the rights of the mortgagee who caused the sale.¹ The act of congress regulating the method of sale on foreclosure does not apply to decrees rendered prior to the act.² The act of congress describing the advertisement which shall be made before the foreclosure sale of real estate is for the benefit of the mortgagor alone, and creditors cannot object to the sale on the ground that such statute was not complied with.³ The validity of a judicial sale of the assets of an insolvent corporation by a receiver cannot be impeached in a collateral action.⁴ Mere errors in a decree as to the mode of sale and mere irregularities in the sale are not fatal to the sale where it has been confirmed on due notice and without objection.⁵ Even though the master sells subject to a mortgage, when he was directed to sell free from all liens, yet if no one was injured the court may confirm the sale.⁶ The rule of *caveat emptor* applies to a purchaser at a foreclosure sale.⁷ A misrepresentation

the court ordered that the property be offered in parcels first and then the whole property as an entirety, and in case the bid for the entirety was greater than the separate bids, the latter were to fix the rate of distribution.

¹ *Brobst v. Brock*, 10 Wall. 519 (1870). Informalities in a receiver's sale do not render the purchasing corporation liable to return to the old corporation the property together with improvements. *Mining Co. v. Mining Co.*, 116 Ill. 170 (1886). The purchaser at a void foreclosure sale may be entitled to the benefit of the mortgage. *Venner v. Denver, etc. Co.*, 15 Colo. App. 495 (1900).

² *Central Trust Co. v. Sheffield, etc. Ry.*, 60 Fed. Rep. 9 (1894). See act of March 3, 1893, 27 U. S. Stat. at L., p. 751.

³ *Nevada, etc. Syndicate v. National, etc. Co.*, 103 Fed. Rep. 391 (1900); *aff'd*, 106 Fed. Rep. 116. Even though the decree in the federal court foreclosing land does not follow the requirements of the act of congress of March 3, 1893, as to notice of sale, yet if the mortgagor does not object, even when the sale is confirmed, and does not appeal, he cannot attack the sale collaterally by an action in eject-

ment. *National, etc. Co. v. Nevada, etc. Syndicate*, 106 Fed. Rep. 110 (1901). A defendant in a foreclosure suit cannot object to a sale on the ground that it did not comply with the federal statute where he took no appeal and made no objection until after the sale had been confirmed. *National, etc. Co. v. Nevada, etc. Syndicate*, 112 Fed. Rep. 44 (1901).

⁴ *Anderson v. Chicago, etc. T. Co.*, 101 Wis. 385 (1898).

⁵ *Nevada, etc. Syndicate v. National, etc. Co.*, 103 Fed. Rep. 391 (1900), holding also that confirmation of the sale may be made before the time specified in the decree, if no objection is made.

⁶ *Old Colony T. Co. v. Great, etc. Co.*, 181 Mass. 413 (1902).

⁷ He cannot have a reduction from the price on account of unpaid taxes nor on account of interest not yet due on prior mortgage bonds, unless the decree so provided. *Terre Haute, etc. Ry. v. Harrison*, 96 Fed. Rep. 907 (1899). Even though a railroad mortgage is being foreclosed in the federal court on the supposition that a prior mortgage had been fully paid, yet a *bona fide* purchaser of bonds secured by such prior mortgage may bring a foreclosure suit thereon in

by the receiver in making a sale may not release the purchaser, but he may hold the receiver responsible either personally or officially. If he elects to do the latter, his judgment has no preference over other claims against the receiver.¹

A deed by the trustee of a mortgage reciting a foreclosure decree is not limited in its operation to the authority conferred by the decree but passes the title of the trustee to the land which it purports to convey.² The court will put the purchaser into possession by a writ of possession.³ If the purchaser at the foreclosure sale refuses to fulfill, he is liable to attachment or for the deficiency arising on a second sale,⁴ and he may be required to pay interest.⁵ Where the

the state court after the foreclosure suit in the federal court has been completed, even though such purchaser purchased during the foreclosure of the subsequent mortgage and was aware of the default on such second mortgage. *Pittsburgh, etc. Ry. v. Lynde*, 55 Ohio St. 23 (1896). Same case *aff'd sub nom. Pittsburgh, etc. Ry. v. Long Island L. & T. Co.*, 172 U. S. 493 (1899). A purchaser at foreclosure sale has a right to intervene in another foreclosure suit brought by an unforcedclosed lienholder. *Connor v. Tennessee, etc. Ry.*, 109 Fed. Rep. 931 (1901).

1 *Coe v. Patterson*, 122 N. Y. App. Div. 76 (1907).

2 *Chesapeake, etc. Ry. v. Washington R. R.*, 199 U. S. 247 (1905).

3 *Terrell v. Allison*, 21 Wall. 289 (1874); *Brooks v. Vermont Cent. R. R.*, 14 Blatchf. 463 (1878); s. c., 4 Fed. Cas. 308. The purchaser's remedy to obtain possession is at law and not in equity, even though he seeks to oust assignees of a lessee, who were not made parties defendant. *Tyler v. Hamilton*, 62 Fed. Rep. 187 (1894).

4 *Camden v. Mayhew*, 129 U. S. 73 (1889). Where the purchaser at a receiver's sale does not fulfill, the court may compel him to pay the difference between the price he bid and the price at which the property was afterwards sold. *Watrous v. Hilliard*, 88 Pac. Rep. 185 (Colo. 1906). Where

the purchaser does not fulfill and a resale is had, general creditors may compel the first purchaser to make good the deficiency. *Central Trust Co. v. Cincinnati, etc. Ry.*, 58 Fed. Rep. 500 (1892). Where, by the terms of the sale, the sale is to be confirmed by the chancellor, the party who bids and does not fulfill cannot be held liable for the difference between his price and the price realized at the final sale, if the receiver sues for the difference without first having the defaulted sale confirmed. *Leslie v. Goodhue*, 69 Hun, 71 (1893). Even though a receiver sells and delivers the property and takes a bond for payment instead of the payment itself, he may enforce the bond. *O'Gorman v. Sabin*, 62 Minn. 46 (1895). Where the purchaser does not fulfill and a resale is ordered, notice of a resale must be given to him, if he is to be held liable for the difference in price. *Bayne v. Brewer Pottery Co.*, 90 Fed. Rep. 622 (1898).

5 The purchaser who is at once put in possession must pay interest on the purchase price up to the time of payment. *Haven v. Grand Junction, etc. Co.*, 109 Mass. 88 (1871). For the form of a deed to the purchaser, see *Duncan v. Atlantic, etc. R. R.*, 88 Fed. Rep. 844 (1880). Interest is not chargeable against the purchaser where he has not clearly been put in default of payment. *Cutting v. Tavares, etc. R. R.*, 61 Fed. Rep. 150,

purchaser at the foreclosure sale is really acting as agent for an undisclosed principal, but a judgment is obtained against him personally, his principal cannot also be held liable.¹ But the undisclosed principals of the purchaser at foreclosure sale may be liable for his bid, even though the agent had been sued therefor, it not being known that the latter was acting as agent.² For failure to carry out a purchase at a foreclosure sale the purchaser's bondsmen may be held liable.³ Even though the purchaser has not paid in full the deposit called for by the terms of the sale, yet the court will not set the sale aside, there being no proof that the purchaser will not pay.⁴ Where the highest bidder at the sale does not pay, the property may be turned over to the next highest bidder who is ready to pay. No resale is necessary.⁵ Where the purchase price on foreclosure sale is not paid, an action lies in behalf of the bondholders to set aside the sale and all subsequent transfers and mortgages as fraudulent.⁶ But even though the entire purchase price at foreclosure sale is not paid, and the court directs certain new first-mortgage bonds to be deposited as security for the balance of the purchase price, and the new company becomes insolvent and the bonds so deposited are insufficient to pay the full purchase price, yet the sale will not be set aside nor the unpaid purchase price declared a lien upon the property, all parties having acquiesced in the orders of the court.⁷ A purchaser at foreclosure sale cannot avoid the obligations of the sale by setting up that subsequently to the sale he acquired another title by purchase at a judicial sale made by another court.⁸ The purchaser is not liable on the receiver's certificates unless the decree so provided.⁹ Where the receiver stated the amount of debts which the purchaser must pay, and

157 (1894). *Cf. Nashua, etc. Corp. v. Boston, etc. Corp.*, 61 Fed. Rep. 37 (1894).

¹ *Ranger v. Thalmann*, 65 N. Y. App. Div. 5 (1901).

² *Ranger v. Thalmann*, 39 N. Y. Misc. Rep. 420 (1902).

³ *Terbell v. Lee*, 40 Fed. Rep. 40 (1889).

⁴ *Fidelity Insurance, etc. Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 752 (1897).

⁵ *Coler v. Barth*, 24 Colo. 31 (1897).

⁶ *Stevens v. Central Nat. Bank*, 144 N. Y. 50 (1894); *rev'd on other grounds in Central Nat. Bank v. Stevens*, 169 U. S. 432 (1898).

⁷ *United States Rubber Co. v. America, etc. Co.*, 181 U. S. 434 (1901).

⁸ *Baltimore T. & G. Co. v. Hofstetter*, 85 Fed. Rep. 75 (1898).

⁹ In the case of *Grand Trunk Ry. v. Central Vermont R. R.*, 103 Fed. Rep. 740 (1900), where, in 1872, the receivers issued, under the order of the court, a large quantity of thirty-year eight per cent. bonds constituting a lien on property, and in 1883, upon reorganization, these bonds were made exchangeable for first-mortgage bonds, and in 1899 such mortgage was foreclosed, and in the decree the court provided for distribution of the selling price among the bondholders secured by the mortgage without making provision for certain bonds issued by the receiver and not actually ex-

it turns out they are much greater, the court may relieve the purchaser from his bid.¹ The bidder at the sale becomes a sort of party to the suit, and may appeal from decisions affecting him.² He may contest a suit for foreclosure subsequently brought by persons who were supposed to have been cut off.³ Sometimes, by the terms of the sale, the purchaser is required to assume and pay all the receiver's obligations.⁴ A purchaser at foreclosure sale may pay and demand an assignment of a prior lien which is due.⁵ Where the purchaser intervenes and deposits money with the court to pay bonds not yet due, such purchaser may be liable for costs to the clerk of the court for receiving and paying out such money.⁶ Various questions relative to the rights of the purchaser are considered elsewhere.⁷

After foreclosure has been commenced by the trustee of a railroad mortgage, the court is not inclined to allow redemption except upon terms which will protect the bondholders from a further default and a second suit to foreclose.⁸ Upon payment of the amount

changed for mortgage bonds, the court held that it could not order the purchaser at foreclosure sale to pay any outstanding receiver's bonds, inasmuch as the court, having sold and transferred the property, had no further jurisdiction to entertain a petition to enforce such receiver's bonds or to require the purchaser to pay them.

¹ *Interstate Nat. Bank v. O'Dwyer*, 15 Tex. Civ. App. 33 (1896). Where the purchaser obtains a release from his bid, his attorney's charges will not be paid out of the fund. *Farmers' L. & T. Co. v. Green*, 79 Fed. Rep. 222 (1897).

² See § 849, *supra*.

³ *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889); *rev'd* on other points, *sub nom. Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895).

⁴ See § 890, *infra*. Where by decree of foreclosure of the federal court the purchaser has to pay such claims as the court might direct, the federal court will enjoin proceedings in the state court on such claims. *Stewart v. Wisconsin, etc. Ry.*, 117 Fed. Rep. 782 (1902).

⁵ *City of Lincoln v. Lincoln St. Ry.*, 97 N. W. Rep. 255 (Neb. 1903).

⁶ *In re Michigan, etc. R. R.*, 124 Fed. Rep. 727 (1903).

⁷ See § 890, *infra*. A purchaser at a receiver's sale cannot object that the receiver himself did not make the sale and that a statute as to notice of sale by execution is applicable to receiver's sales. *Threadgill v. Colcord*, 16 Okl. 447 (1906).

⁸ In *Fleming v. Soutter*, 6 Wall. 747 (1867), the decree authorized the complainant, when further coupons should become due and unpaid, to apply for an order of sale in that same suit. If the mortgagor offers to pay the debt upon which the foreclosure is based, the court is bound to discharge the receiver. *Milwaukee, etc. R. R. v. Soutter*, 2 Wall. 510 (1864). The mortgagor, or persons with whom it has contracted, cannot stop strict foreclosure by giving security for past-due interest. Payment in full of principal and interest must be made. *Ellis v. Boston, etc. R. R.*, 107 Mass. 1, 37 (1871). Where foreclosure is commenced for non-payment of interest, the trustees taking possession,

found due in a foreclosure suit, the mortgagor is entitled to possession, and to have the receiver discharged.¹ Where the foreclosure is for the interest only, the debtor can prevent a sale by paying into the master's office the amount necessary to pay the interest in default. All proceedings will then be stayed until another default.² Where a bondholder is foreclosing, an offer of the defendant to pay his bonds and the costs to date, upon the assignment of his bonds to the defendant, should be made to the owner of the bonds and not to the attorney.³

Although a foreclosure sale is decreed subject to the rights of a junior mortgagee, a party defendant, yet seven years' delay is fatal to redemption by such junior mortgagee.⁴ A second-mortgage bond-

the owners of the equity of redemption may stop the foreclosure by paying the interest due, but will not be allowed to take possession except upon paying or securing the whole debt not yet due. *Wood v. Goodwin*, 49 Me. 260 (1861), where the purchaser at execution sale of a part of the road sought to redeem. Where a railroad company has delivered its road to the trustee of the deed of trust to operate for the purpose of paying back interest according to a compromise of the creditors, the company may obtain possession again upon tendering unpaid back interest. *Union T. Co. v. Missouri, etc. Ry.*, 26 Fed. Rep. 485 (1880). A mistake by the company in regard to the place where the interest is deposited to pay the coupons is sufficient excuse to prevent foreclosure. *Union, etc. Ins. Co. v. Union, etc. Co.*, 37 Fed. Rep. 286 (1889).

¹ *Railroad Co. v. Soutter*, 2 Wall. 510 (1864). If the road runs into two states and the equity of redemption is sold on execution in one, the purchaser is entitled to redeem the whole property in both states from a mortgage which covers the whole. *Wood v. Goodwin*, 49 Me. 260 (1861). Where, in a foreclosure suit, junior lienholders wish to redeem from senior lienholders, an absolute offer to pay must be made. *Bound v. South Carolina Ry.*, 58 Fed. Rep. 473 (1893). As to

the right to redeem such part of an interstate railroad as is in one state, see *Compton v. Jesup*, 68 Fed. Rep. 263 (1895). This was a complicated case where a lienor established his lien in a state court, and such lien was recognized in the federal court to the extent of allowing redemption. See s. c., 167 U. S. 1 (1897).

² *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168, 181 (1894). See also § 836, *supra*. The foreclosure suit does not fail by reason of the receiver paying a part of the back interest. *American L. & T. Co. v. Union Depot Co.*, 80 Fed. Rep. 36 (1897).

³ *Whittaker v. Belvidere, etc. Co.*, 55 N. J. Eq. 674 (1897).

⁴ *Simmons v. Burlington, etc. Ry.*, 159 U. S. 278 (1895), rev'g *Simmons v. Taylor*, 38 Fed. Rep. 682 (1889). Where a judgment against a railroad is obtained in 1857 creating a lien thereon, and subsequently a mortgage is executed, which is subsequently foreclosed, and thereafter the property is again sold on execution based on the judgment, and the purchaser at the latter sale enters into possession and keeps possession for upwards of thirty years, the ten years' statute of limitations applies to the title acquired on the foreclosure sale. *Gunnison v. Chicago, etc. Ry.*, 130 Fed. Rep. 259 (1904). A lienholder who is not made a party defendant in the suit of another lienholder to fore-

holder seeking to set aside or avoid a foreclosure under a first mortgage on the ground that the purchaser was disqualified must tender reimbursement of the full amount of their bonds to the first-mortgage bondholders who have bid in the property, even though it was bid in for less than the first-mortgage debt.¹

Where a judgment creditor, having a lien by the Indiana statutes, sells the property by foreclosure at a price less than his judgment, another lienholder may redeem by paying the price realized at such sale, but redemption by the judgment debtor himself restores the lien for the unpaid balance of the judgment, the rule as to him being different from the rule as to redemption by other lienholders.² Questions relative to the ownership of bonds, as for instance between the pledgor and pledgee, are decided after the sale but before distribution.³ A trust company that has instituted a suit to foreclose a mortgage and caused a receiver to be appointed may be required to pay the debts of the receiver and the expenses in excess of the amount realized on the foreclosure sale.⁴

close, is entitled to redeem within a reasonable time, but is not entitled to another sale of the property. *Crouch v. Dakota, etc. R. R.*, 18 S. D. 540 (1904). See § 844, *supra*.

¹ *Cunningham v. Macon, etc. R. R.*, 156 U. S. 400 (1895), holding also that it is the duty of second-mortgage bondholders to attend the sale and raise the bid if they wish to protect their interests. See also § 848c, *supra*.

² *Porter v. Pittsburg Steel Co.*, 122 U. S. 267 (1887). For the mortgagor or his grantee to redeem property which has been sold under a mortgage, it is not sufficient for him to tender the amount of the sale. The whole mortgage money must be tendered or, if suit be brought, be paid into court. *Collins v. Riggs*, 14 Wall. 491 (1871). That the person redeeming must pay the whole mortgage debt instead of the price at which the property sold on a foreclosure sale, see *McCormick v. Knox*, 105 U. S. 122 (1881); *Holbrook v. Worcester Bank*, 12 Fed. Cas. 326 (1855); *Jones on Mortgages* (5th ed.), § 1075. In Alabama a statute allows redemption by judgment creditors at the price at

which the property sold. See Code, §§ 3505-3519. Where, in Minnesota, a judgment creditor redeems from a sale under the first mortgage, such judgment creditor takes complete title and need not foreclose. Under the Minnesota statutes the judgment creditor need pay only the price realized at the foreclosure sale, even though the foreclosure was only for the interest, leaving the principal entirely unpaid. *Curtis v. Cutler*, 76 Fed. Rep. 16 (1896). Where the purchaser at foreclosure sale has taken up a street railway before the time of redemption expires, the damage to the party entitled to redeem is the value of the materials so taken up in excess of the price realized at the sale. *Coffin v. Batesville, etc. Ry.*, 63 Ark. 602 (1897). The remedy of a purchaser of the equity of redemption as against a foreclosure suit in Illinois is to redeem within one year from any sale under the trust deed. *Morse v. Holland T. Co.*, 184 Ill. 255 (1900).

³ See § 847, *supra*, and § 881, *infra*.

⁴ *Chapman v. Atlantic T. Co.*, 119 Fed. Rep. 257 (1902), the court refus-

The subject of distribution of assets is considered elsewhere.¹ Where the referee in a foreclosure sale sells chattels which are not covered by the mortgage, the owner's remedy is replevin or conversion.² The mortgage bondholders are entitled, after exhausting their mortgage security, to a decree for the balance due, and may come in as general creditors for such balance.³ Where the trustee enters a deficiency judgment a bondholder cannot thereafter bring suit on his bonds.⁴ Where the trustee of the mortgage in foreclosing knows that the corporation is entitled to the surplus but pays the same to a pledgee of the corporation the trustee is personally liable.⁵

ing to follow *Farmers' L. & T. Co. v. trustee can in the foreclosure suit en-*
Oregon, etc. R. R., 31 Oreg. 237 force to the extent of the deficiency a
 (1897). See also § 879, *infra*. guarantee of the bonds, see *Central*

¹ See § 881, *infra*.

Trust Co. v. Indiana, etc. R. R., 98

² *Beebe v. Richmond Light, etc. Co., Fed. Rep. 666 (1900).*

⁶ *N. Y. App. Div. 187 (1896).*

⁴ *Grant v. Winona, etc. Ry., 85*

³ *Mercantile Trust Co. v. Southern, Minn. 422 (1902).*

etc. Co., 86 Fed. Rep. 711 (1898). See ⁵ *Brinkerhoff, etc. Co. v. Boyd, 192*
 also § 849, *supra*. As to whether the *Mo. 597. (1905).*

CHAPTER L.

PRIORITY OF THE MORTGAGE LIEN OVER OTHER LIENS, MORTGAGES, DEEDS, LEASES, CLAIMS, JUDGMENTS, DEBTS, AND LIABILITIES.

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| <p>§ 851. Conflict of claims.</p> <p>852. What personal property, contracts, stock, bonds, etc., are covered by the mortgage—Effect on the personal property of the provision that after-acquired property shall be subject to the mortgage—Levy of attachment or execution by corporate creditors on such property.</p> <p>853. Until the trustee or receiver takes possession, all moneys, credits, rents, profits, and debts due to the company may be levied upon by corporate creditors, or reached by a bill in equity filed by judgment creditors.</p> <p>854. Rolling-stock subject to the mortgage—Rolling-stock is generally held to be personalty—Recording the mortgage as a chattel mortgage.</p> <p>855. Rolling-stock—Rights of the general mortgagee and other parties where there is a "car trust," lease, conditional sale, or purchase-money chattel mortgage on rolling-stock.</p> <p>856. Land and railroad extensions which are not covered by the mortgage—The words of the mortgage are strictly construed, and no land or personal property is included, unless clearly within the meaning of the words of the mortgage—Condemned land and abandoned rights of way.</p> | <p>§ 857. After-acquired real estate or personal property may be covered by the mortgage—Construction of the words used—Prior mortgages on property so acquired—Acquiring property through a "dummy" corporation—Purchase-money mortgages are prior in right.</p> <p>858. Creditors of a railroad corporation are not allowed to levy an attachment or execution upon the railroad or parts of it, even subject to the mortgage.</p> <p>859. Liens by statute, mechanics' liens, and judgment liens as affecting mortgages and receivers.</p> <p>860. Claims by contracts and contractors, contractor's lien by contract or possession—Fixtures—Taxes—Advances made to keep the company afloat—Damages to persons and property—General debts existing when foreclosure is commenced—How far the mortgage is affected as to its priority.</p> <p>861. The "six months rule" to the effect that labor and supply claims arising within six months prior to a receiver being appointed will be paid out of the income received by the receiver.</p> |
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§ 851. *Conflict of claims.*—The mortgage bondholders take a risk when they foreclose their mortgage and cause a receiver to be appointed. It is a risk which cannot be avoided, because if the mortgage is not foreclosed when the corporation becomes insolvent there very soon will be nothing to foreclose, and if a receiver is not appointed there very soon will be nothing to receive. Yet it often happens that the receivership and foreclosure consume the whole property, leaving nothing whatsoever for the bondholders.

The avenues through which the property is lost are multitudinous. They include not only the expense of litigation and the losses due to the receiver's operation of the road, but to other liens, judgments, debts, liabilities, mortgages, and claims which at the end of the litigation are often decided to be prior in right to the first mortgage itself. The law relative to these conflicting liens and claims is stated in the following sections of this chapter.

§ 852. *What personal property, stock, bonds, contracts, etc., are covered by the mortgage—Effect on the personal property of the provision that after-acquired property shall be subject to the mortgage—Levy of attachment or execution by corporate creditors on such property.*—Where the mortgage expressly and explicitly covers personal property, all personal property enumerated and all personal property necessary and essential to the operation of the road are included in the mortgage.

Complicated questions sometimes arise where the mortgagor owns shares of stock in or bonds of other corporations, and the mortgage explicitly specifies such stock and bonds or fails to explicitly specify them, or contains the after-acquired property clause which may be construed to cover them. There may also be a question as to whether a mortgage covers unpaid subscriptions. The rights, duties, powers, and liabilities of the trustee of the mortgage deed of trust under such circumstances and the *status* of the mortgagor and of its stockholders have given rise to much litigation. These questions are of particular importance where one company holds stock in other companies, recently denominated "holding companies," and are considered elsewhere.¹

The mortgage is generally worded so as to cover choses in action.² Even though a mortgage given to secure bonds includes choses in action, it does not cover a cause of action for a conversion of the bonds secured by the mortgage.³

¹ See § 317, *supra*.

² "The term 'choses in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises which confer on one party the right to recover a personal chattel or sum of money from another by action." *Coler v. Grainger County*, 74 Fed. Rep. 16 (1896). In *General Elec. Co. v. Wightman*, 3 N. Y. App. Div. 118 (1896), the court laid down the rule that, as against a purchaser at a receiver's sale, a purchaser at a foreclosure sale of

corporate property did not acquire title to its choses in action which were not described in the judgment, notice of sale, and in the conveyance with sufficient particularity to be identified, even though the foreclosure sale conveyed all the "property, possession, claim, and demand whatsoever." See cases in notes following.

³ *Medina, etc. Co. v. Buffalo, etc. Co.*, 119 N. Y. App. Div. 245 (1907). In Pennsylvania, although the statute authorizes a sale of all the property, real, personal and mixed, and also the

The usual railroad mortgage does not prevent the use, sale, and replacing of supplies, etc., used in the business,¹ not even though the mortgage is so drawn as to cover personal property subsequently acquired by the corporation mortgagor.² As to property subsequently acquired the mortgage may expressly cover it. Such a mortgage is legal.³ The mortgage may be so drawn as to cover worn-out materials,⁴ also supplies, tools, and materials,⁵ especially under the provision covering after-acquired property.⁶ But the courts will not hold that personal property acquired after the mortgage was given is covered by it, unless there is a provision in the mortgage covering such after-acquired property.⁷ An insolvent street railway company having rails on hand not yet laid may resell the same to the party from whom it bought them.⁸

The usual mortgage does not cover contracts by which third persons contract with the company, as, for instance, to pay off a part of a prior mortgage, or to take a lease of the road.⁹

franchises and rights of corporations by execution sale, yet such a sale does not pass title to a claim of a mining corporation for damages in tort. *International, etc. Co. v. Pennsylvania R. R.*, 152 Fed. Rep. 551 (1907); s. c., 152 Fed. Rep. 554.

1 A mortgage on a horse railroad and franchise of the company, "with all the rights, privileges, and property pertaining thereto," does not cover miscellaneous personal property used in the business. *Millard v. Burley*, 13 Neb. 259 (1882); *Marsh v. Burley*, 13 Neb. 261 (1882). In *Farmers' L. & T. Co. v. Commercial Bank* (mentioned in 12 Wis. 653), it was held that the mortgage in that case did not cover iron purchased to fasten down the rails, nor rolling-stock which was sold and replaced by new. See also *Union T. Co. v. Morrison*, 125 U. S. 609 (1888), and § 854, *infra*.

2 See § 857, *infra*.

3 See § 857, *infra*.

4 See § 857, *infra*.

5 See § 857, *infra*.

6 See § 857, *infra*.

7 See § 857, *infra*.

8 *Johnson Co. v. Miller*, 174 Pa. St. 605 (1896). Although a stockholder's bill for a receiver to preserve and ad-

minister the assets of an insolvent corporation is pending, yet the corporation may return to a vendor of rails such part of the rails as have not yet been used. The principle of law that the filing of a bill gives the court the exclusive right to control the property does not apply to such a case. *Illinois Steel Co. v. Putnam*, 68 Fed. Rep. 515 (1895).

9 As to leaseholds, see §§ 873, 874, 890, *infra*. The purchaser at foreclosure sale on a second mortgage does not acquire the right of the mortgagor to enforce an agreement of a prior vendee of part of its property to pay off a portion of a prior first mortgage, where this contract right was not specified in the notice of sale or mentioned at the sale. The second mortgage covered "causes of action, demands, and choses in action of whatever nature." *Milwaukee, etc. R. v. Milwaukee, etc. R. R.*, 20 Wis. 174 (1865). A receiver cannot claim the advantage of a personal contract between the president and an outside party in regard to salary. *Snow v. Russel Coe, etc. Co.*, 58 Hun, 134 (1890). A mortgagee takes only such contract rights as the mortgagor has in a contract of the latter to pur-

In an action brought by a bondholder for the specific performance of a contract which certain individuals had made with the company to place land under the mortgage as additional security, the corporation is a proper party defendant. A bondholder may maintain such a suit after a request to and refusal of the trustee to bring the suit. Such a suit may be maintained before there is any default upon the bonds.¹ Although a mortgage covers money due from a city for gas, yet in foreclosing the mortgage the city cannot be made a party defendant in order to collect the money. The remedy is at law, although in the foreclosure the court may order an assignment of the claim to the mortgagee.² In New Jersey a chattel mortgage by a corporation may cover going book accounts.³ A lessor railroad may mortgage its interests and rights as lessor.⁴ A water-works mortgage covering ordinances granted to the company by the city may be construed to cover rights granted the company by the state.⁵ A mortgage on the real estate and plant of an electric light company covers its poles and wires which are connected with the plant.⁶

chase another road. If the contract is forfeited the mortgagee can only sue within a reasonable time to set the forfeiture aside. *Wright v. Kentucky, etc. Ry.*, 117 U. S. 72 (1886). A bondholder cannot sue in equity to enforce the agreement of an outside party to pay a sum of money to the mortgagor, even though the mortgagor placed the claim under the mortgage. *New York Guaranty Co. v. Memphis, etc. Co.*, 107 U. S. 205 (1882). A mortgagee foreclosing cannot enforce a lease which was executed subsequently to the mortgage, and to which the mortgagee was not a party. *Moran v. Pittsburgh, etc. Ry.*, 32 Fed. Rep. 878 (1887). The rule in this respect would of course be different if the mortgage covered after-acquired property. See § 874, *infra*, and § 831, *supra*. The vendee of stock in the company who retains enough of the price to pay the bonds of the company does not thereby become trustee for the bondholders, nor is there any enforceable contract relation between them. *Nebraska City, etc. Bank v. Nebraska, etc. Co.*, 14 Fed. Rep. 763 (1883).

¹ *O'Beirne v. Allegheny, etc. R. R.*, 151 N. Y. 372 (1897).

(185)

² *International Trust Co. v. Cartersville, etc. Water Co.*, 63 Fed. Rep. 341 (1894). See also § 931, *infra*.

³ *Buvinger v. Evening, etc. Co.*, 65 Atl. Rep. 482 (N. J. 1907). *Cf.* § 798, *supra*.

⁴ A corporation may lease its property for one hundred years and then give a mortgage on its interest. The lessee had agreed in advance to pay the interest on the bonds. *First Nat. Bank v. Sioux City, etc. Co.*, 69 Fed. Rep. 441 (1895). A mortgage upon a leasehold is not a mortgage upon real property. *State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 381 (1896), holding also that a warehouseman might obtain a lien on personal property in preference to a chattel mortgage securing bonds, where the chattel mortgage was not properly filed for record. The mortgagee cannot, by action or distress, collect the rental on a lease made subsequently to the mortgage. *Teal v. Walker*, 111 U. S. 242 (1884).

⁵ *Andrews v. National Foundry, etc. Works*, 61 Fed. Rep. 782 (1894).

⁶ *Dreisbach v. Ross*, 195 Pa. St. 278 (1900). A defect in the description of personal property mortgaged is not cured by a receiver taking possession

The good-will and business are presumed to be included in a mortgage on the entire plant of a colliery, even though the good-will and business are not specified.¹ A mortgage on a railroad is subject to the charter restrictions applicable to the railroad.² Land patents granted by the United States to a railroad company may be vacated for mistake, even as against a mortgagee of such railroad.³

The mortgagee's claim that lands standing in the names of directors belong to the company must be clearly proved.⁴ Mortgage bondholders may have an equitable lien on the proceeds of insurance policies on corporate property by virtue of a stipulation in the mortgage to that effect.⁵ But where the mortgagor sells the property subject to the mortgage, insurance taken out by the purchaser on the property belongs to the purchaser in case of fire, and not to the mortgagee.⁶ Where one corporation is merely a dummy in another corporation, a mortgage on the property of the latter may attach to property of the former, even in priority to a new mortgage on the property of the former.⁷ The mortgage may cover equitable assets,⁸ and the franchise to operate the plant and collect compensation.⁹ A sale of the assets at foreclosure sale, and purchase thereof by a reorganized company, however, does not carry a cause of action against promoters for fraud.¹⁰ The mortgagee is of course not bound to carry out contracts made by the mortgagor.¹¹

under the mortgage, prior to other liens being obtained upon the property. *Central Trust Co. etc. v. Worcester, etc. Co.*, 93 Fed. Rep. 712 (1899).

1 *County, etc. Bank v. Rudry Merthyr, etc. Co.*, [1895] 1 Ch. 629. Where a company is in difficulties and an agreement is made by which creditors are given the right to sell all the assets in case the business does not succeed within a certain time, and they do so, the purchaser has no right to organize a corporation having the same name as the old corporation, unless that was a part of the original agreement, and not even a majority of the stockholders have the right to vote to allow such use of the name, unless there is a new consideration therefor. *Armington v. Palmer*, 21 R. I. 109 (1898). A mortgage covering property and effects covers the good-will. *Re Leas Hotel Co.*, [1902] 1 Ch. 332.

2 *Union Pacific Co. v. Mason City Co.*, 199 U. S. 160 (1905).

3 *United States v. Southern, etc. R. R.*, 117 Fed. Rep. 544 (1902).

4 *Olcott v. Rice*, 69 Fed. Rep. 199 (1895).

5 *Chicago, etc. Bank v. Bentz*, 59 Fed. Rep. 645 (1893). *Of. § 799, supra.*

6 *Farmers', etc. Co. v. Penn. etc. Co.*, 186 U. S. 434 (1902), *aff'g* 103 Fed. Rep. 132.

7 See § 857, *infra*.

8 *Toledo, etc. R. R. v. Hamilton*, 134 U. S. 296 (1890); *Central T. Co. v. Kneeland*, 138 U. S. 414 (1891); *Williamson v. New Jersey Southern R. R.*, 28 N. J. Eq. 277 (1877); *aff'd*, 29 N. J. Eq. 311 (1878).

9 See § 790, *supra*.

10 *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902). See also § 890, *infra*.

11 See §§ 860, 890, *infra*.

The mortgage should be recorded as a chattel mortgage as well as a real-estate mortgage.¹ A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state.² A trust mortgage on personalty giving the mortgagor power to sell or dispose of the mortgaged property, and the income and proceeds thereof, without reinvesting them or redeeming the bonds or replacing the property or developing the business or management, gives him power to dispose of the property without restraint, and hence is illegal both as to present and future personal property, so far as creditors are concerned.³ If a corporate creditor levies upon personal property which is covered by the mortgage, the mortgagee may enjoin a sale, if the mortgagee's security is inadequate.⁴ But ordinarily a court of equity will not interfere. The sheriff will be allowed to sell, subject of course to prior rights.⁵

¹ See § 811, *supra*.

² *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78 (1900). See also § 798, *supra*. A corporation may give a lien on all property thereafter to be acquired, and such lien is valid except as against creditors or purchasers or lienors who intervene before possession is taken. *Mathews v. Hardt*, 79 N. Y. App. Div. 570 (1903). Even though a mortgage, by reason of not being recorded as a chattel mortgage, does not cover personal property, cash, and accounts receivable, yet if the receivers take possession of all these and a decree of foreclosure is entered and a sale had, it is too late for general creditors to then intervene. *State Trust Co. v. Kansas City, etc. R. R.*, 120 Fed. Rep. 398 (1903).

³ *Zartman v. First, etc. Bank*, 109 N. Y. App. Div. 406 (1905). A chattel mortgage by a ship-building company on its ship-building materials with permission to use and replace

the same is void. *In re Marine, etc. Co.*, 135 Fed. Rep. 921 (1905).

⁴ Where a judgment creditor has levied upon personal property which is subject to the mortgage, and the security for the mortgage is inadequate, the mortgagee may enjoin any further proceedings on the executions. The judgment creditor's remedy is then in equity to have the mortgagor's equity sold or to have a receiver appointed. *Lane v. Broughman*, 17 Ohio St. 642 (1867). The trustee of the mortgage may enjoin an execution against an engine which is covered by the mortgage. The execution may be on the whole of the property or none. The court based its decision, not on the decisions to that effect, but on a statute. *Central T. Co. v. Moran*, 56 Minn. 188 (1894). Although a foreclosure suit is pending in the federal court and an application has been made for a receiver, yet the corporate property is open to an attachment. The court

⁵ *Eells v. Johann*, 27 Fed. Rep. 327 (1886). Where the sheriff levies on horse cars, etc., which are subject to a mortgage, and the mortgagee noti-

fies the sheriff of that fact, the sheriff may sell subject to the mortgage. *Brill v. West End R. R.*, 4 W. N. Cas. (Pa.) 139 (1877).

After the trustee or receiver takes possession, the supplies, wood, ties, etc., cannot be seized under levy of attachment or execution at the instance of corporate creditors.¹ Bondholders secured by mortgage on real estate are entitled to participate with other creditors in the proceeds of the personal property sold by the receiver.² The duty of the trustee to protect the mortgaged property is an active one, and the trustee may be personally liable for failure to perform that duty.³

§ 853. *Until the trustee or receiver takes possession, all moneys, credits, rents, profits, and debts due to the company may be levied upon by corporate creditors or reached by a bill in equity filed by judgment creditors.*—This principle of law is an old and salutary one. It is based on the fact that such moneys, etc., were, in large part at least, earned or obtained by funds furnished by unsecured creditors, and hence should be applied to the payment of their debts.⁴

did not pass upon the priority of rights. *South Carolina R. R. v. People's Sav. Inst.*, 64 Ga. 18 (1879). Where the mortgage covers all property, it is a prior lien on locomotives as against an attachment, even though there has been no default in the mortgage. *Mabry v. Metropolitan Trust Co.*, 94 Ga. 619 (1894). The corporation itself cannot enjoin an execution on the ground that it impairs the security of its mortgagee. *Boyd v. Chesapeake, etc. Co.*, 17 Md. 195 (1860).

1 The trustee in possession may prevent the sale under execution of rails and bridge timbers for repairing the road. *Palmer v. Forbes*, 23 Ill. 301 (1860). But he cannot enjoin the sale of cordwood under such levy. *Hunt v. Bullock*, 23 Ill. 320 (1860). See also *Fahs v. Roberts*, 54 Ill. 192 (1870). Cordwood so sold before the appointment of a receiver cannot be recovered back by him. *McIlrath v. Snure*, 22 Minn. 391 (1876). Where ties are sold, but title is to pass only after they are laid, a creditor of the company cannot sell them on execution before title has passed. *Owens v. Hastings*, 18 Kan. 446 (1877). In *Felton v. Potomac, etc. Ins. Co.*, 4 Del. Ch. 573 (1873), the trustees of

the first mortgage enjoined bondholders under the second mortgage from selling on execution a locomotive, the trustees of the first mortgage being in possession and operation of the road. Although the words "all other personal property whatsoever in any way belonging or appertaining to the said railroad of the said company" do not cover canal-boats, yet, if the mortgagor delivers them to the trustee as being covered by the mortgage, the trustee may hold them as against the company, but not as against a chattel mortgagee. *Parish v. Wheeler*, 22 N. Y. 494 (1860).

2 *Re Mont, etc. Co.*, 34 Atl. Rep. 638 (Pa. 1896).

3 See § 815, *supra*.

4 A judgment creditor may reach the net earnings of a railroad, though earned during foreclosure proceedings, there being no receiver. *Gilman v. Illinois, etc. Tel. Co.*, 91 U. S. 603 (1875). A judgment creditor, by filing a bill in equity, obtains a prior lien on cash in hand of the corporation, although a mortgage foreclosure is pending, if there is no receiver in such foreclosure proceedings. *American Bridge Co. v. Heidelberg*, 94 U. S. 798 (1876). Unless the mortgagee takes possession or a receiver is ap-

A mortgage is not a lien upon earnings until actual entry and possession under the mortgage, and the earnings on hand at the time of taking such possession belong to the general creditors, including accounts receivable on sales made prior to that time.¹ But where

pointed by the court during foreclosure proceedings, the income prior to the sale belongs to a mortgagor and may be attached or reached by general creditors. *Freedman's Sav. Co. v. Shepherd*, 127 U. S. 494 (1888). Moneys belonging to the mortgagor and levied upon before a receiver is appointed or possession taken by the trustees is subject to such levy. *Merchants' Bank v. Petersburg, etc. R. R.*, 12 Phila. 482 (1877). Although the mortgage of a building company covers the "net income realized from said property as the rents thereof," yet this does not change the common-law rule that, until possession is taken by the mortgagee or a receiver, the accrued rents are not covered by the mortgage. The purchaser under a foreclosure of the second mortgage need not pay over such rents. *Re Life Assoc.*, 96 Mo. 632 (1888). Even though the mortgage covers tolls, income, and earnings, yet an execution levied prior to the appointment of a receiver takes moneys and balances due, in preference to the receiver. If the receiver has used them for other purposes the court will direct him to refund them out of the income. *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 645 (1881). In *Re Tallassee, etc. Co.*, 64 Ala. 567, 596 (1879), the mortgage did not cover the income. A mortgage on "all the real and personal property now, or hereafter, belonging to the company" is legal. It covers income and profits. *Kelly v. Alabama, etc. R. R.*, 58 Ala. 489 (1877). The mortgagor is entitled to the income from property until the mortgagee takes possession in person or a receiver is appointed. Assignments of credits prior thereto by the mortgagor pass title. *Young v. Northern, etc. Iron Co.*, 13 Fed.

Rep. 806 (1880). Where the mortgage covers "moneys," and a demand is made therefor or for possession, the company may be required to turn over to the receiver the money which it has on hand at the time when the demand is made. *Dow v. Memphis, etc. R. R.*, 124 U. S. 652 (1888), rev'g 20 Fed. Rep. 768. In *Frayser v. Richmond, etc. R. R.*, 81 Va. 388 (1886), the court held that an execution levied after the appointment of the receiver, but before he filed his bond, was a lien on the company's funds in bank, representing the earnings of the company, even though the mortgage covered tolls, income, etc. A receiver appointed in a suit to foreclose a railroad mortgage is not entitled to earnings earned prior to his appointment. *Noyes v. Rich*, 52 Me. 115 (1862).

¹ *N. Y. etc. Co. v. Saratoga, etc. Co.*, 159 N. Y. 137 (1899). The rents accruing between the time of the notice of motion for a receiver and the entry of the order appointing the receiver belong to the mortgagee. *Preston v. Tumbridge, etc. Ltd.*, 88 L. T. Rep. 53 (1903). Cf. § 866, *infra*, and p. 2947, *supra*.

Where the state loans money to the company, and takes a mortgage therefor, and provides by statute that the income shall be applied to necessary expenses, a creditor cannot levy on money necessary for such necessary expenses in the future. *Macalester v. Maryland*, 114 U. S. 598 (1885). Money obtained by an insolvent railroad company by selling mileage books on connecting lines is not current income and does not belong to its creditors entitled to a preference. *Gregg v. Metropolitan T. Co.*, 124 Fed. Rep. 721 (1903). In the case *Cox v. Terre Haute, etc. R. R.*, 123 Fed.

a second mortgage is being foreclosed, and then the first mortgagee commences foreclosure, and the same receiver is continued, and

Rep. 439 (1903), the court questioned the right of the trustee to collect a rental due to the insolvent railroad company prior to the receivership. Money paid to the sheriff while in possession of the property belongs to the judgment creditor, and not to the debenture holders. *Robinson v. Burnell's, etc. Bakery, Ltd.*, [1904] 2 K. B. 624. In ascertaining net earnings during receivership, moneys which should have been expended for repairs, but were not, are not deducted, nor moneys expended in litigation by the receivers on matters with which as receivers they had nothing to do. *Bell v. St. Johnsbury, etc. R. R.*, 76 Vt. 42 (1903). A mortgagee is not entitled to the rents except from the time when he or a receiver takes possession, and the court cannot compel a purchaser of the equity who is in possession to operate it without compensation in lieu of a receivership. *Georgetown Water Co. v. Fidelity, etc. Co.*, 117 Ky. 325 (1904). The mortgagor of real estate need not turn over to the receiver rents collected before the receivership. *Rider v. Vrooman*, 12 Hun, 299 (1877); *Rider v. Bagley*, 84 N. Y. 461 (1881). So long as the mortgagor company remains in the use and management of the property an attachment may be had of its income. The mortgage does not attach. *Smith v. Eastern R. R.*, 124 Mass. 154 (1878). *Dunham v. Isett*, 15 Iowa, 284 (1863), is to the contrary. *Woodman v. York, etc. R. R.*, 45 Me. 207 (1858), to the same effect, is inconsistent with the cases of *Bath v. Miller*, 51 Me. 341 (1863), where an attachment of wood was sustained as against the mortgagee; and *Noyes v. Rich*, 52 Me. 115 (1862), where a receiver's suit against the superintendent to recover income received before the receiver was appointed failed; and *Bath v. Miller*, 53 Me. 308 (1865), sustaining the prior decision between the same parties, *supra*; and *Emerson v. European, etc. Ry.*, 67 Me. 387 (1877), holding that moneys earned by a company under a contract with an express company belong to the company so far as earned before the mortgagee took possession, even though not yet paid, and that an instalment due for work done partly before and partly after such possession was taken would be apportioned. In *Ellis v. Boston, etc. R. R.*, 107 Mass. 1, 30 (1871), the court held that "the lien of the mortgagees attaches to the income only from the time of thus taking possession of the corporate property and franchises." All earnings after that date belong to the mortgagees. If the mortgagees take possession of the income earned before they took possession, a general creditor of the company may reach the money by garnishee or attachment process. *De Graaf v. Thompson*, 24 Minn. 452 (1878). Such income not yet paid may be garnisheed in the hands of an express company. *Mississippi Valley, etc. Ry. v. U. S. Express Co.*, 81 Ill. 534 (1876). Even though the court does not appoint a receiver, yet in foreclosure proceedings the property is in its control and it may enjoin the levy of executions. *Bill v. New Albany, etc. R. R.*, 2 Biss. 390 (1870); s. c., 3 Fed. Cas. 379. In *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32, the court appointed a receiver, not to take the road, but to receive one-fourth of the net earnings for the bondholders. In *Pullan v. Cincinnati, etc. R. R.*, 5 Biss. 237, 247 (1873); s. c., 20 Fed. Cas. 38, the court held that the mortgagees were entitled to the income of the road as soon as it came into existence as property, and that by contract the mortgage

the mortgage covers the net income after default, the first mortgage takes the net income from the commencement of the fore-

lien attached and impressed a trust upon it. An early decision in Iowa is to the effect that a judgment creditor cannot reach money in the company's hands, where there is an outstanding mortgage on the income, even though there has been no default in the mortgage. *Jessup v. Bridge*, 11 Iowa, 572 (1861). An attachment or garnishment of funds which pass into the hands of the receiver is not good as against the mortgagee. *Newport, etc. Co. v. Douglass*, 12 Bush (Ky.), 673 (1877). The words "income and revenues" in a mortgage cover "earnings." *Tompkins v. Little Rock, etc. R. R.*, 15 Fed. Rep. 6 (1882). In *Wilder v. Shea*, 13 Bush (Ky.), 128 (1877), the judgment creditor garnisheed the officers of the company in order to reach the corporate funds in their hands. The court held that the proceedings would not lie, and that the remedy was by bill in equity for a discovery and order to pay, or a receiver in lieu thereof. A mortgage may be made to cover book accounts although they are not yet due. *Bloomer v. Union, etc. Co.*, L. R. 16 Eq. 383 (1873).

An unsecured creditor of a railroad, who, without procuring a judgment, alleges corporate insolvency and obtains a receiver, is entitled to the earnings during the receivership as against mortgagees who did not commence foreclosure during such receivership. *Sage v. Memphis, etc. R. R.*, 125 U. S. 361 (1888). Garnishee process lies against another railroad that owes the mortgagor corporation for through tickets sold. There had been no default on the mortgage in this case. *Parkhurst v. Northern, etc. R. R.*, 19 Md. 472 (1862). Where a company leases its property and then mortgages its remaining interest, including the rents, and the mortgage is foreclosed, the whole sum realized

goes to the mortgagee without deduction for salaries of officers of the mortgagor. Rent coming due after the sale goes to the purchaser, although partly earned before the sale. *Sheaff's Appeal*, 55 Pa. St. 403 (1867). A general creditor cannot garnishee money in the hands of a ticket agent of the mortgagor corporation. Such an agent is not a third person, but is the same as the company itself. *Fowler v. Pittsburgh, etc. R. R.*, 35 Pa. St. 22 (1859). So also as to the treasurer (*Sprague v. Stickney*, 52 Me. 592—1864) and station agent. *Pettingill v. Androscoggin, etc. R. R.*, 51 Me. 370 (1863). In *Williamson v. New Albany, etc. R. R.*, 1 Biss. 198 (1857); s. c., 30 Fed. Cas. 12, the court refused to appoint a receiver, and in this way enabled and permitted the company to apply a part of the earnings in completing and operating the road. Money which before it has been earned is specifically set aside to pay interest cannot be attached. Hence, where the mortgagor company has appropriated to the payment of interest an income which has been guaranteed by another road, that sum cannot be attached by general creditors. The mortgagees were in possession in this case. *Galena, etc. R. R. v. Menzies*, 26 Ill. 121 (1861). Where, prior to the appointment of a receiver, a dividend was legally declared and money deposited to pay it, and part of the stockholders were paid and then the remainder of the fund drawn out by the company, the stockholders not paid have a prior lien on that money, and the court will order the receiver to pay them. *Re Le Blanc*, 14 Hun, 8 (1878); affirmed, 75 N. Y. 598. Where foreclosure suit is commenced in the federal court and a receiver is appointed and is then discontinued, the parties preferring to foreclose in

closure of the first mortgage.¹ Even though money earned before the appointment of a receiver does not belong to the receiver, yet if he collects it and distributes it among the bondholders in accordance with the orders of the court, the general creditors cannot hold him personally liable for so doing. The remedy is by motion or appeal and not by collateral action.² A mortgagee is entitled to the income and a receiver therefor upon default, if the mortgagor is insolvent and the security inadequate, even though the

the state court, the former suit does not start the right of the mortgagees to claim the rents and profits. *Johnston v. Riddle*, 70 Ala. 219 (1881). Garnishment does not lie against the treasurer of the company. His possession is the company's possession, and he is merely agent. A mortgage lien does not extend to the money in the treasury for the operation of the road. *McGraw v. Memphis, etc. R. R.*, 5 Coldw. (Tenn.) 434 (1868). In Tennessee it is held that moneys in the treasurer's hands belong to the mortgagee and cannot be attached. See 4 Cent. L. J. 430 (Tenn. 1877). "Even though the mortgage may in terms give a lien upon the profits and income until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control." *Fosdick v. Schall*, 99 U. S. 235, 253 (1878); *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870). But from the time that the trustees demand possession, the company must account for the income and the commencement of a suit by them to obtain possession is such a demand. *Sage v. Memphis, etc. R. R.*, 124 U. S. 652 (1888). The mortgagor is entitled to keep the income received prior to the demand. *Dow v. Memphis, etc. R. R.*, 125 U. S. 361 (1888). "While the mortgage may in terms give a lien upon the income and earnings of the road, it is well settled that, until the mortgagee takes possession or a receiver is appointed, the income and earnings belong to the company, and any judgment cred-

itor may subject the same to the payment of his judgment." *Farmers' L. & T. Co. v. Kansas City, etc. R. R.*, 53 Fed. Rep. 182 (1892). In proceedings to wind up a corporation the receiver cannot take a fund which by contract had been placed by the company in a trustee's hands for a specific purpose. *Re Home Assoc.*, 129 N. Y. 288 (1891). The income may be attached before default occurs, and such attachment has priority. *Clay v. East, etc. R. R.*, 6 Heisk. (Tenn.) 421 (1871).

¹ *Downs v. Farmers' L. & T. Co.*, 79 Fed. Rep. 215 (1897). Improvements ordered in a receivership, obtained by judgment creditors, cannot be charged to income received after the mortgagee commences suit and claims the subsequent income. *Atlantic T. Co. v. Dana*, 128 Fed. Rep. 209 (1903). Where a receiver is already in possession, at the instance of a judgment creditor, the mortgagee may by intervening and setting up its rights, obtain the income from the date of such intervention as against creditors afterwards intervening. *Atlantic T. Co. v. Dana*, 128 Fed. Rep. 209 (1903).

² *Platt v. N. Y. etc. Ry.*, 170 N. Y. 451 (1902); *State Trust Co. v. Kansas City, etc. R. R.*, 120 Fed. Rep. 398 (1903). Where a receiver intervenes in a foreclosure suit and claims the funds involved in that suit and is defeated, all parties to the suit in which he was appointed are bound thereby. *Atlantic T. Co. v. Dana*, 128 Fed. Rep. 209 (1903).

mortgage does not cover the income.¹ Where a mortgage does not cover income or earnings, but merely authorizes possession to be taken in case of default, the trustee can secure the earnings only by taking possession, or by filing a bill of foreclosure and demanding possession.² Where a receiver is appointed at the instance of stockholders, the earnings received by him do not necessarily belong to a mortgagee.³ Although the mortgage covers income, yet the mortgagee is not entitled thereto until he demands a surrender of the property or commences foreclosure, and is not even then entitled to income already earned.⁴ A receiver appointed at the instance of a mortgagee is entitled to the income during the receivership, where the mortgage itself included the income.⁵ The cars of

¹ *Central Trust Co. etc. v. Chattanooga, etc. R. R.*, 94 Fed. Rep. 275 (1899).

² *U. S. Trust Co. v. Wabash Ry.*, 150 U. S. 287 (1893). Where the mortgage does not cover profits, the profits accruing before the commencement of the action to foreclosure do not pass to the receiver appointed in behalf of the mortgagee. *Alabama Nat. Bank v. Mary Lee, etc. Co.*, 103 Ala. 288 (1896). Where the filing of the bill is the first demand by the mortgagee, moneys earned by the company prior thereto do not go to the receiver, although received after his appointment. *Hook v. Bosworth*, 64 Fed. Rep. 443 (1894).

³ *Veatch v. American L. & T. Co.*, 84 Fed. Rep. 274 (1897).

⁴ *Farmers', etc. Co. v. American, etc. Co.*, 107 Fed. Rep. 23 (1895). Even though the income is expressly mortgaged, yet it may first be used to pay current expenses. *Illinois, etc. Bank v. Doud*, 105 Fed. Rep. 123 (1900). Although a mortgage covers moneys to be paid in the future by a municipality to a corporation, yet if the corporation makes a subsequent assignment of the moneys to another person, and that other person gives notice thereof to the municipality after the money has become due and before notice has been given by the mortgagee of its claim, the assign-

ment subsequent in time, but prior in notice, to the municipality, has a right to the fund. *Methven v. Staten Island, etc. Co.*, 66 Fed. Rep. 113 (1895).

The rule may be different as to a judgment for damages. *Farmers' L. & T. Co. v. Detroit, etc. R. R.*, 71 Fed. Rep. 29 (1895). As between the receiver and a debtor, the debtor cannot claim that the debt belongs to creditors of the corporation, even though the debt accrued prior to the receivership. *St. Louis, etc. Co. v. Bosworth*, 73 Fed. Rep. 897 (1896). Where, nine days before the appointment of a receiver, the corporation draws a draft in favor of a bank payable in thirteen days, and the receiver is appointed before the draft is presented for acceptance, and the receiver takes the money, the court will not order payment of the draft. *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. Rep. 615 (1894).

⁵ *First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140 (1898). A receiver appointed in insolvency proceedings may be directed by the court to pay the income to a mortgagee who has commenced foreclosure proceedings. *Busch, etc. Co. v. Niagara River, etc. Co.*, 41 N. Y. App. Div. 204 (1899). Earnings received by a receiver appointed at the instance of a general creditor are distributed the same as

an Illinois railroad corporation passing through another state in the transportation of freight or return cannot be attached in the latter state, neither can sums of money due from railroads in that state to such foreign railroad corporation for freight on interstate shipments be attached.¹

Unless the mortgage so provides, the mortgagee is not entitled to rents and profits during the time the receiver is in charge before a strict foreclosure is decreed.² A railroad may mortgage future net earnings to secure the interest upon its bonds.³

After the receiver is appointed it is contempt of court for the officers to collect moneys and deposit them to the credit of the company.⁴ But such moneys earned prior to the receivership do not necessarily go to the mortgagee. The court may administer them for the benefit of the creditors at large.⁵ Money paid to a trustee

the proceeds of a foreclosure sale. *Thomas v. Cincinnati, etc. Ry.*, 91 Fed. Rep. 202 (1898).

¹ *Davis v. Cleveland, etc. R. R.*, 146 Fed. Rep. 403 (1906). Traffic balances held by another corporation cannot be garnisheed, even though part thereof belongs to the insolvent corporation. *Cox v. Central Vermont R. R.*, 187 Mass. 596 (1905).

² *Ellis v. Boston, etc. R. R.*, 107 Mass. 1, 28 (1871).

³ See cases *supra*; also *Jessup v. Bridge*, 11 Iowa, 572 (1861); *State v. Northern Central Ry.*, 18 Md. 193 (1861); *Dunham v. Isett*, 15 Iowa, 284 (1863), holding also that attachment or execution upon earnings so pledged may be restrained by injunction. A mortgage may cover, by its terms, the net earnings of all business coming to the mortgagor company "from or over" the mortgagee company. *Schmidt v. Louisville, etc. Ry.*, 95 Ky. 289 (1894). Where under special charter power the company constructs a new road, and by a trust deed sets aside a certain proportion of the entire gross receipts of the company for dividends on the stock issued on the new line, a receiver of the company will be compelled to pay the amount called for by such a trust deed. *Re Eastern, etc. Ry.*, L. R. 45 Ch. D. 367 (1890). See also *Proffitt v. Wye Val-*

ley Ry., 64 L. T. Rep. 669 (1891). Under the Georgia statutes a mortgage cannot cover income. *Lubroline Oil Co. v. Athens Sav. Bank*, 104 Ga. 376 (1898).

⁴ *American Const. Co. v. Jacksonville, etc. Ry.*, 52 Fed. Rep. 937 (1892). A deed of surrender to the trustee of the mortgage, the terms of the deed being the same as those used in the mortgage, which do not expressly cover income, does not prevent the company from subsequently assigning to a general creditor certain income which was earned prior to the deed of surrender. *Farmers' L. & T. Co. v. Cary*, 13 Wis. 110 (1860).

⁵ Where the receiver is put in possession of all the corporate property, both that which is mortgaged and that which is not, and the latter is used to continue the business and is thereby turned into cash, the court will not cause such cash to be paid to the mortgagee, but will preserve it for the general creditors, an equitable allowance to the mortgagee for the use of the mortgaged property being made. *Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567, 598 (1879). A mortgage covering tolls and income covers only the net income after possession has been taken. Arrears of expenses in the operation of the road must be

with which to pay coupons cannot be attached by a general creditor.¹

§ 854. *Rolling-stock subject to the mortgage—Rolling-stock is generally held to be personalty—Recording the mortgage as a chattel mortgage.*—There has been a vast amount of litigation over the question whether rolling-stock is personalty or realty. Also whether, if it is personalty, it may be seized under levy of attachment or execution by corporate creditors; and also how far the mortgagee of a railroad company is protected in his lien on the rolling-stock.

The various states differ on the question of whether rolling-stock is personalty or realty. Some courts hold that it is one and some hold that it is the other.

Owing to the peculiar nature of railroad property, which requires that it shall at all times be in condition to transport passengers and freight, for which purpose the rolling-stock, consisting of engines and cars, is as necessary as the track itself, the courts, in construing mortgages, have been inclined to hold that rolling-stock is realty.²

paid first. The mortgagee seeks equity in asking for a receiver, and hence must do equity. The order that the receiver must pay such arrears may be made at the time of appointment or subsequently. *Poland v. Lamoille, etc. R. R.*, 52 Vt. 144, 177 (1879). See also *Williamson v. Washington, etc. R. R.*, 33 Gratt. (Va.) 624 (1881), holding that, if such income has been applied to the interest on the bonds, it is to be replaced from the price realized on the sale of the road. For a review of the decisions and situation prior to the decision in *Fosdick v. Schall*, see 4 Cent. L. J. 458 (1877). After a receiver has been appointed a bank cannot exercise its contract right to declare a corporate debt due and apply to it money on deposit by the corporation. *Corn, etc. Bank v. Locher*, 151 Fed. Rep. 764 (1907); *McManus-Kelly Co. v. Pope Mfg. Co.*, 70 Atl. Rep. 297 (N. J. 1908).

¹ *Holland Trust Co. v. Sutherland*, 177 N. Y. 327 (1904).

² *Palmer v. Forbes*, 23 Ill. 301 (1860); *Hunt v. Bullock*, 23 Ill. 320 (1860); *Titus v. Ginheimer*, 27 Ill.

462 (1861); *Titus v. Maybee*, 25 Ill. 257 (1861), holding also that rolling-stock only becomes personal property when severed from the road by the owner. Neither the plaintiff in execution nor the officer can detach it. *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32; *Railroad Co. v. James*, 6 Wall. 750 (1867); *Miller v. Rutland, etc. R. R.*, 36 Vt. 452 (1863), where the statute makes rolling-stock realty; *Williamson v. New Jersey, etc. R. R.*, 28 N. J. Eq. 279 (1877), holding that as between mortgagees and execution creditors rolling-stock is part of the realty. To same effect, *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. 484 (1857); *State v. Northern Cent. Ry.*, 18 Md. 193 (1861), holding that a mortgage upon the entire line with its tolls and revenues covers the rolling-stock and fixtures necessary to the production of tolls and revenues; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857), in which cars, wheels, firewood for engines, and coal for machine shops were held to be included in a mortgage upon a road "and all other personal property and interest

In some of the states statutory and even constitutional provisions have been enacted in order to settle this question.¹

Nearly all railroad mortgages specifically name the rolling-stock as being included in the mortgage. Even if not specifically named, however, the rolling-stock is included in a mortgage covering all property of a corporation.² Although the mortgage covers the rolling-stock, this does not prevent the company from selling old stock and replacing it by new.³ The mortgage may cover such rolling-stock as belongs to a division of a railroad system.⁴

therein," as being things incident to and indispensable to the use and enjoyment of the property conveyed; *Farmers' L. & T. Co. v. St. Joseph, etc. Ry.*, 3 Dill. 412 (1875); s. c., 8 Fed. Cas. 1053, holding that where a mortgage upon a railroad, including rolling-stock and property strictly appurtenant to the road, had been recorded as a mortgage of realty, it is not necessary to record it as a chattel mortgage. But see, *contra*, *Hoyle v. Plattsburgh, etc. R. R.*, 54 N. Y. 314 (1873), where rolling-stock was held to be personal property and not a part of the realty. To same effect, *Randall v. Elwell*, 52 N. Y. 521 (1873), where it was held that rolling-stock may be seized and sold for taxes.

1 For a detailed statement of such provisions in the various states, see *Jones, Corp. Bonds*, §§ 128, etc.

2 Where a mortgage covers the road and "all the revenue and tolls," it covers "all the rolling-stock and fixtures, whether movable or immovable, essential to the production of tolls and revenues." *State v. Northern Cent. Ry.*, 18 Md. 193, 218 (1861); also *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32; also in Tennessee, see 4 Cent. L. J. 430 (1877). Under a power to mortgage its franchises and rights, a company may give a mortgage on rolling-stock now owned or hereafter acquired, and such mortgage has priority over executions. *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857). The mortgage lien on rolling-stock continues after a consolida-

tion "to the same extent to which it embraces the railroad itself—the same proportion of the one as of the other," and covers new rolling-stock acquired by the consolidated company. It attaches, however, subject to existing liens on the rolling-stock, such liens being money paid therefor by the receiver. *Meyer v. Johnston*, 53 Ala. 237, 332, 352 (1875); s. c., 64 Ala. 603 (1879), holding that where the title never passed to the company the lien does not attach. A mortgage on the "road and its franchise" does not cover rolling-stock. *Miller v. Rutland, etc. R. R.*, 36 Vt. 452, 498 (1863).
3 *Union Trust Co. v. Morrison*, 125 U. S. 609 (1888).

4 Separate mortgages on separate parts of a railroad may be made to cover separate portions of the rolling-stock, each mortgage covering that part of the rolling-stock which is assigned to that part of the road which is covered by it. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609 (1864). If, however, the underlying divisional mortgage is general in its terms, it covers all rolling-stock on the whole system. *Minnesota Co. v. St. Paul Co.*, 6 Wall. 742 (1867). A covenant that a mortgage shall cover so much rolling-stock as shall be assigned to a certain division of a railroad, and that a certain proportion shall be so assigned, is not sufficient except to the extent that rolling-stock is actually assigned. Where rolling-stock is assigned to a division and thereby becomes subject to a mortgage, the lien is not lost by subsequent obliteration.

Where the mortgage covers not only the present property of the company, but also property acquired in the future, rolling-stock as soon as it is purchased becomes subject to the mortgage.¹ A mortgage covering after-acquired rolling-stock does not cover rolling-stock purchased by a purchaser of the property of the mortgagor company.² If the mortgage covers the rolling-stock, the rolling-stock remains subject to it in any and all states into which the rolling-stock may run.³

In states where rolling-stock is held to be personalty, it is cus-

tomary of the designations. *United States T. Co. v. Wabash Ry.*, 38 Fed. Rep. 891 (1889).

¹ *Shaw v. Bill*, 95 U. S. 10 (1877); *Central T. Co. v. Ohio, etc. R. R.*, 36 Fed. Rep. 520 (1888). A mortgage on property, "including all cars, engines, and furniture that have been or may be purchased for or by said company," covers after-acquired rolling-stock, even though it be regarded as personalty, and such mortgage has priority over a mortgage given on such rolling-stock specifically. *Morrill v. Noyes*, 56 Me. 458, 468 (1863); *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32, holding that a mortgage of "all present and future-to-be-acquired property, including the right of way and all rails and other materials used thereon and purchased therefor," covers the rolling-stock; *Scott v. Clinton, etc. R. R.*, 6 Biss. 529 (1876); s. c., 21 Fed. Cas. 820, holding that the constitutional provision of Illinois that rolling-stock shall be deemed personal property does not change the rule that a mortgage covering future-acquired property includes the rolling-stock if obtained before rights of execution creditors attach; *Railroad Co. v. James*, 6 Wall. 750 (1867). A constitutional provision that rolling-stock is personalty does not prevent a mortgage, having the after-acquired-property clause, attaching to the rolling-stock "as soon as it comes into existence and is in possession of the mortgagor; and the mortgagees, under such circumstances, have a prior

equity to the claims of creditors obtaining judgments and executions after the property is thus acquired and placed in possession of the mortgagor." *Scott v. Clinton, etc. R. R.*, 6 Biss. 529 (1876); s. c., 21 Fed. Cas. 820.

² *Hinchman v. Point, etc. Ry.*, 14 Wash. 349 (1896).

³ Rolling-stock in one state belonging to a railroad in another state and subject to a mortgage in the latter state is subject to the mortgage wherever it goes. *Nichols v. Mase*, 25 Hun, 640 (1881); *aff'd*, 94 N. Y. 169. Pending an application in Kentucky by the trustees for a receiver of a Kentucky road which is being foreclosed, a Kentuckian cannot go into the state of Ohio and obtain an attachment in Ohio on rolling-stock in Ohio, but belonging to the Kentucky road and subject to the mortgage. *Bank v. McLeod*, 38 Ohio St. 174 (1882). Attachment does not lie against cars owned by a foreign corporation, such cars being run on to a connecting line which comes into the state, especially where they are covered by a mortgage in the other state. *Michigan, etc. R. R. v. Chicago, etc. R. R.*, 1 Bradw. (Ill.) 399 (1878). But rolling-stock manufactured to be used on an Illinois railroad and sent there for that purpose is subject to the laws of Illinois on this point. *Hervey v. Rhode Island Loco. Works*, 93 U. S. 664 (1876). So also, where a contract is made in Ohio concerning rolling-stock to be used on a railroad in Kentucky, the law of Kentucky in re-

tomary and safer to record the mortgage as a chattel mortgage as well as a real-estate mortgage. The supreme court of the United States has held, however, that even though the rolling-stock be personalty, yet the mortgage need not be recorded as a chattel mortgage.¹

Even if the rule were otherwise the peculiar character of rolling-stock would not make the mortgage void under the chattel-mortgage act, by reason of the mortgagor being left in possession.² Moreover, until creditors obtain a specific lien on the rolling-stock the unrecorded mortgage is a valid lien.³ In addition to all this, there are authorities to the effect that an attachment or execution cannot be levied upon rolling-stock, and that the remedy of creditors is sequestration proceedings, the policy of the law being to preserve the property intact, so that it may continue to be operated as a railroad.⁴

The general rule, however, seems to be to the contrary, where the rolling-stock is looked upon as personalty.⁵ Where mortgaged property runs into different states and consists of a lease and of rolling-stock, and there are prior liens in some of the states, the court may apportion the proceeds according to the mileage in the different states.⁶

§ 855. *Rolling-stock—Rights of the general mortgagee and other parties where there is a "car trust," lease, conditional sale, or purchase-money chattel mortgage on rolling-stock.*—Where rolling-stock is delivered to a railroad company on a contract, whereby the railroad company is to acquire title only upon payment therefor being made thereafter as specified in the contract, great doubt arises whether such a transaction is a conditional sale, or is an absolute sale with a chattel-mortgage right in the vendor. The difference is important, since, if the latter construction is put upon the contract, the contract must be recorded as a chattel mortgage, whereas in the former case it need not be recorded. The courts of the various states differ in their construction of such contracts. The controversy over them generally arises under a levy of attachment or execution by a creditor of the corporation, or under a claim by the general mortgagee of the corporation that his mortgage covers rolling-stock delivered under such a contract, even though the deferred payments have not been made to the vendor. The courts, in accordance with an

gard to chattel mortgages must be complied with. *Hart v. Barney*, etc. Co., 7 Fed. Rep. 543 (1881).

1 See § 811, *supra*.

2 See § 811, *supra*.

3 See § 811, *supra*.

4 See § 899, *infra*.

5 See § 899, *infra*.

6 *Thomas v. Cincinnati, etc. Ry.*, 91 Fed. Rep. 195 (1898). See also §§ 830, 836, *supra*.

old principle of law, favor the construction that the contract is a conditional sale and that the vendor is protected.¹ So also, where a lease of rolling-stock is made by the owner to the company, the lease providing that upon certain rentals being paid the title shall pass to the company, the rentals being in reality partial payments for the

¹ A sale of motors, controllers, trolley poles, electric generators, and a switch board by contract, which reserves title in the vendor until he is paid, gives the vendor precedence as against judgment creditors and mortgagees. *General, etc. Co. v. Transit, etc. Co.*, 57 N. J. Eq. 460 (1898). A vendor's lien may be retained by contract on pumping machinery purchased by a contractor for a corporation, and if the corporation had notice thereof it takes subject thereto, although its stock was issued in payment therefor to the contractor. A mortgage given by the company does not take precedence over such lien. *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. Rep. 19 (1892). In Missouri a sale of rolling-stock conditionally, the title not to pass until certain deferred payments are made, is legal, and such a contract of sale need not be recorded as a chattel mortgage. The contract recited that the company had "received" the rolling-stock. *Rogers Locomotive Works v. Lewis*, 4 Dill. 158 (1877); s. c., 20 Fed. Cas. 1134. Where rolling-stock is purchased by a railroad, and the contract provides that the vendor shall have a lien thereon for the price, such lien is good as against a prior mortgage of the vendor, though the lien is not recorded and the mortgage covered after-acquired property. *U. S. v. New Orleans R. R.*, 12 Wall. 362 (1870); *Fosdick v. Schall*, 99 U. S. 235 (1878). Where a construction company places rolling-stock on a railroad and marks the cars with the latter's name, and aids in the sale of the railroad bonds, which bonds purport to be upon an equipped railroad, the rolling-stock is subject to the railroad mortgage, notwithstanding the

papers between the two companies showed that the title was not intended to pass. *Central Trust Co. v. Marietta, etc. Ry.*, 48 Fed. Rep. 850 (1891). But a party who owned the rolling-stock and gave possession to the construction company, and who took no part in supplying the railroad company with the rolling-stock so as to aid in the sale of the bonds, may insist upon his right to take back the rolling-stock. *Central Trust Co. v. Marietta, etc. Ry.*, 48 Fed. Rep. 864 (1891). So held in favor of a car-building company as against equipment bonds issued by the railroad company. The Georgia statute relative to recording such contracts is not applicable to sales made prior to its enactment. *Central Trust Co. v. Marietta, etc. Ry.*, 48 Fed. Rep. 865 (1891). This statute does not give title to a prior mortgagee as against the car-builder and car-owner. It was intended only for the protection of subsequent purchasers and creditors. *Central Trust Co. v. Marietta, etc. Ry.*, 48 Fed. Rep. 868 (1891). The court held also that a conditional sale of rolling-stock does not pass title. Under the Kentucky statute requiring the recording of chattel mortgages, etc., a conditional sale of rolling-stock, partial payments being made, and delivery made, but the vendor retaining title and the right to retake possession, is not good as against *bona fide* purchasers and attaching creditors of the vendee, where such contract of conditional sale is not recorded. *Hart v. Barney, etc. Co.*, 7 Fed. Rep. 543 (1881). A contract of sale of cars to a railroad to be paid for in instalments, and title to remain in the vendor until paid for, is a protection to the vendor as

rolling-stock, the courts look at the substance of the contract and hold that the lessor is protected the same as though he had made a conditional sale.¹ In some states, however, such a lease is held to be a

regards a prior mortgage on all property then owned or subsequently acquired by the company. So held even in Illinois, where a statute is hostile to such sales. *Fosdick v. Schall*, 99 U. S. 235 (1878). Where the bondholders purchased their bonds with knowledge of the fact that a manufacturing company has erected machinery on the property covered by the mortgage, under a contract by which said company reserved title in the machinery, and the right to take it away in default of payment, the lien of the manufacturing company is prior in right to that of the bondholders. *Central Trust Co. v. Arctic, etc. Co.*, 77 Md. 202 (1893). See § 860, *infra*. The after-acquired property clause attaches subject to all claims and equities against the property which afterwards comes within the terms of the mortgage. So held as regards rolling-stock, although the contract of sale was not recorded as required by statute. *Newgass v. Atlantic, etc. Ry.*, 56 Fed. Rep. 676 (1893). A sale of an electric generator to a street railway may be such that the title is not to vest until payment is made, and in this way the mortgage does not come in ahead of the payment. *Manhattan Trust Co. v. Sioux City, etc. Ry.*, 76 Fed. Rep. 658 (1896). Concerning rolling-stock contracts in Virginia, see *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 86 Va. 1 (1889). A mortgage covering after-acquired property does not attach to rolling-stock belonging to a third person and in use by the railroad. The rolling-stock does not become a part of the realty. *Hardesty v. Pyle*, 15 Fed. Rep. 778 (1883). Cf. § 857, *infra*.

¹ The supreme court of the United States, in speaking of car leases, said: "These in form were leases, but in

substance, and properly so adjudged, were contracts of purchase, reserving title in the vendors until after the payment of certain annual sums, called rents, and with the right to retake possession on default in payment." *Kneeland v. American L. & T. Co.*, 136 U. S. 89 (1890). A conditional sale of cars does not render the cars subject to a railroad mortgage on after-acquired property, even under the Iowa statute. A lease with an option to the lessee to purchase has the same effect, though not recorded. *Myer v. Car Co.*, 102 U. S. 1 (1880), giving the contract itself. Cf. *Taylor v. Burlington, etc. R. R.*, 4 Dill. 570 (1877); s. c., 23 Fed. Cas. 737. In *Hervey v. Rhode Island Loco. Works*, 93 U. S. 664, 673 (1876), the court said: "It is true that the instrument of conveyance purports to be a lease, and the sums to be paid are for rent, but this form was used to cover the real transaction. . . . It was evidently not intended that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on payment of the last instalment?" Justice Strong, in *Heryford v. Davis*, 102 U. S. 244 (1880), said: "Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company for hire, it is manifest that no mere bailment for hire was intended. . . . It is quite unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale." Where personal property is leased to a corporation on partial payments to be made, and title then to pass, this is a conditional sale. If the corporation becomes insolvent and the vendor, by collusion with the president, sells it to the president's

sale, not conditional, but absolute, and the vendor has an informal chattel mortgage which he must record in order to be protected.¹

The owner of rolling-stock who leases it to a railroad company,

brother, a receiver cannot claim the property unless he repays the price. *Kidder v. Wittler, etc. Co.*, 38 Wash. 179 (1905). Where the vendor of machinery retains the title until he is paid, and partial payment is made, and a foreclosure then had, general creditors cannot object that the decree of foreclosure provides for payment of the balance due on the machinery out of the proceeds of the foreclosure sale. *Washington T. Co. v. Morse, etc. Co.*, 187 N. Y. 307 (1907). A mortgage is not a first lien on a boiler subsequently delivered under a contract reserving title in the seller until it should be fully paid for, and a statute making conditional sales void unless recorded as to subsequent mortgagees in good faith does not apply to bondholders secured by such a mortgage. *Tilford v. Atlantic Match. Co.*, 134 Fed. Rep. 924 (1905). Where the receiver retains possession of cars which have been leased to the railroad on a contract of sale, he must pay the rent therefor, and this rent may be taken out of the corpus of the estate where the trustee of the mortgage objected to the cars being returned. *Lane v. Macon, etc. Ry.*, 96 Ga. 630 (1895). In *Central Trust Co. v. New York Equipment Co.*, 74 Hun, 405 (1893), the agreements of the lessee to make the stipulated payments were construed to be promissory notes, the plan of deferred payments under the guise of rentals having been adopted in this transaction. Where some of the notes which are secured by car rentals or lease are transferred by the holder, the transferee may compel the former to account for the transferee's proportion of the moneys realized from the seizure and sale of the rolling-stock by the original holder of the notes. *Central Trust*

Co. v. New York Equipment Co., 87 Hun, 421 (1895).

¹ A rolling-stock contract, which is practically a conditional sale, but in form a lease, must be recorded under the Illinois chattel-mortgage act. A judgment creditor of the railroad may sell the rolling-stock on execution if the contract is not recorded. *Hervey v. Rhode Island Loco. Works*, 93 U. S. 664 (1876). Where cars are rented to the railroad, but notes equal to an agreed purchase price are passed, and upon payment of the notes title is to pass, and if notes are not paid the lessor is to keep back payments and sell the cars and apply the same on the notes, a sale is the effect. Title is thereby passed at once and a chattel mortgage exists. The instrument must be recorded in order to obtain protection. *Heryford v. Davis*, 102 U. S. 235 (1880). A contract in the form of a lease, whereby the owner of cars leases them to a railroad on an annual rental equal to one-sixth of the cost thereof, such rental to be paid for ten years and then the cars to belong to the railroad, is not a lease nor a conditional sale, but is a mortgage with the seller as a mortgagee. Unless the instrument is acknowledged and recorded as a chattel mortgage according to the statute of the state wherein the cars are situated, the mortgage is void as against attaching and execution creditors, or *bona fide* purchasers, but takes precedence over a prior general mortgage covering after-acquired property. *Frank v. Denver, etc. Ry.*, 23 Fed. Rep. 123 (1885). The after-acquired property clause of a street railway covers a stationary engine in preference to a provision in the contract of sale of the engine that title should not pass until it was paid for, the statutes of Texas providing that such

with an option to the company to purchase before the expiration of the lease, is a bailor of the property, and may recover the property against a purchaser at the foreclosure sale of the railroad, especially where such bailor gives notice at the sale that he claims the property.¹ Where the lease is a mere pretense, the money therefor having been charged to the company, the contract will be held to be a sale.² So also where the corporate officers took the title to cover advances made by them.³

a reservation of title must be recorded as a chattel mortgage. *Guaranty, etc. Co. v. Galveston, etc. R. R.*, 107 Fed. Rep. 311 (1901). A *bona fide* purchaser of a railroad is not bound to know that there is a contract constituting a lien on the rolling stock in favor of the manufacturer thereof. *Hogan v. Detroit United Ry.*, 140 Mich. 101 (1905). Under the after-acquired property clause personal property is covered by the mortgage, even though the sale of the personal property was a conditional sale in that the title was not to pass until the price was paid in full, it being shown that such conditional sale was not recorded, as required by the New York statutes. *Westinghouse, etc. Co. v. New Paltz, etc. Co.*, 32 N. Y. Misc. Rep. 132 (1900). As to the effect of the Kentucky statute, requiring contracts for the sale of rolling-stock with the title reserved to the vendor until payment is made to be recorded, and the effect where the same is not recorded, but a prior mortgagee under a mortgage covering after-acquired property claims the rolling-stock, see *Evals v. Kister*, 92 Fed. Rep. 828 (1899).

¹ *Collins v. Bellefonte Cent. R. R.*, 171 Pa. St. 243 (1895). A car-equipment lease, the title to pass upon the payment of the specified rentals, is in law a sale with title reserved to the seller until payment in full, and is legal under the statutes of Ohio as a pledge by the company, and is not affected by the conditional sales statute of Ohio, nor is it affected by a mortgage given by the corporation.

Metropolitan T. Co. v. Railroad, etc. Co., 108 Fed. Rep. 913 (1901). Under the Ohio statutes a conditional sale of rolling-stock, the condition being that rent should be paid and credited on the purchase price, the title to remain in the vendor until full payment of the purchase price, is legal and the vendor is protected upon the foreclosure of the mortgage. *Metropolitan Trust Co. etc. v. Columbus, etc. R. R.*, 93 Fed. Rep. 702 (1899). The after-acquired-property clause attaches to the equity in rolling-stock sold to the company on the plan of a lease of such rolling-stock with partial payments called rentals. *Contracting, etc. Co. v. Continental T. Co.*, 108 Fed. Rep. 1 (1900).

² Where property, though nominally leased by the railway company, is acquired under an arrangement which amounts in law to a purchase of it, the mortgagee or purchaser at the foreclosure sale may claim the property. *McGourkey v. Toledo, etc. Ry.*, 146 U. S. 536 (1892). In this case the court held that the apparent lease was merely a mortgage, where there was no provision for resuming title, but merely a provision for resuming possession for the purpose of sale.

³ Where the title to rolling-stock has not passed, but the officers advance the money to pay for it on the understanding that they take title until the company reimburses them, the mortgage has priority. *New Jersey Mid. Ry. v. Wortendyke*, 27 N. J. Eq. 658 (1876). "Contracts by which railways insufficiently equipped with rolling-stock of their own, lease or

A "car trust" is practically an agreement of several owners or a single owner of cars to place them in the hands of a trustee or agent to sell on the instalment plan, the agent being authorized and directed also to issue certificates representing the interests of the vendors in the instalments. These certificates are then used, bought, and sold like shares of stock.¹ Car-manufacturing companies often

purchase, under the form of a conditional sale, such equipment from manufacturers, are not of uncommon occurrence, and, when entered into *bona fide* for the benefit of the road, have been universally respected by the court. . . . If, however, such contracts are made by directors of the road with themselves, or with others with whom they stand in confidential relations, they are open to the suspicion which ordinarily attaches to transactions between a corporation and its directors; and, if they appear to have been made directly or indirectly for their own benefit, courts will refuse to give them effect." Thus, where, the rolling-stock is purchased by the directors and in the name of a trustee of a car trust, he being merely a figure-head, payments being made from the funds provided for the building of the road under the construction contract, the court held that there was such a mingling of the funds and of the interests of the directors as directors, with their interests as purchasers of the rolling-stock, that the title to the rolling-stock passed to the company, and the car trust was invalid. The court said: "Any arrangement by which the road is equipped with rolling-stock belonging to another corporation should be distinct, unequivocal, and above suspicion." *McGourkey v. Toledo, etc. Ry.*, 146 U. S. 536 (1892).

¹ In *Ricker v. American L. & T. Co.*, 140 Mass. 346 (1885), a car trust was described as being formed by an instrument in writing containing numerous articles, for the purpose of buying, selling, and leasing railroad

rolling-stock, to be sold or leased to a certain railroad company, with provisions for admitting other persons to membership. The members of the association were to furnish money for the purchase of the rolling-stock, and were to have certificates for the amounts so furnished. The principal sum contributed by each member was to be repaid in ten annual instalments with interest. Both principal and interest were payable only out of the rentals received for the rolling-stock. A plan was adopted by which the association delivered the property to a corporation as trustee, which issued the certificates to the members of the association, and also executed the leases to the railroad company, with provisions for a rental sufficient to meet the above payments of principal and interest, in addition to expenses, including taxes. At the end of ten years the rolling-stock was to become the property of the railroad company. The original board of managers was named in the articles of association, but the shareholders were to have the power to remove them and elect others. At all meetings every shareholder was to have one vote for each share of stock owned by him, and provision was made for the transfer of shares. The association was not to be dissolved by the death of members. Every owner of one or more shares was to be entitled to a proportional share of the rental received. A car-trust company wherein the subscribers were to have certificates representing their interest, and the rolling-stock owned by the company was to be rented at a certain rental, which was to go to the sub-

dispose of their cars under a contract similar to those described above.¹

§ 856. *Land and railroad extensions which are not covered by the mortgage*—*The words of the mortgage are strictly construed, and no land or personal property is included unless clearly within the meaning of the words of the mortgage*—*Condemned land and abandoned rights of way.*—The courts are not inclined to give the mortgagee more security than his mortgage clearly calls for, especially so since everything added to the mortgage is generally added at the expense of unsecured creditors who realize little or nothing on their claims. Hence a clause in the mortgage to the effect

scribers until their subscriptions were repaid, and then the rolling-stock was to belong to the lessee, is a joint-stock company—a mere voluntary association. *Ricker v. American L. & T. Co.*, 140 Mass. 346 (1885). See also *Mills v. Hurd*, 29 Fed. Rep. 410 (1887).

In an address by Mr. Francis Rawle, before the American Bar Association in 1885, on the subject of "Car Trust Securities," a clear statement of the character of a "Car Trust Association," or a "Car Trust," was made.

1 A car-trust certificate is in effect a mortgage bond with interest coupons attached. The form is given in this case at length. But where the cars are purchased by the railroad company and are then declared by it to be subject to the car trust, the latter is not protected. A prior mortgage on all present and future property of the railroad company takes precedence of the car-trust lien. *Central T. Co. v. Ohio Cent. Ry.*, 36 Fed. Rep. 520 (1888). A car trust was involved in *Frank v. Denver, etc. Ry.*, 23 Fed. Rep. 123 (1885), and *Humphreys v. St. Louis, etc. Ry.*, 37 Fed. Rep. 307 (1889). In *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 86 Va. 1 (1889), the court said in regard to a car trust: "There was, in legal effect, a conditional sale of the equipment in question, with the retention of title as a security for the purchase-

money. The written contracts between the parties, it is true, purport to be leases, but the mere language used is by no means conclusive of the legal nature of the transaction." The car trust is entitled to reasonable rental from the receiver, but as to the rest the car trust may take the property back and present a claim as a general creditor. In *McGourkey v. Toledo, etc. Ry.*, 146 U. S. 536 (1892), the court said: "The car-trust associations were not corporations or partnerships, nor legal entities of any description, but were simply car-trust certificates in the hands of various persons." If the trustees of a car trust make a contract which by its terms is to be binding only on the assenting certificate-holders, the court will enforce the contract as written. The court said: "Whether the car trust is a partnership or a joint-stock association or a quasi-corporation is not of the least importance." *Humphreys v. New York, etc. R. R.*, 121 N. Y. 435 (1890). It is legal for a railroad company to sell rolling-stock to a party, and then to take a lease of the same rolling-stock on the car-trust principle, the instalments of rent being equivalent to partial payments. A debenture-holder cannot cause the transaction to be set aside. *Re Eastern, etc. Ry.*, 65 L. T. Rep. 668 (1891). Concerning car trusts, see also 2 Nat. Corp. Rep. 347; *North American Review*, March, 1891; *Ray*

in general that it covers all property pertaining to the operation of the railroad is construed not to include land and personal property which may be sold and separated from the railroad without interfering with its regular operation. And, in general, the courts are not inclined to extend the meaning of the words used in the mortgage.¹ This rule applies not only to land owned by the mortgagor at

on Contractual Limitations. See also a pamphlet on "Car Trusts," by Davis and Browne (N. Y. 1894).

¹ Quoted and approved in *In re Adamant Plaster Co.*, 137 Fed. Rep. 251 (1905). A railroad mortgage covering property "used for and pertaining to the operation of said railroad" does not cover land purchased for the purpose of subdivision and sale, especially where a jury so decided. *Pardee v. Aldridge*, 189 U. S. 429 (1903). In *Walsh v. Barton*, 24 Ohio St. 28 (1873), it was held that a mortgage covering all property, real or personal, "whether now owned or hereafter to be acquired, used, or appropriated for the operating or maintaining the said road," does not cover land which has not been used or appropriated for operating or maintaining the road. To same effect, *Boston, etc. R. R. v. Coffin*, 50 Conn. 150 (1882). In *Morgan v. Donovan*, 58 Ala. 241 (1877), it was held that a mortgage covering lands in connection with the railroad covered only such land as was useful and necessary and employed in the construction, maintenance, operation, repair, and preservation of the railroad, and did not include property bought of an opposition steamboat company to prevent competition. It was also held that property illegally acquired was not covered. A mortgage covering all property pertaining to the "main line" does not cover an extension which is built for use in connection with the main line. *Randolph v. New Jersey, etc. R. R.*, 28 N. J. Eq. 49 (1877). A mortgage on all property pertaining to the main line of a railroad does not cover lands acquired but not used for railroad purposes.

Randolph v. New Jersey, etc. R. R., 28 N. J. Eq. 49 (1877). Where one corporation owns all the stock of another corporation the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company. *Central T. Co. v. Kneeland*, 138 U. S. 414 (1891). A mortgage covering the railroad and the lands upon which depots, etc., are erected and used for depot purposes does not cover woodlands lying seven miles from the railroad and purchased for the purpose of getting wood for fuel. *Dinsmore v. Racine, etc. R. R.*, 12 Wis. 649 (1860). In *Shamokin Valley R. R. v. Livermore*, 47 Pa. St. 465 (1864), it was held that a mortgage covering a railroad "with its franchises and appurtenances" did not cover town lots which were not mentioned in the mortgage. "Road and appurtenances" cover everything that belonged to the road as a railroad. *Kennebec, etc. R. R. v. Portland, etc. R. R.*, 59 Me. 9 (1871). The term "all other property" contained in a mortgage is construed to cover only the property used in and about the specific property described in the mortgage, where there was a clear intent to exclude a large class of property. *Alabama v. Montague*, 117 U. S. 602 (1886). A hotel owned by a railroad is subject to its mortgage, although title is taken in the name of a trustee. *U. S. Trust Co. v. Wabash, etc. Ry.*, 32 Fed. Rep. 480 (1887). See also *Boston, etc. R. R. v. Coffin*, 50 Conn. 150 (1882). A mortgage on all property covers all land owned by the company, and a subsequent purchaser of the land takes subject to the mortgage. *Wilson v. Boyce*, 92 U. S. 320

the time of the giving of the mortgage, but also to land subsequently acquired, and which the mortgagee claims under the after-acquired-

(1875). A mortgage on the railroad and franchise, station-houses, etc., and other appendages, with all the lands thereto belonging and intended for the use and accommodation of said road, covers only such land as the company could have acquired compulsorily by power of eminent domain. *Eldridge v. Smith*, 34 Vt. 484 (1861). The word "plant" does not cover property used in an independent business in a different place, although owned by the corporate mortgagor. *Maxwell v. Wilmington, etc. Co.*, 77 Fed. Rep. 938 (1896). A street-railway mortgage, covering a contemplated extension for which a right of way has been obtained, is a lien on such extension, although the extension is completed by a company that buys out the mortgagor. *Hinchman v. Point, etc. Ry.*, 14 Wash. 349 (1896). The mortgagee's claim that lands standing in the names of directors belong to the company must be clearly proved. *Olcott v. Rice*, 69 Fed. Rep. 199 (1895). A stockholder's remedy to restore land to the corporation, he claiming that the land was sold under a mortgage which did not cover such land, is at law and not in equity, although he might have a receiver appointed to recover the land. *Knevals v. Florida, etc. R. R.*, 66 Fed. Rep. 224 (1894). Where in a foreclosure suit the receiver is given possession of land not covered by the mortgage, a judgment creditor having a lien on the land is entitled to have the receiver give up possession. *Scott v. Farmers' L. & T. Co.*, 69 Fed. Rep. 17 (1895). In *Gray v. Massachusetts Cent. R. R.*, 171 Mass. 116 (1898), the court construed liberally words describing the property covered by the lease.

Even though a mortgage covers only the property "used and intended for use" in connection with a rail-

road, yet it covers lots acquired for use in connection with the railroad. *Ruhlender v. Chesapeake, etc. R. R.*, 91 Fed. Rep. 5 (1898). A tract of land purchased by a railroad to divide into lots and sell to employees is not acquired for the "construction, equipment, and operation" of the road, and hence is not covered by a mortgage covering only property needed for such construction, equipment, or operation. *Aldridge v. Pardee*, 24 Tex. Civ. App. 254 (1900).

Where a right of way is deeded to a company it passes under a foreclosure of a mortgage given by the company. *Columbus, etc. Ry. v. Braden*, 110 Ind. 558 (1886). In *Mississippi it has been held*, in *Mississippi Valley Co. v. Chicago, etc. R. R.*, 58 Miss. 896 (1881), that a mortgage covering all land, property, etc., in use upon the railroad, or attached or appurtenant to it, "intending hereby to include all its present real and personal estate and franchises now owned or hereafter to be acquired, without any exception or reservation whatever," does not cover a hotel, storehouse, vacant lots, and a farm. A mortgage on the "main line" of an Arkansas railroad does not cover real estate, depots, etc., in Tennessee. 4 Cent. L. J. 430 (Tenn. 1877). Although the corporation purchases land *ultra vires*, and it does not come under the mortgage, yet if the mortgagee forecloses and sells all the property, including this land, and the legislature validates the foreclosure, the purchaser at the foreclosure sale takes title. *Youngman v. Elmira, etc. R. R.*, 65 Pa. St. 278 (1870). A mortgage by a Pennsylvania railroad corporation on all its railroad, etc., in Pennsylvania does not cover a right of way, road-bed, etc., owned by such corporation in the state of West Virginia. *Chapman v. Pittsburg, etc. R. R.*,

property clause. The court will strictly construe the language used in the mortgage, and will not apply it to such property as does not clearly come within the terms of the mortgage.¹

26 W. Va. 299 (1885). The mortgage given before the construction of the road covers the road, although there are variations from the original route as laid out. *Meyer v. Johnston*, 53 Ala. 237, 357 (1875). In *State v. Glenn*, 18 Nev. 34 (1883), the court held that a conveyance of "all rights, privileges, franchises, and property whatever, now belonging or hereafter to belong to or to be acquired by said party of the first part," covered only such property as was useful or necessary for the construction, maintenance, operation, preservation, repair, or security of the railroad mortgaged, and did not include certain land sixty feet away from the railroad. Rails temporarily laid down do not become fixtures. *Cayuga Ry. v. Niles*, 13 Hun, 170 (1878). In *Van Keuren v. Central R. R.*, 38 N. J. L. 165 (1875), the court held that where a railroad removed its tracks from a gravel pit which it had sold, it was a question for the jury to decide whether the tracks belonged to the land by being intended to remain there permanently, or was mere personalty by the intent to remove it. A mortgage on "all and singular the estate and property, real, personal, and mixed," of the company covers lands, whether those lands are used with the railroad or not. *Robinson v. Atlantic, etc. R. R.*, 66 Pa. St. 160 (1870). A mortgage may cover what equitable title a company has to land, even though it does not have the legal title. *Augusta, etc. R. R. v. Kittel*, 52 Fed. Rep. 63 (1892). For a case involving a mortgage covering a leasehold interest of the mortgagor, see *Vermont, etc. R. R. v. Vermont Cent. R. R.*, 34 Vt. 1, 46 (1861).

¹ Even though the bonds recite that the mortgage covers all after-acquired property, yet if the mortgage itself

covers only such after-acquired property as is connected with the railroad, the mortgage does not cover a hotel property not connected with the operation of the railroad, but does cover stock in another railroad subsequently purchased by the mortgagor, a lease of the railroad itself being taken at the same time. *Guaranty T. Co. v. Atlantic, etc. R. R.*, 132 Fed. Rep. 68 (1904). A mortgage covering property "now held or acquired" covers a branch line subsequently acquired. *Central Trust Co. v. Washington, etc. R. R.*, 124 Fed. Rep. 813 (1903). A mortgage on present property and property subsequently acquired attaches to land subsequently acquired in preference to second mortgages and subsequent judgment creditors. The covenant for further assurance operates as an equitable lien on property subsequently acquired. *Stevens v. Watson*, 4 Abb. App. Dec. 302 (1865). A mortgage covering after-acquired lands, "appurtenant or necessary" to the operation of the railroad, does not cover a congressional land-grant to the company (reviewing the cases). *New Orleans, etc. Ry. v. Parker*, 143 U. S. 42 (1892), reversing *Parker v. New Orleans, etc. R. R.*, 33 Fed. Rep. 693 (1888). The lower court held also that a forfeiture of the land by the government did not affect the mortgage. A mortgage covering property "acquired and to be acquired" attaches to real estate thereafter acquired, and is prior in right to judgments rendered against the company after the mortgage was given. *Bell v. Chicago, etc. R. R.*, 34 La. Ann. 785 (1882). In *Calhoun v. Memphis, etc. R. R.*, 2 Flap. 442 (1879); s. c., 4 Fed. Cas. 1045, the court held that a clause covering after-acquired property "belonging or appertaining to

The same rules apply also to personal property thereafter acquired by the mortgagor. If there is any doubt the court will resolve the doubt in favor of the unsecured creditors.¹ A mortgage

the said railroad" does not cover lands not used for railroad purposes; and the court proceeded to say that the after-acquired-property clause, though legal as regards property subsequently acquired for railroad purposes, yet will not be enforced as regards other property, but judgment creditors may levy upon and sell it. The company's contract right to purchase certain land is covered by a previous mortgage on present and subsequently-acquired property. The mortgagees may complete the contract by paying for and taking the land. *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114 (1862). A mortgage covering property subsequently acquired attaches to a land contract by which the company agrees to purchase certain land. Even though a consolidated road completes the purchase and improves the land, it is subject to the mortgage. *Hamlin v. European, etc. Ry.*, 72 Me. 83 (1881), referring to a prior decision, in which it was held that such a clause covered a subsequently acquired leasehold. A railway mortgage on after-acquired property does not attach to property purchased *ultra vires* of an opposition steamship line, in order to prevent competition. *Morgan v. Donovan*, 58 Ala. 241 (1877). A mortgage covering such after-acquired property as is "used or appropriated for the operating or maintaining" of the road does not attach to real estate acquired but not used for those purposes. *Walsh v. Barton*, 24 Ohio St. 28 (1873). The provision is liberally construed. *Little Rock, etc. Ry. v. Page*, 35 Ark. 304 (1880); *Buffalo, etc. R. R. v. Lampson*, 47 Barb. 533 (1867), where land in the name of a director being declared in trust for the corporation was held to be subject to a mortgage previously placed upon its property.

Where the company, upon the completion of its road, is to become entitled to transferable "certificates" or "land warrants" or "scrip" from the state, entitling the company to sixteen sections of land for every mile of road built, and the company, before any road is built, gives a mortgage on twelve out of every sixteen certificates, a *bona fide* purchaser of the certificates from the company is protected, even though he has purchased more than the extra four certificates for each mile. *Campbell v. Texas, etc. R. R.*, 2 Woods, 263 (1872); s. c., 4 Fed. Cas. 1188. Where the terms of the mortgage specify property used and occupied for railway purposes, it does not cover lands subsequently acquired, but not used for such purposes. *Seymour v. Canandaigua, etc. R. R.*, 25 Barb. 284 (1857). A mortgage on lands used with the railroad does not cover woodland seven miles away. *Dinsmore v. Racine, etc. R. R.*, 12 Wis. 649 (1860).

¹ A mortgage covering all property thereafter acquired by the company, together with improvements thereon, does not cover goods manufactured for sale. *Mallory v. Maryland Glass Co.*, 131 Fed. Rep. 111 (1904). Even though the bonds recite that the mortgage covers all after-acquired property, yet if the mortgage itself covers only such after-acquired property as is connected with the railroad, the mortgage does not cover a hotel property not connected with the operation of the railroad, but does cover stock in another railroad subsequently purchased by the mortgagor, a lease of the railroad itself being taken at the same time. *Guaranty T. Co. v. Atlantic, etc. R. R.*, 132 Fed. Rep. 68 (1904). Where the mortgage covers after-acquired property "connected with, or issuing from, or re-

covering an entire line of railroad is good as to the entire road, even though a part was not built at the time of the giving of the mortgage.¹

The word "railroad" may be construed to cover also land appertaining to" the existing property, it does not cover a railroad subsequently acquired, and it is immaterial that the directors, resolution authorizing the mortgage provided for its covering all subsequently acquired property. *Murray v. Farmville, etc. R. R.*, 101 Va. 262 (1903). A mortgage covering after-acquired property for use in mining does not cover property acquired but not so used. *Grape Creek Coal Co. v. Farmers' L. & T. Co.*, 63 Fed. Rep. 891 (1894). A mortgage covering all personal property, present and future, in connection with, and for use in developing and operating, coal mines and a railway, does not cover profits, proceeds, coal, coke, iron mined and manufactured, and open accounts. *Alabama Nat. Bank v. Mary Lee, etc. Co.*, 108 Ala. 288 (1896). A mortgage covering the personalty now in use or as hereafter "changed or removed" does not cover new machinery which did not replace old. Words of a general nature, followed by the words "consisting, among other things, of the following, to wit," are construed to include only articles of the same nature and kind as those specifically named. *Brainard v. Peck*, 34 Vt. 496 (1861). A mortgage covering property subsequently acquired by an extension does not cover wood subsequently acquired by the whole road. *Bath v. Miller*, 53 Me. 308 (1865). A mortgage covering personal property thereafter acquired, so far as the same "shall be used for operating" the road, does not cover railroad chairs which had not yet been used to fasten down the rails. Such a mortgage attaches to subsequently-acquired personalty upon possessions or a new instrument being given, but not to personalty not covered. *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207 (1860). If the mortgage does not expressly cover after-acquired property, the court will not extend its terms so as to cover slaves acquired subsequently (*State v. New Orleans, etc. R. R.*, 4 Rob. (La.) 231—1843), nor rails (*State v. Mexican, etc. Ry.*, 3 Rob. (La.) 513—1843). A mortgage by an electric light company covering after-acquired property covers wire purchased to string on the poles, although not yet so strung. *Met. T. Co. v. Dolgeville, etc. Co.*, 35 N. Y. Misc. Rep. 467 (1901). Where the after-acquired-property clause purports to but does not legally cover personal property, the fact that the receiver of the court takes possession of the personal property does not cause the mortgage to cover it on the ground of a reduction to possession, inasmuch as the possession of the receiver is the possession of the court. *Central T. Co. v. Worcester, etc. Co.*, 110 Fed. Rep. 491 (1901). The general provisions in a mortgage to the effect that the mortgage covers property owned by the mortgagor does not cover railway lines subsequently constructed, but may cover rolling-stock subsequently acquired, where such mortgage covers the income. *Louisville T. Co. v. Cincinnati, etc. Ry.*, 91 Fed. Rep. 699 (1897). A mortgage covering the railroad and "other materials used thereon" covers wood purchased for the use of the road. *Coe v. McBrown*, 22 Ind. 252 (1864). Also office furniture. *Raymond v. Clark*, 46 Conn. 129 (1878). And personal property which the mortgagee has taken possession of. *Buck v. Seymour*, 46 Conn. 156 (1878).

¹ *Central Trust Co. v. Chattanooga, etc. R. R.*, 89 Fed. Rep. 388 (1898).

purtenant thereto, and reasonably necessary for its present or future business. It may cover terminals.¹ Under "appurtenances," as used in mortgages of railways, is included all such property as is necessary for the use of the road and the enjoyment of its franchise.² A mortgage of a franchise giving the right to "construct, own, maintain, and operate" a certain water plant in process of construction carries with it such plant.³ Although a railroad mortgage covers a land grant, yet if the original grant was conditional, and the condition is broken, the mortgage bondholders have no legal or equitable claim on the lands.⁴ The mortgage is subject to the claims of a land-

1 *Knevals v. Florida, etc. R. R.*, 66 Fed. Rep. 224 (1894).

2 *Seymour v. Canandaigua, etc. R. R.*, 25 Barb. 285 (1857), holding that land with the erections thereon, which was essential to the use and enjoyment of a railroad, was subject to a mortgage upon the road, but that land not used by it for railroad purposes was not so subject; *Eldridge v. Smith*, 34 Vt. 484 (1861); *Calhoun v. Memphis, etc. R. R.*, 4 Fed. Cas. 1045 (1879); *Shamokin Valley, etc. R. R. v. Livermore*, 47 Pa. St. 465 (1864); *Parish v. Wheeler*, 22 N. Y. 494 (1860), holding that canal-boats used and run in connection with a road beyond its terminus were not included.

3 *Andrews v. National, etc. Works*, 76 Fed. Rep. 166 (1896); s. c., 77 Fed. Rep. 774 (1897).

4 *Farmers' etc. Co. v. Chicago, etc. Ry.*, 163 U. S. 31, 47 (1896). So also where the original grant was obtained by fraud. *United States v. Southern, etc. R. R.*, 117 Fed. Rep. 544 (1902). A grant of a railroad to a railroad company may be subject to a condition subsequent, which upon breach may enable the grantor to retake possession and title. *Schlesinger v. Kansas City, etc. Ry.*, 152 U. S. 444 (1894). Where in a charter granted by congress to a railroad corporation for a bridge, the right is retained to congress to alter, amend or repeal, and thereafter another act

of congress provides that such bridge shall be open for the use of other railroads on a reasonable compensation, and thereafter a mortgage given by the corporation is foreclosed, the purchaser takes the bridge subject to the obligation to allow other railroads to use the bridge, even though the mortgage was executed before the second statute was enacted. The court came to this conclusion without stopping to inquire whether the foreclosure and sale "was anything more than a reorganization under the form of a judicial proceeding," nor whether, if it were a *bona fide* sale to an independent third party, the sale took the property out of the jurisdiction of congress. *Union Pacific Co. v. Mason City Co.*, 199 U. S. 160 (1905). A criminal statute against disturbing a railroad applies to the land-owner who tears up the rails of a railroad passing over his land without authority. The court said: "His only justification for his acts was that he owned the land, and that, as the railroad company had failed to pay him the damages he had been awarded, he had a right to resume possession of it. Whatever the rights of the defendant might have been in an action to recover the land occupied by the railroad company, he had no right to take the law into his own hands, and proceed to tear up the railroad track." *Wichita, etc. Ry. v. Quinn*, 57 Kan. 737 (1897).

owner, whose land has been condemned or purchased, but not paid for.¹

¹ A person whose land is condemned has a lien prior to a mortgage. *Hobbs v. State Trust Co.*, 68 Fed. Rep. 618 (1895); *Central Trust Co. v. Louisville, etc. Ry.*, 81 Fed. Rep. 772 (1897). Judgment by a landowner against a railroad company for taking his land without condemnation proceedings is a claim prior in right to a mortgage given by the railroad. *Zimmerman v. Kansas City, etc. R. R.*, 144 Fed. Rep. 622 (1906). An assessment of damages for a right of way is prior to a mortgage lien. *Central, etc. Co. v. Grantham*, 143 Fed. Rep. 43 (1906). The owner of land taken by condemnation proceedings has a lien thereon, for the award, prior to a mortgage. *Southern Ry. Co. v. Gregg*, 101 Va. 308 (1903). Judgment by a land-owner against a railroad company for taking his land without condemnation proceedings is a claim prior in right to a mortgage given by the railroad. *Zimmerman v. Kansas City, etc. R. R.*, 144 Fed. Rep. 622 (1906). A purchaser at foreclosure sale is liable for money due on condemnation proceedings. Such a debt follows the property. This principle, however, does not sustain an agreement to give passes for life, it being shown that the purchaser did not know of such an agreement. *Missouri, etc. Ry. v. Henrie*, 5 Kan. App. 614 (1896). A mortgage of an electric company covering after-acquired property covers poles and wires erected on railroad property, as against a claim of the railroad company based on an agreement of the mortgagor. *Monmouth, etc. Co. v. Central R. R. etc.*, 54 Atl. Rep. 140 (N. J. 1903). Where a land-owner allows a railroad company to construct its road over his land, the company agreeing to pay the damages afterwards, the owner cannot revoke the right, but may collect the dam-

ages, and even though the railroad is foreclosed its successor must pay the damages. *Chicago, etc. Ry. v. Hall*, 135 Ind. 91 (1893). A purchaser at foreclosure sale takes the same subject to claims for right of way. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). The contract price for a right of way may be prior in right to a mortgage, and the court may direct a receiver to pay such contract price, although the contract is seven years old. *Wheeling, etc. Ry. v. Reymann, etc. Co.*, 90 Fed. Rep. 189 (1898). Damages for the destruction of a private right of way by the construction of a railroad are prior in right to a railway mortgage. *Central Trust Co. v. Hennen*, 90 Fed. Rep. 593 (1898). Even though a railroad acquires its right of way from a mortgagor and the mortgage is afterwards foreclosed, yet the purchaser at such foreclosure sale does not acquire title to the rails, ties, fish plates, etc., constituting a railroad. *Skinner v. Ft. Wayne, etc. R. R.*, 99 Fed. Rep. 465 (1900).

Where a company gives a mortgage on its whole line, but constructs only the middle section, and then another company constructs the two ends on a right of way procured by such latter company, the mortgage does not cover the two ends. On a foreclosure the court will not order a sale of the middle section alone, but of the whole, in order to preserve the system. *Chicago, etc. Ry. v. Loewenthal*, 93 Ill. 433 (1879). Where under the statute a railroad company condemns the whole of a canal and appropriates it for its roadbed, a mortgagee of the canal must bring suit to set the condemnation aside within the time fixed by the statute of limitations, or his rights will be barred, even though he charges fraud and that the railroad company controlled the canal com-

§ 857. *After-acquired real estate or personal property may be covered by the mortgage—Construction of the words used—Prior mortgages on property so acquired—Acquiring property through a “dummy” corporation—Purchase-money mortgages are prior in right.*—A corporation mortgage may cover property which is acquired by the corporation after the mortgage is given. This is now the well-established rule. It seems to be contrary to the common law, or at least is a wide extension of common-law rules. It is due, however, to the necessity or public policy of preserving intact and holding together the whole of a railroad or system of railroads and other quasi-public properties.¹ If the mortgage by its express terms covers not only the present property, but also all property acquired in the future by the corporation, the courts hold that such a mortgage becomes a lien on subsequently acquired property the moment it is acquired by the mort-

pany. *Carpenter v. Canal Co.*, 35 Ohio St. 307 (1880). Damages due to the owner of land from a railroad company which has taken the land for railroad purposes must be paid, and the foreclosure of an existing mortgage on the railroad gives no rights in such land except subject to such obligation to pay. *Western Pa. R. R. v. Johnson*, 59 Pa. St. 290 (1868). If a reorganized company uses such land it is liable for such damages. *Pfeifer v. Sheboygan*, etc. R. R., 18 Wis. 155 (1864). If the right of way is granted conditionally the mortgage is subject of course to the condition. *Ingalls v. Byers*, 94 Ind. 134 (1883). But where the company condemning the land gives a bond, the owner must resort to the bond and cannot pursue the purchaser upon foreclosure. *Fries v. Southern Pa. R. R.*, 85 Pa. St. 73 (1877). Where a railroad seizes land for its use and does not pay for it, damages recovered therefor are prior in right of payment to a prior mortgage covering after-acquired property. *Buffalo*, etc. R. R. *v. Harvey*, 107 Pa. St. 319 (1884). Damages obtained by abutting property owners against a railroad must be paid before the mortgage bonds, even though the mortgage was executed before the damages were ascertained. *Pennsylvania*, etc. Co. *v. Heiss*, 141 Ill. 35

(1892). A receiver may be ordered to pay damages assessed against the company for the condemnation of land. *Rome*, etc. R. R. *v. Sibert*, 97 Ala. 393 (1893). A judgment by an abutting property owner against a steam railroad constructed in the street is a lien on the road in the nature of a vendor's lien, and may be enforced by the appointment of a receiver. *Ball v. Maysville*, etc. R. R., 43 S. W. Rep. 731 (Ky. 1897). A claim for a right of way has priority over receiver's certificates. *Crosby v. Morristown*, etc. R. R., 42 S. W. Rep. 507 (Tenn. 1897). A person whose land is condemned has a lien prior to a mortgage. *Hobbs v. State Trust Co.*, 68 Fed. Rep. 618 (1895). A purchaser at foreclosure sale who continues to use land which has been condemned by the foreclosed company must pay the damages which had been awarded before foreclosure. *New York*, etc. R. R. *v. Hammond*, 132 Ind. 475 (1892).

¹ Quoted and approved in *In re Adamant Plaster Co.*, 137 Fed. Rep. 251 (1905). If the stockholders authorize a mortgage in such form and on such terms as the directors may approve, the directors may insert in it an after-acquired-property clause. *Cummings v. Consolidated*, etc. Co., 27 R. I. 195 (1905).

gagor corporation.¹ In New York it is held that the after-acquired-property clause of a chattel mortgage may not apply to shifting stock

¹ *Thompson v. White, etc. R. R.*, 132 U. S. 68 (1889); *Bear Lake Irr. Co. v. Garland*, 164 U. S. 1, 15 (1896); *Pennock v. Coe*, 23 How. 117 (1859); *Dunham v. Cincinnati, etc. Ry.*, 1 Wall. 254 (1863); *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 480 (1870); *U. S. v. New Orleans R. R.*, 12 Wall. 362 (1870); *Central Trust Co. v. Chattanooga, etc. R. R.*, 94 Fed. Rep. 275 (1899); *Shaw v. Bill*, 95 U. S. 11, 15 (1877); *Parker v. New Orleans, etc. R. R.*, 33 Fed. Rep. 693 (1888); *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881); *Williamson v. New Albany, etc. R. R.*, 1 Biss. 198 (1857); s. c., 30 Fed. Cas. 12; *Dunham v. Earl*, 8 Fed. Cas. 41 (1859); *Morrill v. Noyes*, 56 Me. 458 (1863); *Seymour v. Canandaigua, etc. R. R.*, 25 Barb. 284 (1857); *Stevens v. Buffalo, etc. R. R.*, 31 Barb. 590, 596 (1858); *Raymond v. Clark*, 46 Conn. 129 (1878); *Buck v. Seymour*, 46 Conn. 156 (1878); *Nichols v. Mase*, 94 N. Y. 160 (1883); *Philadelphia, etc. R. R. v. Woelpper*, 64 Pa. St. 366 (1870); *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857); *Meyer v. Johnston*, 53 Ala. 324 (1875); *Ludlow v. Hurd*, 1 Disney (Ohio), 552 (1857); *Coe v. McBrown*, 22 Ind. 252 (1864). See also *State v. Northern Cent. Ry.*, 18 Md. 193 (1861); *Pierce v. Emery*, 32 N. E. 484 (1856); *Howe v. Freeman*, 80 Mass. 566 (1860); *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372 (1847); *Stevens v. Watson*, 4 Abb. App. Dec. 302 (1865), holding that a mortgage of after-acquired property is valid as against the mortgagors, and those claiming under them, except purchasers for value without notice. If the company has power to mortgage, it may include after-acquired property in the mortgage. It will attach to cars, wheels, firewood, and coal as against judgment creditors, and equity will enjoin executions. *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857). A railroad mortgage may cover after-acquired property and may include a city lot adjacent to the main line and adapted to railroad use. *Pere Marquette R. R. v. Graham*, 136 Mich. 444 (1904). Although the vendor or mortgagor of personal property is left in charge to sell property, this is only presumptive and not conclusive evidence of fraud. *Preston v. Southwick*, 115 N. Y. 139 (1889). See also *Brackett v. Harvey*, 91 N. Y. 214 (1883). A chattel mortgage by a ship-building company on its ship-building materials with permission to use and replace the same is void. *In re Marine, etc. Co.*, 135 Fed. Rep. 921 (1905). See § 852, *supra*, on this subject. A mortgage covering after-acquired property attaches to land thereafter acquired and is prior in right to a mechanic's lien filed subsequently. *United States, etc. Co. v. Eastern Iron Co.*, 120 N. Y. App. Div. 679 (1907). A mortgage covering property to be acquired for railroad purposes does not cover land in which the railroad has an undivided half interest, because the railroad could not use for railroad purposes an undivided half interest. *Chicago, etc. Ry. v. Tice*, 83 N. E. Rep. 818 (Ill. 1908). A street railway mortgage covering after-acquired property covers steel rails, even though they have not been actually laid when a receiver takes possession. *Chalmers v. Littlefield*, 69 Atl. Rep. 100 (Me. 1907). An equitable assignment does not exist if the assignor has any control over the fund, any power to collect, or any power of revocation. An agreement to pay is not an equitable assignment. *Christmas v. Russell*, 14 Wall. 69 (1871). Where the company, upon the completion of its road, is to become en-

and material, nor to property not then in existence, excepting as

titled to transferrable "certificates" or "land warrants" or "scrip" from the state entitling the company to sixteen sections of land for every mile of road built, and the company, before any road is built, gives a mortgage on twelve out of every sixteen certificates, a *bona fide* purchaser of the certificates from the company is protected, even though he has purchased more than the extra four certificates for each mile. *Campbell v. Texas, etc. R. R.*, 2 Woods, 263 (1872); s. c., 4 Fed. Cas. 1188. Where the mortgage is given a date prior to the actual date when it is authorized and executed, it is a mortgage from the first named date as between mortgagor and mortgagee and will cover property acquired in the meantime if it contains the after-acquired-property clause. *Guaranty T. Co. v. Atlantic, etc. R. R.*, 138 Fed. Rep. 517 (1905). A cattle-company mortgage may cover subsequently-acquired property. *Frank v. Hicks*, 4 Wyo. 502 (1894). A gas company's mortgage may cover coal. *Hunt v. Memphis Gaslight Co.*, 95 Tenn. 136 (1895). A gas company's mortgage may cover after-acquired property, and attaches to tools and new material as fast as purchased. *New York Security, etc. Co. v. Saratoga Gas, etc. Co.*, 88 Hun, 569 (1895); *aff'd*, 157 N. Y. 689. In order to have the after-acquired-property clause take effect, the mortgagee must take physical possession of the property if chattels, and if a chose in action, must institute suit to subject it to the lien. *Medina, etc. Co. v. Buffalo, etc. Co.*, 119 N. Y. App. Div. 245 (1907). A mortgage on after-acquired property is good if the mortgagee takes possession before the rights of third persons intervene. *Allen v. Windham Co.*, 87 Fed. Rep. 786 (1898).

In Philadelphia, etc. R. R. *v. Woelper*, 64 Pa. St. 366 (1870), the court

held that a mortgage on property, etc., "now held or hereafter to be acquired," covered after-acquired rolling-stock, furniture, tools, and materials for support and repair of the road. Office furniture is covered by the after-acquired-property clause, and execution may be enjoined where the security is inadequate. *Ludlow v. Hurd*, 1 Disney (Ohio), 552 (1857). A mortgage covering property subsequently acquired by the company covers switches purchased by and delivered to the company, even though they are sold by the company before they are put into use. *Little Rock, etc. Ry. v. Page*, 35 Ark. 304 (1880). A mortgage covering "present and future to be acquired property" covers cast-off iron, etc., as against judgment creditors, although under another clause of the mortgage they may be sold by the company. If the property is insufficient to pay the mortgage debt, the sheriff is liable nominally only for failure to sell on execution, inasmuch as such sale would have had to be subject to the mortgage. *Coopers v. Wolf*, 15 Ohio St. 523 (1864). *Cf. Union T. Co. v. Morrison*, 125 U. S. 609 (1888), as to worn-out or discarded rolling-stock. As against a mortgage covering after-acquired property, an execution on old or new rails and chairs is not good, though they are not yet attached to the road. *Covey v. Pittsburg, etc. R. R.*, 3 Phila. 173 (1858). Where the trustee has not taken and does not seek to take possession of the road, he cannot replevy wood which has been levied on by creditors of the company. He must take possession of the whole road and property or none. *Coe v. Peacock*, 14 Ohio St. 187 (1863). The mortgage has priority over a subsequent mortgage specifically on rents and profits. *Thompson v. White, etc. R. R.*, 132 U. S. 68 (1889). A railroad mortgage may cover future property of the company. A subsequent mort-

between the mortgagor and mortgagee.¹ Whether a chattel mortgage may include after-acquired property is a local and not a federal question.² The rule that a mortgage may cover after-acquired property applies only to a quasi-public corporation.³

If the mortgage does not expressly cover subsequently-acquired

gage is subordinate thereto. *Pennock v. Coe*, 23 How. 117 (1859); *Whitney v. N. Y. etc. R. R.*, 32 Hun, 164 (1884), where stocks, etc. were involved. The clause covering after-acquired property makes the mortgage "a lien upon all property subsequently acquired by it [company] which comes within the description in the mortgage." It covers property of which the company acquires either the legal or equitable title. *Central T. Co. v. Kneeland*, 138 U. S. 414 (1891). After-acquired property may be covered by the mortgage. *Brady v. Johnson*, 75 Md. 445 (1893); *Stevens v. Watson*, 4 Abb. App. Dec. 302 (1865); *Benjamin v. Elmira*, etc. R. R., 49 Barb. 441 (1867); *aff'd*, 54 N. Y. 675 (1873); *Boston, etc. Co. v. Bankers'*, etc. Tel. Co., 36 Fed. Rep. 288 (1888). After-acquired property may be included in a telegraph mortgage. *United Lines Tel. Co. v. Boston, etc. Co.*, 147 U. S. 431 (1893). Power to mortgage gives power to mortgage subsequently-acquired property. *Philadelphia, etc. R. R. v. Woelpper*, 64 Pa. St. 366 (1870). A mortgage may be made to cover "future to be acquired property." It will take precedence over executions. *Butler v. Rahm*, 46 Md. 541 (1877). That the mortgage is legal, see also *Jessup v. Bridge*, 11 Iowa, 572 (1861); *Whitehead v. Vineyard*, 50 Mo. 30 (1872). A chattel mortgage in Connecticut cannot cover after-acquired personal property unless actual possession is taken of said property. *American, etc. Co. v. Worcester, etc. Co.*, 100 Fed. Rep. 40 (1900). See *Brainerd v. Peck*, 34 Vt. 496 (1861); and for the law under the Louisiana code, *State v. Mexican Gulf R. R.*, 3 Rob. (La.) 513 (1843). In Louisiana, by statute, a

mortgage cannot cover after-acquired property except such property as becomes part of the mortgaged line. A subsequent government land-grant is not covered by it. *New Orleans, etc. Ry. v. Union T. Co.*, 41 Fed. Rep. 717 (1890). But compare *New Orleans Pac. Ry. v. Parker*, 143 U. S. 42 (1892); also *Bell v. Chicago, etc. R. R.*, 34 La. Ann. 785 (1882).

A mortgage covering personal property subsequently acquired does not cover fuel, office furniture, materials for light, etc., until actual possession is taken or the mortgage is filed as a chattel mortgage with a detailed description of the personal property, as required by statute. *Hunt v. Bullock*, 23 Ill. 320 (1860). In *Mississippi Valley Co. v. Chicago, etc. R. R.*, 58 Miss. 896 (1881), the court said that a mortgage of "all property" now owned is valid, but a mortgage of "all property" hereafter acquired is void for uncertainty. In New York it is held that a mortgage covering after-acquired property does not cover after-acquired personal property as against the sheriff in possession on an execution before foreclosure is commenced. *Farmers' L. & T. Co. v. Long Beach, etc. Co.*, 27 Hun, 89 (1882). As to rails not yet laid, see *Weetjen v. St. Paul, etc. R. R.*, 4 Hun, 529 (1875). By express contract the wires of a telegraph line may be considered as personality and as not subject to a mortgage. *Western Union Tel. Co. v. Burlington, etc. R. R.*, 11 Fed. Rep. 1 (1882).

¹ *Zartman v. First, etc. Bank*, 189 N. Y. 267 (1907).

² *Thompson v. Fairbanks*, 196 U. S. 516 (1905).

³ *In re Adamant Plaster Co.*, 137 Fed. Rep. 251 (1905).

property it does not attach thereto except as such property becomes a fixture of the property actually mortgaged.¹ Hence, a levy of execution prior to the appointment of a receiver has a prior claim on the assets levied upon.² A mortgage on a railroad, executed prior to the completion of the road, covers it, although the route differs from that which was originally laid out.³ Where a railroad has a right of way, any railroad built thereon by a contractor is subject to a prior mortgage of the railroad containing the after-acquired-property clause.⁴ But where a corporation, after giving a mortgage covering existing and after-acquired property, which was duly recorded, placed poles and wires belonging to it on the land of another by agreement with him, the mortgage is a lien prior to any claim of the landowner.⁵ A provision in a mortgage that it shall cover subsequently-acquired property will subject to the mortgage new branch lines, additions, and extensions of the railroad; also new roads built and other lines of railroad purchased by the mortgagor corporation, and also depots and terminals.⁶ A mortgage on after-

1 *Davidson v. Westchester, etc. Co.*, 99 N. Y. 558 (1885). *Cf. Pierce v. Emery*, 32 N. H. 484 (1856), holding that railroad iron was covered as an accession. See also *Shamokin Valley R. R. v. Livermore*, 47 Pa. St. 469 (1864); *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857). A mortgage does not cover future-acquired property, unless clearly so stated. *Maxwell v. Wilmington, etc. Co.*, 77 Fed. Rep. 938 (1896).

2 *Van Steenberg v. Parsil, etc. Co.*, 34 Atl. Rep. 135 (N. J. 1896). An attachment prior to a receivership has priority over the receiver's rights. *Kittredge v. Osgood*, 161 Mass. 384 (1894). An attachment levied before a receiver is appointed takes title prior to that of the receiver. *Arnold v. Weimer*, 40 Neb. 216 (1894). A person attaching corporate assets before a receiver is appointed is not entitled to pay for his whole claim out of the receiver's funds, unless the property attached amounts to that much. *Glines v. Order of Iron Hall*, 21 N. Y. Supp. 736 (1893). A sale by the sheriff on an execution is not good if made after a receiver has been appointed.

The sale should be by the receiver. *Ellis v. Vernon, etc. Co.*, 4 Tex. Civ. App. 66 (1893).

3 *Meyer v. Johnston*, 53 Ala. 237, 331 (1875); *Elwell v. Grand St. etc. R. R.*, 67 Barb. 83 (1874). In *Willink v. Morris Canal, etc. Co.*, 4 N. J. Eq. 377 (1843), the court held that a mortgage on a canal, the route of which had been laid out, but the land not yet fully acquired, covered land and property subsequently acquired and used for the canal, although the mortgage did not expressly cover property subsequently acquired.

4 *Harris v. Youngstown Bridge Co.*, 90 Fed. Rep. 322 (1898).

5 *Monmouth County, etc. Co. v. Central R. R. etc.*, 54 Atl. Rep. 140 (N. J. 1903).

6 A mortgage covers the depots, termini, etc., as well as the track between the termini. A terminal mortgage, subsequent in time, is subject to it. Where the railroad furnishes the money to a "dummy" to purchase property, its mortgage attaches to that property. The scheme in this instance to place the terminal mortgage ahead of the prior general mortgage failed. *Central T. Co. v.*

acquired property covers property acquired by a consolidated company that is organized subsequently to the mortgage.¹ But as between a mortgage of a consolidated company and a mortgage of one of the constituent companies, both mortgages having an after-acquired-property clause, the mortgage of the latter does not attach to property acquired after the consolidation.² A mortgage of a gas company covering improvements and additions covers addi-

Kneeland, 138 U. S. 414 (1891). A mortgage covering after-acquired property covers the subsequently-constructed railroad as fast as work is put upon it. Though a subsequent mortgagee furnishes the money that builds the latter part of the railroad, yet the prior mortgagee has a first lien. *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870). A mortgage which covers after-acquired property covers a railroad which is subsequently purchased by the mortgagor, and which is used as a part of its charter route. *Branch v. Jesup*, 106 U. S. 468, 485 (1882). It is a question whether a mortgage on after-acquired property attaches to a railroad subsequently acquired without the consent of the stockholders as required by the charter. *Hodder v. Kentucky, etc. Ry.*, 7 Fed. Rep. 793 (1881). In *Alexandria, etc. Ry. v. Graham*, 31 Gratt. (Va.) 769 (1879), the court held that a mortgage covering all property, real and personal, "acquired, or which may be acquired, constructed, or to be constructed, of every species, nature, and kind whatsoever," did not cover an extension built under the charter as amended. A subsequently-constructed branch line is covered by the mortgage, even as against the contractor who built it. *Seymour v. Canandaigua, etc. R. R.*, 25 Barb. 284 (1857). A branch line constructed under a different charter and with different stockholders is not covered. *Meyer v. Johnston*, 53 Ala. 237, 331 (1875). A mortgage covering after-acquired real estate of a railroad "and other appurtenances

thereto belonging" covers a hotel erected by the company adjacent to the depot. *Omaha, etc. Ry. v. Wabash, etc. Ry.*, 108 Mo. 298 (1892). A street-railway mortgage covering subsequently-acquired property "for use or adapted to use" of the company covers pavilion grounds used in connection with the railway at its terminus. *California, etc. Co. v. Pauly*, 111 Cal. 122 (1896).

¹ *Compton v. Jesup*, 68 Fed. Rep. 263 (1895); *aff'd*, 167 U. S. 1 (1897); *Meyer v. Johnston*, 53 Ala. 237 (1875). A judgment that the after-acquired-property clause applies to a consolidated company into which the mortgagor is merged cannot be attacked collaterally. The remedy of a stockholder attacking the judgment is to intervene or after judgment to vacate it and be allowed to defend. *Drake v. New York, etc. Co.*, 36 N. Y. App. Div. 275 (1899).

² *New York, etc. T. Co. v. Louisville, etc. R. R.*, 102 Fed. Rep. 382 (1900). A stockholder's suit to vacate a foreclosure decree seven years after it was entered and three years after a decision that he was entitled to make the application, the property in the meantime having passed into *bona fide* hands, is too late, his claim being that he was a stockholder in a company that was consolidated with another company, and that the property of his corporation was sold on the foreclosure of a mortgage of the latter, which mortgage was executed prior to the consolidation. *Atlantic Trust Co. v. New York, etc. Co.*, 75 N. Y. App. Div. 354 (1902).

tions and franchises obtained from the city.¹ A mortgage covering after-acquired property covers an extension of a street railway.² A steam plant and motive power of a street railway is covered by a prior mortgage covering after-acquired property, even though the vendor of the plant stipulated that title should not pass until full payment.³ A right of way subsequently acquired is also covered by the mortgage.⁴ A mortgage of a water-works company covering extensions, additions and after-acquired property covers a new pumping station and a new source of supply.⁵

Land subsequently acquired by the company is covered by the mortgage, but in regard to this class of property the courts will not give a liberal construction to general words used in the mortgage. Hence, if the mortgage refers to property used for railroad purposes, land not so used is not covered. And in general the court will not subject outside lands or personal property to the mortgage unless the terms of the mortgage clearly cover them.⁶ A lease of a railroad to the mortgagor railroad after the mortgage is made comes under this clause and the mortgagee may carry out the lease or not, as he desires.⁷ The company's contract right to pur-

¹ *Lewis v. Weidenfeld*, 114 Mich. 581 (1897).

² *Front, etc. Ry. v. Drake*, 84 Fed. Rep. 257 (1897).

³ *Phoenix, etc. Co. v. N. Y. S. & T. Co.*, 83 Fed. Rep. 757 (1897). *Cf.* note 1, p. 2959.

⁴ Under the clause in a mortgage covering after-acquired property, the right of a railroad subsequently acquired from a city to build tracks on certain streets is covered by the mortgage. *Quincy v. Chicago, etc. R. R.*, 94 Ill. 537 (1880). A decree of foreclosure of an irrigation canal does not prevent the mortgagor from selling *pendente lite* to a party the right to construct another canal. The latter is not covered by the foreclosure of the former. Even the clause that after-acquired property shall be covered by the mortgage was held not to apply to such a case as this. *Mitchell v. Amador, etc. Co.*, 75 Cal. 464 (1888).

⁵ *New England, etc. Co. v. Farmers', etc. Co.*, 136 Fed. Rep. 521 (1905).

⁶ See § 856, *supra*.

⁷ *Barnard v. Norwich, etc. R. R.*, 2

Fed. Cas. 840 (1876). See also many cases in § 874, *infra*, where the receiver exercised his right to assume or refuse to assume such leases. A lease of a railroad to another railroad company is covered by an after-acquired-property clause in a mortgage given by the latter. *Columbia, etc. Trust Co. v. Kentucky Union Ry.*, 60 Fed. Rep. 794 (1894). A mortgage covering after-acquired property may cover a lease which the mortgagor takes of union depot facilities, and if the purchaser at the foreclosure sale continues to use those facilities he is liable for the rent according to the lease. *St. Joseph U. D. Co. v. Chicago, R. I. & P. Ry.*, 89 Fed. Rep. 648 (1898). A mortgagee or purchaser at the sale cannot enforce the covenants of a lease made subsequently to the mortgage, by which covenants the lessee was to make certain repairs; it being shown that the property without such repairs was as good as it would have been if the lease had not been made. *Grand Trunk Ry. v. Central Vermont R. R.*, 91 Fed. Rep. 696

chase certain land is covered by a previous mortgage on present and subsequently-acquired property. The mortgagee may complete the contract by paying for and taking the land.¹

Where there are liens existing upon property at the time when it is acquired by a corporation, which has given a mortgage on all its present and subsequently-acquired property, those liens are prior in right to the lien of the mortgage of the purchasing company.² But

¹ *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114 (1862); *Hamlin v. European*, etc. Ry., 72 Me. 83 (1881). Where a mortgage covers after-acquired property it attaches to a pumping plant thereafter established, even though the title to the pumping plant has not passed by reason of payment not having been made, and in selling the property as a whole the court may direct the purchase price of the plant to be first paid. *Washington T. Co. v. Morse Iron Works*, 187 N. Y. 307 (1907). See also cases in notes *infra*. The after-acquired-property clause attaches subject to all claims and equities against the property which afterwards come within the terms of the mortgage. So held as regards rolling-stock, although the contract of sale was not recorded as required by statute. *Newgass v. Atlantic*, etc. Ry., 56 Fed. Rep. 676 (1893).

² "The future-acquired-property clause of a railway mortgage attaches only to such property as the company owns or may thereafter acquire, subject to any liens under which it comes into possession of the company." *McGourkey v. Toledo*, etc. Ry., 146 U. S. 536 (1892); *U. S. v. New Orleans R. R.*, 12 Wall. 362 (1870). The after-acquired-property clause attaches subject to liens, encumbrances and equities on the property purchased by the corporation. *Farmers', etc. Co. v. Denver*, etc. R. R., 126 Fed. Rep. 46 (1903). Any liens or mortgages which are upon property subsequently acquired by the company have priority over a mortgage covering after-acquired property. *Williamson v. New*

Jersey, etc. R. R., 29 N. J. Eq. 311 (1878), *aff'g*, on this point, 28 N. J. Eq. 277; *Rand v. Wilmington*, etc. R. R., 11 Phila. 501 (U. S. C. C., 1876); *Branch v. Jesup*, 106 U. S. 468, 486 (1882). This question has arisen often in connection with cars sold or delivered conditionally to the company. Concerning these cases see § 855, *supra*. In regard to the claims of contractors, see § 860, *infra*. In general, see also *Boston*, etc. Tel. Co. *v. Bankers'*, etc. Tel. Co., 36 Fed. Rep. 288 (1888); *aff'd sub nom. United Lines Tel. Co. v. Boston*, etc. Co., 147 U. S. 431; *Western*, etc. Tel. Co. *v. Burlington*, etc. Ry, 11 Fed Rep. 1 (1882); *Willink v. Morris Canal*, etc. Co., 4 N. J. Eq. 377 (1843); *Branch v. Atlantic*, etc. R. R., 3 Woods, 481 (1879); s. c., 4 Fed. Cas. 12; *Galveston R. R. v. Cowdrey*, 11 Wall. 459 (1870); *Fox v. Seal*, 22 Wall. 424 (1874), involving a contractor's lien for construction; *Pierce v. Emery*, 32 N. H. 484 (1856), involving a government lien for duties upon rails; *Williamson v. New Jersey*, etc. R. R., 29 N. J. Eq. 311 (1878), holding also that a vendor to a corporation may avoid the sale for fraud as against the corporation and purchasers or mortgagees, unless they be such *bona fide* and for a valuable consideration; *Vermont*, etc. R. R. *v. Vermont Cent. R. R.*, 34 Vt. 1 (1861), holding the mortgage to be subject to the company's liability for rent on a railroad leased to it. The mortgagee cannot object to the validity of the lease. The bonded debt of a road consolidated with another may take precedence over a mortgage given by the consoli-

where one corporation is merely a "dummy" of another corporation, a mortgage on the property of the main corporation may attach to property of the former, even in priority to a new mortgage on the property of the "dummy."¹ This subject, however, of when and under what circumstances a court will ignore the corporate existence of a "dummy" corporation is considered elsewhere.² A mortgage attaches to land purchased by the company, even though the title to the land is conveyed to a naked trustee. A mortgage issued by the trustee on the land is subject to the old mortgages which cover after-acquired property, the company having taken open possession

dated road. *Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592 (1888). Stockholders cannot defeat a vendor's lien on the ground that the vendor, before they bought their stock, represented that he had no lien, where they do not set up that defense in a suit by him to establish his lien. *Wilson v. Seymour*, 76 Fed. Rep. 678 (1896). Where the equity of redemption of a mortgaged property is acquired by a corporation, the after-acquired-property clause of a previous mortgage applies to the equity so purchased, but if the proceeds of a subsequent mortgage given by the corporation are used to discharge such prior mortgage on the property purchased; such second mortgage must be repaid that amount before the after-acquired-property clause applies, it being a condition of the purchase that title should not pass until the vendor's lien was paid. The same rule applies to taxes paid from the proceeds of the second mortgage. *Farmers', etc. Co. v. Denver, etc. R. R.*, 126 Fed. Rep. 46 (1903).

1 *Central T. Co. v. Kneeland*, 138 U. S. 414 (1891). See also § 317, *supra*. Where the owner of all the stock of a water-works company organizes another company to build a new pumping station and a new source of supply, a mortgage of the first company covering extensions, additions and after-acquired property covers such new pumping station, it appearing that a portion of the mortgage bonds were reserved for such extension, and

the physical facts were visible to any person, and the provision in the mortgage, which was also open to public notice, made it evident that the mortgage necessarily included the new pumping station and mains. *New England, etc. Co. v. Farmers', etc. Co.*, 136 Fed. Rep. 521 (1905). Where a mortgage covers after-acquired property and the company does acquire such property, and instead of taking title causes the title to be transferred to a new corporation, all the stock of which is thereby acquired by the mortgagor, such stock is subject to the mortgage as against any personal claim of the trustee of the mortgage, even though the trustee of the mortgage has loaned money to the mortgagor with the stock pledged as collateral. *Guaranty T. Co. v. Atlantic, etc. R. R.*, 138 Fed. Rep. 517 (1905), rev'g on this point 132 Fed. Rep. 68. Where the mortgagor company constructs a branch road in the name of another company and then takes a lease of the property, the mortgagee acquires the leasehold right by reason of the clause covering after-acquired property. But a contract made by such lessor company with another company with the consent of the mortgagor lessee company, by which contract the third company had certain track privileges, is binding on the mortgagee. *Coe v. Delaware, etc. R. R.*, 34 N. J. Eq. 266 (1881).

2 See § 663, *supra*.

of the land and having executed the notes which the trustee's mortgage was given to secure.¹ Even though a corporation has executed a mortgage containing the after-acquired-property clause, yet if subsequently it makes additions to the property not contemplated when the mortgage was given, and the money for which additions was furnished by a third party under a contract by which the company before the conveyance of the property to it executed its bonds to such third person secured by mortgage on the property so obtained, this latter mortgage is a prior lien over such after-acquired property.² The after-acquired-property clause in a railroad mortgage covers equitable as well as legal rights, and interests subsequently acquired either by or for the railroad company, the mortgagor. Hence an uncompleted right of way is subject to the mortgage, even though acquired by a construction company which attempts to convey it to others.³ Where a mortgage covers after-acquired property and the

¹ *United States Rubber Co. v. American, etc. Co.*, 181 U. S. 434 (1901). In this case the court held, however, that where a railroad company wishes to purchase land, but, in order to do so, causes a third person to furnish the money and take a purchase-money mortgage, the priority of his mortgage is not affected by the fact that a construction company controlled by the bank gives a note in payment of the moneys advanced by him. The mortgage of an electric company covering after-acquired property covers the title to land subsequently acquired, even though there was no deed of the land to the corporation. *Monmouth, etc. Co. v. McKenna*, 68 N. J. Eq. 160 (1905).

In foreclosing the mortgagee may claim property which never stood in the name of the mortgagor, but stood in the name of an agent or trustee of the mortgagor. *Metropolitan Trust Co. etc. v. Columbus, etc. R. R.*, 93 Fed. Rep. 689 (1899). Where a construction company contracts to complete and deliver certain terminals, using the name of the railroad company to condemn, the contract reciting that such delivery is to be subject to a first mortgage on the terminal, this terminal mortgage is prior in

right to a prior first mortgage of the railroad company, even though the latter covered after-acquired property. *Harris v. Youngstown Bridge Co.*, 90 Fed. Rep. 322 (1898), the court, however, refusing to apply this rule to ordinances granted to the railroad company at the instance of the construction company.

A mortgage covering after-acquired property of an irrigation company does not cover property of another company subsequently organized by parties interested in the first company, even though the second company used the property of the first company. *Farm, etc. Co. v. Alta, etc. Co.*, 65 Pac. Rep. 22 (Colo. 1901).

² *Harris v. Youngstown Bridge Co.*, 90 Fed. Rep. 322 (1898), the property involved herein being additional terminals, the court saying that a mortgagee taking property under the after-acquired-property clause, is not a purchaser for value, and moreover that the mortgage attaches to the property in the condition in which the mortgagor acquires it and subject to all liens and equities against it arising from the act of purchase or acquisition.

³ *Wade v. Chicago, etc. R. R.*, 149 U. S. 327 (1893).

company thereafter acquires nearly the entire capital stock of another company, but the president of the former fraudulently causes such stock to be transferred to himself as security for an alleged debt and thereafter causes the stock to be sold for non-payment of the debt and buys it in himself, the court on a foreclosure of the mortgage will subject the stock to the mortgage.¹ Even though a statutory lien is not by the statute given priority over a prior mortgage, yet, where all the bonds are still held by the promoter, and the mechanic's lien should equitably have priority, the court will so decree.² Where one corporation owns all the stock of another corporation, the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company.³ A purchase-money mortgage has priority over a previous mortgage given by the purchasing company, even though such previous mortgage covered after-acquired property.⁴ If the property was fraudulently acquired, the vendor may rescind, even as against such a mortgagee.⁵ Even though

¹ Williamson v. N. J. Southern R. R., 26 N. J. Eq. 398 (1875); s. c., on appeal, 29 N. J. Eq. 311.

² Kilpatrick v. Kansas City, etc. R. R., 38 Neb. 620 (1894).

³ Central T. Co. v. Kneeland, 138 U. S. 414 (1891). See also § 317, *supra*.

⁴ U. S. v. New Orleans R. R., 12 Wall. 362 (1870). A railroad mortgage covering after-acquired property does not, in regard to land purchased by the company, give a lien prior in right to the vendor's purchase-money mortgage or lien. The latter has priority. As to after-acquired property the general mortgagee is not a purchaser for value. The purchaser at a foreclosure sale takes subject to such purchase-money lien. The fact that the suit therefor in the state court was abandoned, and proceedings taken in the federal court, is no waiver. Loomis v. Davenport, etc. R. R., 17 Fed. Rep. 301 (1882). A mortgage covering after-acquired property does not take precedence over a purchase-money chattel mortgage, although the latter is not recorded as required by statute. Frank v. Denver, etc. Ry., 23 Fed. Rep. 123 (1885). In Pierce v. St. Paul, etc. R. R., 24

Wis. 551 (1869), the court held that a grantor of a road-bed to the mortgagor could not set up a vendor's lien for purchase-money as against *bona fide* purchasers at foreclosure sale, where he did not intervene in the foreclosure suit. The clause in the mortgage covering subsequently-acquired property took precedence. In Taylor v. Burlington, etc. Ry., 23 Fed. Cas. 737 (1877), the court held that a mortgage covering after-acquired property attached to rolling-stock ahead of an unwritten and unrecorded contract by which the vendor was to retain title until he was paid, such a contract being void under the statutes of Iowa. See also Fisk v. Potter, 2 Abb. App. Dec. 138 (1865), where an agent of a corporation who had sold land to it was held to have waived his vendor's lien as against prior mortgagees. A purchase-money mortgage is good against a consolidation into which the purchasing company has been merged. Western N. C. R. R. v. Drew, 3 Woods, 691 (1879); s. c., 29 Fed. Cas. 744.

⁵ Where rolling-stock is acquired by fraudulent representations as to the bonds which are issued in payment therefore, the vendor may rescind, and

a mortgage is partly a purchase-money mortgage in that some of the bonds are issued in payment for a railroad which comes under the mortgage, yet the holders of such bonds are not entitled to priority over the other bonds.¹ The questions of when and to what extent a mortgage covering after-acquired property attaches to rolling-stock, personal property, income, etc., are considered elsewhere.²

§ 858. *Creditors of a railroad corporation are not allowed to levy an attachment or execution upon the railroad or parts of it, even subject to the mortgage.*—This rule is due to public policy. A railroad is valuable to the public when it is operated as a whole. It would lose this value if it was divided into many parts, as it would be, if it could be levied upon in portions under executions or attachments. Moreover, even if the execution were levied upon the whole, the question would arise as to who should operate the road after the levy and before the sale. Public policy requires that railroads should not be subject to executions. The creditors of the corporation, after judgment and execution returned unsatisfied, should be required to file a bill in equity for sequestration, if they desire to have the railroad or the equity of redemption sold.³

In some states, however, a contrary view of the law is taken, and in still other states the statutes provide that a railroad or the company's equity of redemption therein may be sold under levy of execution.⁴

§ 859. *Liens by statute, mechanics' liens, and judgment liens as affecting mortgages and receivers.*—The next source of danger and loss to railroad bondholders is the statutory lien law of the state in which the railroad is situated. The fact that railroad bonds to the full amount of the value of the railroad are generally issued in the inception of the enterprise, and the fact that these bonds are generally issued at less than par, has caused the legislatures to enact statutes giving lien rights for labor, supplies, construction work, and damages.

The ordinary mechanic's lien statute does not apply to railroads unless the statute expressly states that it shall,⁵ and the courts are not inclined to extend the application of lien statutes by a liberal construction.⁶

his rights are superior to those of a mortgage covering after-acquired property. *Williamson v. New Jersey*, etc. R. R., 29 N. J. Eq. 311 (1878), aff'g, on this point, 28 N. J. Eq. 277.

¹ *Murray v. Farmville*, etc. R. R., 101 Va. 262 (1903).

² See §§ 852, 854, *supra*.

³ See § 899, *infra*, and § 857, *supra*.

⁴ See § 899, *infra*.

⁵ *Buncombe County v. Tommey*, 115 U. S. 122 (1885).

⁶ *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. Rep. 436 (1887). A statutory lien for material, supplies, and labor does not give any lien for

Inasmuch as the liens now under consideration are created entirely by statute, and the statutes of each state are different from those of the other states, very few general rules can be deduced. Cases in which many of such lien statutes have been construed are given in the notes below.¹

money loaned to pay for them. Statutory liens are not assignable at law. The enforcement of a statutory lien cannot be in a court of law. It must be in a court of equity. *Cairo, etc. R. v. Fackney*, 78 Ill. 116 (1875). A mechanic's lien law applicable to railroads applies to a street railway. *Egan v. Cheshire, etc. Ry.*, 78 Conn. 291 (1905). The South Carolina mechanic's lien law relative to structures does not apply to railroads. *Greenwood, etc. Ry. v. Strang*, 77 Fed. Rep. 498 (1896). The general mechanic's lien law of Michigan does not apply to materials used in constructing a railroad. *Pennsylvania Steel Co. v. Potts Lumber Co.* 63 Fed. Rep. 11 (1894). The mechanic's lien law does not apply to a waterworks plant. *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264 (1894). A statute making judgments a lien ahead of railroad mortgages does not apply to street railways. *Manhattan Trust Co. v. Sioux City, etc. Ry.*, 68 Fed. Rep. 82 (1895). A street railway is not a railroad within the meaning of a judgment lien law enacted before there were any street railways in the state. *Fidelity L. & T. Co. v. Douglas*, 104 Iowa, 532 (1898). The Ohio mechanic's lien law applicable to railroads is not applicable to a street railway. *Massillon, etc. Co. v. Cambria, etc. Co.*, 59 Ohio St. 179 (1898). A mechanic's lien law applicable to railroads applies to a street railroad. *Montgomery v. Allen*, 107 Ky. 298 (1899).

¹ Concerning liens on railroads by reason of mechanic's lien laws, see 8 *Lawyers' Rep. Ann.* 700, note.

Alabama: The Alabama mechanic's lien statute authorizing a lien for an "improvement on land" gives a lien on coal cars and the coal mine for coal

cars furnished to such mine. *Central T. Co. v. Sheffield, etc. Ry.*, 42 Fed. Rep. 106 (1890).

Arkansas: Under the Arkansas statute, laborers, etc., materialmen, and persons having claims for loss or damage, not over a year old, are prior in right to mortgages, trusts, leases, etc. *Central T. Co. v. St. Louis, etc. Ry.*, 41 Fed. Rep. 551 (1890). A subcontractor has no lien under the Arkansas statute. *Tucker v. St. Louis, etc. Ry.*, 59 Ark. 81 (1894).

Colorado: The Colorado statute giving citizens of that state, as creditors of a foreign corporation, priority over a mortgage of the corporation, is strictly construed. *Brittle, etc. Co. v. Rust*, 10 Colo. App. 463 (1897).

Florida: A lien to those who perform labor on a railroad includes contractors under the Florida law. *Couper v. Gaboury*, 69 Fed. Rep. 7 (1895).

Georgia: The statute in Georgia giving a lien to contractors does not protect subcontractors. *Cartter v. Rome, etc. Co.*, 89 Ga. 158 (1892). A statute that employees of railroads may recover damages due to co-employees does not apply to employees of a receiver. *Henderson v. Walker*, 55 Ga. 481 (1875). See also *Sparks v. Dunbar*, 102 Ga. 129 (1897).

Illinois: The Illinois statute giving a lien on railroads renders a lien for rails good. Such lien is not waived by a special contract for a lien. A subsequent mortgage is subject to the lien. *Chicago, etc. R. R. v. Union, etc. Co.*, 109 U. S. 702 (1884). A subcontractor's lien in Illinois takes precedence over a mortgage given after the commencement of the work but before service of notice of the lien. *St. Louis, etc. R. R. v. Kerr*, 153 Ill. 182 (1894).

It is constitutional for the legislature to provide that the claims of certain employees and supply and material men to railroad, min-

Indiana: The laborer's lien is good, although he worked for a contractor, and the company has paid the contractor in full. *Indiana, etc. R. R. v. Larrew*, 130 Ind. 368 (1892). See also, as to the Indiana statute, *Midland Ry. v. Wilcox*, 122 Ind. 84 (1890). Concerning the Indiana lien law making the lien good, even though not yet filed, the time given by statute not having expired, see *Aurora Nat. Bank v. Black*, 129 Ind. 595 (1891). A contractor is not an "employee" entitled to a lien under the Indiana statute, and contractors for the construction of a telegraph company, like contractors for the construction of railroads, have no lien at common law ahead of a mortgagee. *Vane v. Newcombe*, 132 U. S. 220 (1889). A laborer is entitled to his lien under the statute, although the contractor was to take payment in bonds. It is sufficient to file the lien in one county. A mortgage given before construction, and for the purpose of constructing a railroad, is second to labor liens incurred in the construction. *Farmers' L. & T. Co. v. Canada, etc. Ry.*, 127 Ind. 250 (1891). As to a subcontractor's lien under the Indiana statute, see *Dean v. Reynolds*, 12 Ind. App. 97 (1895).

Iowa: A contractor's lien on a railroad under the Iowa statute will be upheld in accordance with the Iowa decisions. *Brooks v. Railway Co.*, 101 U. S. 443 (1879); *Meyer v. Hornby*, 101 U. S. 729 (1879). As to the Iowa lien on a terminal railroad and depot, see *Beach v. Wakefield*, 107 Iowa, 567 (1898). A contractor's lien under the Iowa statute is not waived by an agreement of the railroad to pay him out of certain municipal subscriptions. *Meyer v. Construction Co.*, 100 U. S. 457 (1879). A person entitled to a statutory mechanic's lien in Iowa on a railroad does not waive his right by

taking security therefor, not even though the security be bonds secured by a mortgage on a part of the railroad. The purchaser of a railroad at foreclosure sale is not affected by a mechanic's lien which is not filed until after the sale has taken place. *Hale v. Burlington, etc. R. R.*, 13 Fed. Rep. 203 (1881). The Iowa statute that a judgment for an injury to person or property shall be a lien prior to any mortgage is constitutional as regards mortgages made after the statute was enacted. *Central T. Co. v. Sloan*, 65 Iowa, 655 (1885). Concerning the Iowa mechanic's lien law, see also *Taylor v. Burlington, etc. R. R.*, 23 Fed. Cas. 737 (1877). As to a conflict between a landlord's statutory lien for rent and a mortgage in Iowa, see *Manhattan Trust Co. v. Sioux City, etc. Ry.*, 68 Fed. Rep. 72 (1895).

Kansas: A mechanic's lien statute is applicable to electric-light companies. *Badger Lumber Co. v. Marion, etc. Co.*, 48 Kan. 187 (1892). Where live-stock is killed just before the receiver is discharged and directed to turn over the property to the corporation, the corporation is liable under the Kansas statute making companies liable where they do not fence. *Kansas Pac. Ry. v. Wood*, 24 Kan. 619 (1880).

Kentucky: A lien for day labor on a Kentucky railroad is given by the act of March 27, 1888, but not of March 20, 1876. Where the lienor intervenes in the foreclosure suit he cannot obtain a personal judgment against the company. *Tod v. Kentucky, etc. Ry.*, 52 Fed. Rep. 241 (1892). The Kentucky statute giving a lien for labor and materials upon a railroad does not protect one who furnishes labor or materials under a contract with a subcontractor. *Central T. Co. v. Richmond, etc.*, 54 Fed. Rep. 723 (1892). Taking security does not waive the lien. As to a subcontract-

ing and manufacturing companies shall be liens prior in right to any mortgage, sale, or conveyance made subsequently to the en-

or's lien under the Kentucky statute, and its application where payment by the company was to be in bonds and stock, see *Central Trust Co. v. Richmond, etc. Ry.*, 68 Fed. Rep. 90 (1895); also *Richmond, etc. Constr. Co. v. Richmond, etc. R. R.*, 68 Fed. Rep. 105 (1895). As to the mechanic's lien in Kentucky, see *Waddy, etc. Co. v. Davis, etc. Co.*, 45 S. W. Rep. 895 (Ky. 1898). A contractor may obtain a mechanic's lien, even though the proceeds of such mortgage bonds as have been sold were paid over to the contractor to apply on his contract. *Montgomery v. Allen*, 107 Ky. 298 (1899).

Michigan: Concerning the lien law in Michigan giving a preference to labor claims, see *Re Clark*, 92 Mich. 351 (1892).

Minnesota: A statutory preference to servants and employees gives no preference to the secretary. *Wells v. Southern, etc. Ry.*, 1 Fed. Rep. 270 (1880). See, in regard to this point, § 215, *supra*.

Mississippi: In Mississippi, by statute, no mortgage on the income of a railroad shall have precedence over debts contracted in carrying on the business. *Farmers' L. & T. Co. v. Vicksburg, etc. R. R.*, 33 Fed. Rep. 778 (1888). As to a contractor's lien under the Mississippi statutes, see *Central T. Co. v. Georgia Pac. Ry.*, 83 Fed. Rep. 386 (1896).

Missouri: Illuminating and lubricating oils are not "material" entitled to a lien under the Missouri statute, nor are they entitled to an equitable lien prior to the mortgages, except so far as they were purchased after the company defaulted in its interest. *Central T. Co. v. Texas, etc. Ry.*, 23 Fed. Rep. 703 (1885). In *Central T. Co. v. Texas, etc. Ry.*, 27 Fed. Rep. 178 (1886), the court held that trucks, scales, etc., were not included in the

word "materials" as used in the railroad lien law giving a lien. The court said: "The word 'material,' in the railroad lien law, has no broader or other signification than in ordinary lien laws, and in them it is unquestioned that it includes only those things which pass into permanent structure." There is no equitable lien on the personal property which has passed into the hands of a receiver and been sold. In Missouri the lien attaches if the materials are furnished under an open and current account, if the last item of the account accrued subsequently to the time within which a lien could be filed. If a party is entitled to a lien on property in the hands of a receiver, he need not take the steps prescribed by statute, but may apply to the court appointing the receiver. *Central T. Co. v. Texas, etc. Ry.*, 23 Fed. Rep. 673 (1885). Where a contractor has filed one lien under the Missouri statute, he cannot file successive liens for the same labor and materials. He must abide by the first lien. *Battle v. McArthur*, 49 Fed. Rep. 715 (1891). In foreclosing the lien after the receiver is appointed, the receiver is the only necessary defendant. *Central, etc. Co. v. Chicago, etc. Co.*, 54 Fed. Rep. 598 (Mo. 1893). In regard to the application of the mechanic's lien law in Missouri to work done in instalments, see *Central Trust Co. v. Chicago, etc. Ry.*, 54 Fed. Rep. 598 (Mo. 1893). A mechanic's lien on a railroad in Missouri is lost if it is assigned before the account is filed. *O'Connor v. Current River L. R.*, 111 Mo. 185 (1892).

Montana: A managing agent and superintendent of trains who sometimes runs trains, etc., may have a lien for "work and labor," but a time-keeper cannot. *Gilchrist v. Helena, etc. R. R.*, 58 Fed. Rep. 708 (1893).

actment of the statute. Such an act may apply to corporations organized before the act so far as they give mortgages subsequently

A court of equity may enforce a statutory lien, even though the statute gives no remedy. A lien obtained in a state court may, in a proper case, be enforced in a federal court. *Gilchrist v. Helena*, etc. R. R., 58 Fed. Rep. 708 (1893).

Nebraska: The Nebraska mechanic's lien law is applicable to railroads. *Stewart*, etc. Co. v. *Missouri Pac. Ry.*, 28 Neb. 39 (1889); *Reynolds v. Manhattan T. Co.*, 83 Fed. Rep. 593 (1897).

New Jersey: Under the New Jersey statute the receiver must pay the rent due from the insolvent company, not exceeding one year's rent. *Wood v. McCardell*, etc. Co., 49 N. J. Eq. 433 (1892). An employee's lien under the New Jersey statute does not take precedence over a prior mortgage. *Hinkle v. Camden*, etc. Co., 47 N. J. Eq. 333 (1890); nor over the other liens, *Wright v. Wynockie*, etc. Co., 48 N. J. Eq. 29 (1891).

New York: A corporation is a "person" within the meaning of a lien law giving a lien to "persons." *Gaskell v. Beard*, 58 Hun, 101 (1890). Book-keepers, superintendents, and foremen paid by the month are not employees, operatives, and laborers entitled to prior payment under the New York statute. *Re Stryker*, 73 Hun, 327 (1893); *aff'd*, 158 N. Y. 526 (1899). As to whether a mechanic's lien is assignable, compare *Ogden v. Alexander*, 140 N. Y. 356 (1893).

North Carolina: In accordance with the North Carolina statute judgment creditors in actions in tort are given precedence over mortgages on the property of the corporation. *Guardian T. Co. v. Fisher*, 200 U. S. 57 (1906). The North Carolina lien law (*Battle's Rev.*, ch. 65) giving a lien on "any kind of property" for labor, etc., was held not to sustain a lien on a railroad. A mortgage takes precedence although made and recorded

after the contractor's debts were incurred. *Tommey v. Spartanburg*, etc. R. R., 7 Fed. Rep. 429 (1881). By statute in North Carolina damages due to injuries may have precedence over the mortgage. *Finance Co. v. Charleston*, etc. R. R., 61 Fed. Rep. 369 (1894). Priority of judgments for torts under the North Carolina statutes. *Boston*, etc. Trust Co. v. *Hudson*, 68 Fed. Rep. 758 (1895). As to the statutory provision in North Carolina giving a prior lien to labor claims, etc., see *Traders'*, etc. Bank v. *Lawrence*, etc. Co., 96 N. C. 298 (1887). Coal is material entitled to a lien ahead of a mortgage under the North Carolina statute. *Pocahontas*, etc. Co. v. *Henderson*, etc. Co., 118 N. C. 232 (1896).

Ohio: The Ohio statute gives no lien upon a railroad for materials used in its construction, and the general lien law gives no lien for an electric-lighting apparatus on the ground of its being for the erection of a house. *Industrial*, etc. Co. v. *Electrical Supply Co.*, 58 Fed. Rep. 732 (1893), holding also that where a bill is filed to enforce a statutory lien for the purpose of enabling one of the defendants to enjoin co-defendants by a cross-bill, and the claim of the complainant will necessarily result in less than \$2,000, the suit will be dismissed, holding also that the Ohio statute giving a lien against railroads for labor, etc., does not apply to a claim for an electric plant furnished to a hotel. Under the Ohio lien statute the contractor is not liable to the employees of the subcontractor, nor is the railroad company liable to the foreman of the subcontractor who furnishes supplies, but is liable under the statutory lien for work done. *Ferguson v. Despo*, 8 Ind. App. 523 (1893). See also, on the Ohio lien law, *Cleveland*, etc. Ry. v. *Knickerbocker Trust Co.*, 86 Fed.

to the act, and bondholders taking their bonds subsequently to the

Rep. 73 (1898); *Massillon, etc. Co. v. Cambria, etc. Co.*, 59 Ohio St. 179 (1898).

Oregon: The Oregon statute does not give employees priority in regard to the *corpus*. *Security, etc. Co. v. Goble, etc. R. R.*, 44 Oreg. 370 (1904). The lien law of Oregon on "structures" applies to railroads. *Giant P. Co. v. Oregon, etc. Ry.*, 42 Fed. Rep. 470 (1890). Under the Oregon statute an attaching creditor of the contractor takes precedence over a subcontractor who serves notice after the attachment was levied. *Coleman v. Oregonian R. R.*, 25 Oreg. 286 (1894).

Pennsylvania: A contractor's and workman's lien, under the Pennsylvania statute, against subsequent mortgages of a railroad, continues indefinitely, irrespective of sales, etc., of the railroad. It is not merged in a judgment obtained by the lienor. *Fox v. Seal*, 22 How. 424 (1874). In Pennsylvania a railroad contractor has a lien by statute on the property. *Newcastle, etc. Ry. v. Simpson*, 26 Fed. Rep. 133 (1886). A mechanic's lien cannot be levied on property necessary to the operation of the property of a quasi-public corporation. *Guest v. Merion Water Co.*, 142 Pa. St. 610 (1891).

South Dakota: See *Adams v. Grand Island, etc. Ry.*, 10 S. Dak. 239 (1897). Section 3111 of the Compiled Laws, imposing a liability on stockholders for labor claims in South Dakota, has been repealed by implication. *Busby v. Riley*, 6 S. Dak. 401 (1894).

Tennessee: A subcontractor's lien under the Tennessee statute is good only for the amount due to the contractor, and only after notice served upon the company. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). Where a subcontractor's lien is fraudulent by reason of collusion between the contractor and the company, the lien is not good. *Central Trust Co.*

v. Bridges, 57 Fed. Rep. 753 (1893). In respect to the Tennessee statute giving a lien for judgments for work and labor done and materials furnished in preference to mortgages or liens, see *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). The Tennessee statute against liens prior to labor and damage claims does not give such claims a lien ahead of an out-and-out *bona fide* sale of the property. *Chattanooga, etc. R. R. v. Evans*, 66 Fed. Rep. 809 (1895). A laborer may obtain a statutory lien in Tennessee on ore taken out after the mortgage was executed. *Galloway v. Blue, etc. Co.*, 37 S. W. Rep. 1016 (Tenn. 1896). A mechanic's lien on the plant of a gas company may be waived by taking bonds of the company as collateral security, where the bonds recite that they are a first mortgage. *Bristol, etc. Co. v. Bristol Gas, etc. Co.*, 99 Tenn. 371 (1897). A claim which under the Tennessee statute is prior to a mortgage may be lost if not presented under a general creditors' bill which has been filed. *Hill v. Southern Ry.*, 42 S. W. Rep. 888 (Tenn. 1897). See also, in general, *Baltimore T. & G. Co. v. Hofstetter*, 85 Fed. Rep. 75 (1898).

Texas: As to the Texas lien law applicable to railroads, see *St. Louis, etc. Ry. v. Mathews*, 75 Tex. 92 (1889). A subcontractor is not a mechanic, laborer, or operative. *Krakauer v. Locke*, 6 Tex. Civ. App. 446 (1894). A laborer for a contractor who furnishes ties has no lien under the Texas statute. *St. Louis, etc. Ry. v. Lyle*, 6 Tex. Civ. App. 753 (1894). *Giles v. Stanton*, 24 S. W. Rep. 556, as to a judgment being prior to a mortgage, was reversed in 86 Tex. 620 (1894). As to Texas statutes giving judgments a priority, see *Randolph v. Farmers' L. & T. Co.*, 91 Tex. 605 (1898). Receiver's certificates may be subordinate to a statutory lien of

act are bound by the act.¹ Liens created by statute are subject to prior mortgages on the property, unless the statute provides otherwise.² A statute creating a lien for laborers' wages cannot make

a connecting railroad for traffic balances due on an interchange in business. *International, etc. R. R. v. Coolidge*, 62 S. W. Rep. 1097 (Tex. 1901). Even though a receiver has been appointed, a creditor desiring a mechanic's lien must file the same as required by statute. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900).

Vermont: Stationery and printing are not "materials furnished to keep a road in repair and run same." *Bell v. St. Johnsbury, etc. R. R.*, 76 Vt. 42 (1903).

Virginia: The Virginia statutory lien does not protect mercantile creditors nor the president of the company. The time within which the lien must be filed is not suspended by the appointment of a receiver, but is suspended by a decree of reference to take an account of debts. *Seventh Nat. Bank v. Shenandoah, etc. Co.*, 35 Fed. Rep. 436 (1887). Medical services rendered to an employee are not "supplies" protected by a statutory lien. *Newgass v. Atlantic, etc. Ry.*, 56 Fed. Rep. 676 (1893). Under the Virginia act, where supplies are furnished at various times, the six months for filing the claim commence after the last instalment falls due. *Newgass v. Atlantic, etc. Ry.*, 56 Fed. Rep. 676 (1893). See also, in general, *Liberty, etc. Co. v. Furbush, etc. Co.*, 80 Fed. Rep. 631 (1897). The Virginia statute giving employees a lien ahead of mortgages does not apply to mortgages on property purchased by a corporation. *Furbush, etc. Co. v. Liberty Woolen Mills*, 81 Fed. Rep. 425 (1896). As to the mechanic's lien in Virginia, see *Frick Co. v. Norfolk, etc. R. R.*, 86 Fed. Rep. 725 (1898).

Washington: Under the Washington lien law, one who has furnished materials for the tracks of a street railway cannot claim a lien on the

power-house. A person selling materials to a contractor has no lien. *Pacific, etc. Co. v. James St. Const. Co.*, 68 Fed. Rep. 966 (1895).

West Virginia: The lien law in West Virginia does not apply to subcontractors. *Richardson v. Norfolk, etc. Co.*, 37 W. Va. 641 (1893). Where a contractor is prevented from completing his contract by the appointment of a receiver he may claim a statutory lien for work already done. *Wetzel, etc. Ry. v. Tennis Bros. Co.*, 145 Fed. Rep. 458 (1906).

¹ *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126 (1893), applying such a statute to a rolling-mill. A statute requiring corporations to pay their employees once a month, and giving the latter a lien prior to all liens, excepting recorded mortgages, is unconstitutional as being a grant of special privileges and as denying the corporation the equal protection of the laws, and as depriving them of their property without due process of law, in that such statute interferes with the freedom to make contracts. *Johnson v. Goodyear, etc. Co.*, 59 Pac. Rep. 304 (Cal. 1899). To same effect, *State v. Haun*, 61 Kan. 146 (1899), rev'g s. c., 7 Kan. App. 509 (1898).

² A mechanic's lien is second to a prior mortgage upon the property. *Toledo, etc. R. R. v. Hamilton*, 134 U. S. 296 (1890). An employee's lien under the New Jersey statute does not take precedence over a prior mortgage. *Hinkle v. Camden, etc. Co.*, 47 N. J. Eq. 333 (1890); nor over other liens, *Wright v. Wynockie Iron Co.*, 48 N. J. Eq. 29 (1891). Concerning a lien filed after a mortgage is recorded, but before subsequently-acquired property is actually acquired by the company, and whether the mortgage or lien prevails, see *Nelson v. Iowa, etc.*

such lien prior in right to a mortgage existing when the statute was passed.¹ But the legislature may subordinate future railroad mortgages to judgments for injuries, etc.² A mechanic's lien may have priority over mortgage bonds previously authorized, but subsequently issued to persons knowing of such mechanic's liens.³ A state statute giving a lien to a subcontractor irrespective of payment which the owner has made to the chief contractor is unconstitutional as interfering with the right to make contracts.⁴ A mechanic's lien may have priority over receiver's certificates.⁵ A statutory lien which is good against a lessee mining company is not good against a lessor mining company, even though the stockholders are substantially the same.⁶ A lienor may pay off a prior lien and succeed to the latter's rights.⁷ If a foreclosure is going on, the lienor may have his rights determined in that suit.⁸ A bondholder who buys prior liens on the

R. R., 8 Am. Ry. Rep. 82 (Iowa, 1875).

¹ *Williamson v. New Jersey Southern R. R.*, 28 N. J. Eq. 277, 300 (1877); *Coe v. New Jersey Mid. Ry.*, 31 N. J. Eq. 105, 128 (1879). The South Carolina statute that judgments for personal injuries shall have priority over mortgage bonds cannot apply to mortgages existing when the statute was passed. *Phinizz v. Augusta, etc. R. R.*, 63 Fed. Rep. 922 (1894).

² *East Tennessee, etc. Ry. v. Frazier*, 139 U. S. 288 (1891). A statute giving to creditor citizens of the state a lien on personal property of railroad companies thereafter organized to the extent of \$100 ahead of all mortgages is constitutional. At any rate, neither the company nor its receiver can contest the validity of the statute. *Brown v. Ohio Valley Ry.*, 79 Fed. Rep. 176 (1897). A statute making judgments a lien prior to mortgages is constitutional. *Gilchrist v. Helena, etc. R. R.*, 58 Fed. Rep. 708 (1893). A judgment for personal injuries, which by statute precedes all mortgages, precedes such, although the road is operated by a lessee and the injury occurred in another state, there being no statute releasing the lessor from liability.

Central T. Co. v. Charlotte, etc. R. R., 65 Fed. Rep. 257 (1894).

³ *Porch v. Agnew Co.*, 61 Atl. Rep. 721 (N. J. 1905).

⁴ *Jones v. Great Southern, etc. Co.*, 79 Fed. Rep. 477 (1897), reversed on another point in 177 U. S. 449.

⁵ *Gordon v. Newman*, 62 Fed. Rep. 686 (1894).

⁶ *United Mines Co. v. Hatcher*, 79 Fed. Rep. 517 (1897), rev'g *Hatcher v. United Leasing Co.*, 75 Fed. Rep. 368 (1896). See § 663, *supra*.

⁷ A subsequent lienor may pay off a prior lien and will be entitled to subrogation. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885).

⁸ Where a person is entitled to a statutory lien he may present it by petition in the foreclosure suit without complying with statutory requisites. If such liens exist in one state, claimants in other states having no lien law may present their claims and be entitled to a similar lien. *Blair v. St. Louis, etc. R. R.*, 19 Fed. Rep. 861 (1884). A person claiming a lien prior to a mortgage that is being foreclosed in the federal court may file a bill in that court to establish his rights, even though neither the complainant nor defendant is a resident of that district, and even though citizens of the same state appear as com-

property does so for the benefit of other bondholders, who, within a reasonable time after they know of such purchase, offer to contribute such part of the sum paid by him as the par value of the bonds held by the contributing bondholder bears towards all the bonds.¹

Even though by statute a contractor has a lien, yet a foreclosure thereof, without bringing in as a party defendant a subsequent mortgagee, does not affect the rights of such mortgagee.² Where a mechanic's lien is foreclosed without joining a subsequent mortgagee, and in a subsequent litigation the question of priority between the mechanic's lien and the mortgage arises, the court is free to adjudge priority to the mortgage.³ The mortgagee may redeem from a sale under a lien where the statutes of the state provide for such redemption.⁴

plainants and defendants. *McBee v. Marietta, etc. Ry.*, 48 Fed. Rep. 243 (1891). The trustee of the mortgage need not be joined in a lienholder's suit, where all the bondholders are before the court and the lien of the trust deed is not affected, and to join the trustee would oust jurisdiction. *Holly Mfg. Co. v. New Chester, etc. Co.*, 48 Fed. Rep. 879 (1891). A contractor's lien, prior in right and time to the issuing and recording of a mortgage, is not cut off by the foreclosure of the mortgage, unless the holder of the lien is made a party to the foreclosure suit. *Pittsburgh, etc. Ry. v. Marshall*, 85 Pa. St. 187 (1877). Pending suit the parties may agree that, if the lien which a party claims is sustained, the same shall be paid from the proceeds of the sale. *Vilas v. Page*, 106 N. Y. 439 (1887). Where the receiver is authorized by the court to settle or purchase an outstanding lien on a part of the road, and he agrees that the lien shall be paid from the proceeds arising from the sale of that part, and the foreclosure sale is made, not in parts, but as a whole, the court should order a resale unless the lien is paid. *Farmers', etc. T. Co. v. Newman*, 127 U. S. 649 (1888). The purchaser at a foreclosure sale subject to such liens as shall thereafter be decided cannot contest such liens after they have been

decided. *Swann v. Wright*, 110 U. S. 590 (1884). A lien is to be satisfied by a sale of the property in parcels in the inverse order of their alienation by the debtor. *Savings Bank v. Creswell*, 100 U. S. 630 (1879).

¹ *Booker v. Crocker*, 132 Fed. Rep. 7 (1904).

² *Fidelity, etc. Co. v. Schenley, etc. Ry.*, 189 Pa. St. 363 (1899).

³ *National, etc. v. Oconto, etc. Co.*, 183 U. S. 216 (1902). *Bona fide* purchasers of first-mortgage bonds issued by a reorganized company, which took the property after a foreclosure sale, are protected against a prior lien which the court in the foreclosure suit held to be valid, where the holder of such lien was the purchaser at foreclosure sale and conveyed the property to the new company in payment of the mortgage bonds and had diverted a part of the bonds from their proper purposes. *Venner v. Farmers' L. & T. Co.*, 90 Fed. Rep. 348 (1898).

⁴ Where a judgment creditor, having a lien by the Indiana statutes, sells the property by foreclosure at a price less than his judgment, another lien-holder may redeem by paying the price realized at such sale. Redemption by the judgment debtor would restore the lien for the unpaid balance of the judgment, but the rule as to redemption by other lien-holders

Where a lien exists on such part of a railroad as is in Ohio and not on a part in Indiana, and the road is sold as a whole without prejudice to such lien-holder's rights, the purchaser must pay such lien, or a resale of such part of the road as is in Ohio will be ordered.¹

Judgments by statutory enactments may be and often are made liens upon property.² Where a railroad is regularly sold under a

is different. *Porter v. Pittsburg Steel Co.*, 122 U. S. 267 (1887). *Of.* § 850, *supra*. In *Farmers' L. & T. Co. v. Forest Park, etc. R. R.*, 65 Fed. Rep. 882 (1895), a mortgagee who had not been made a party defendant in the foreclosure of mechanics' liens attempted to foreclose its mortgage and claim that the mechanic's lien foreclosure sale was subject to the mortgage. The mortgage was illegal when issued, because it exceeded the amount of the capital stock, in violation of the statute. Resolutions to increase the capital stock had been passed, but the papers had not been filed, nor the statutory fees to the state paid, until after the foreclosure of the mechanics' liens. The company had received nothing from the bonds. The purchasers at the first foreclosure sale had expended large sums of money. Speculators who long afterwards bought the bonds with knowledge of the facts bought the bonds for a small sum in order to bring this suit. The suit failed.

¹ *Compton v. Jesup*, 167 U. S. 1 (1897).

² Where a judgment creditor claims that his judgment is prior in right to a mortgage, the mortgagee may contest the validity of such judgment, he not having been a party to the suit leading to the judgment. *Central Trust Co. v. Hennen*, 90 Fed. Rep. 593 (1898). A statute giving priority to certain judgments for damages does not apply to judgments obtained against a lessee of a railroad. *Fidelity, etc. Co. v. Norfolk, etc. R. R.*, 90 Fed. Rep. 175 (1898). A statute giving a preference to judgments as

against the property of a judgment debtor does not give preference over a mortgage given by a lessor where the judgment was against the lessee. *Hampton v. Norfolk, etc. Ry.*, 127 Fed. Rep. 662 (1904). In California a judgment lien which is good for only two years unless an execution is levied within that time is lost, even though receivers are in charge, if during the two years the judgment lienors do not apply to the court for leave to levy such execution. *Savings, etc. Co. v. Bear, etc. Co.*, 89 Fed. Rep. 32 (1898). In North Carolina, by statute, a judgment for a tort has priority over a mortgage. *Wilmington, etc. Co. v. Burnett*, 123 N. C. 210 (1898). The Ohio statute that mortgages by railroads shall be subject to judgments for labor or materials or damages, etc., applies to a mortgage on a railroad in the state owned by a foreign corporation. *King v. Thompson*, 110 Fed. Rep. 319 (1901). A state statute giving a judgment for a tort a priority over a mortgage applies only to property in the state. *Fidelity, etc. Co. v. Norfolk, etc. R. R.*, 114 Fed. Rep. 389 (1902); *aff'd*, 127 Fed. Rep. 662. Where a street railroad has been sold out under a damage claim, which by statute has priority over a mortgage, and a state receiver is in charge, the mortgagee cannot have a receiver appointed by the federal court in an action to foreclose. *Lancaster v. Asheville St. Ry.*, 90 Fed. Rep. 129 (1898). Even though the entire amount of bonds provided for by the mortgage is never issued, yet the holders of the bonds which are issued are entitled to payment in

judgment which by statute is a lien, a mortgage executed subsequent to the obtaining of such judgment is wiped out by such sale, and, in addition to this, where the mortgagee waits thirty-one years before commencing suit, the suit will be dismissed.¹ A judgment recovered after the appointment of a receiver is not a lien upon the property.² Judgment creditors having a lien by statute are not necessary parties to a foreclosure suit, but if they are not joined their lien continues upon the equity of redemption.³

full before anything is paid to judgment creditors and other creditors. *East Tennessee, etc. Co. v. London, etc. Co.*, 60 S. W. Rep. 502 (Tenn. 1900). Where a mortgage is connected with a lease of property in such a manner as to obligate the lessee to apply the income to the interest and a sinking fund, but a foreclosure takes place, the lessee cannot stop the foreclosure, even though the lessee owns all the bonds, inasmuch as the stockholders of the mortgagor company have an interest in the suit. A stockholder will not be allowed to intervene so long as the trustee continues to prosecute the suit. *Phillips v. Southern, etc. R. R.*, 60 S. W. Rep. 941 (Ky. 1901). A judgment creditor of a railroad in a receiver's hands on a foreclosure suit will be allowed to intervene and file his claim of a lien, although technically his time to do so has passed. *Central T. Co. v. Wabash, etc. Ry.*, 27 Fed. Rep. 175 (1886). Where judgments are liens, the older judgment creditor may by bill in equity have the railroad sold without making the junior judgment creditor a party. The latter's right is to redeem. *Howard v. Railway Co.*, 101 U. S. 837 (1879). It seems that a docketed judgment in Georgia has a lien prior to a previous mortgage. *Gunn v. Plant*, 94 U. S. 664 (1876). A judgment creditor claiming a prior lien need not file a cross-bill, but may set up his facts by answer. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885). Under the reorganization statutes of Ohio, a judgment lien may take precedence of a prior mortgage

of the reorganized company. *Farmers', etc. Co. v. Cincinnati, etc. R. R.*, 5 Ry. & Corp. L. J. 380 (Cin. Sup. Ct. 1889). A sale by decree of a court of equity under a judgment lien created by statute in Wisconsin passes title. *Railroad Co. v. James*, 6 Wall. 750 (1867). Where judgments are liens, the one prior in time is prior in right. When enforced in equity without making the latter a party, the latter judgment creditor may redeem. An execution sale on the second judgment gave no priority over the first judgment. *Howard v. Milwaukee, etc. Ry.*, 7 Biss. 73 (1875); s. c., 12 Fed. Cas. 645. A judgment, as a lien, becomes such only when judgment is obtained before foreclosure. *Burlington, etc. R. R. v. Verry*, 48 Iowa, 458 (1878); *White v. Keokuk, etc. R. R.*, 52 Iowa, 97 (1879).

¹ *Gunnison v. Chicago, etc. Ry.*, 117 Fed. Rep. 629 (1902); aff'd, 130 Fed. Rep. 259, being the same transaction as was involved in *James v. Railroad Co.*, 6 Wall. 752 (1867). Such a sale under a judgment carries the franchise as well as the property.

² *Mercantile Trust Co. v. Southern, etc. Co.*, 86 Fed. Rep. 711 (1898). A judgment obtained after a receiver is appointed is not a lien upon the real estate. *Savings & T. Co. etc. v. Bear Valley, etc. Co.*, 93 Fed. Rep. 339 (1899).

³ *Sioux, etc. Co. v. Trust Co.*, 82 Fed. Rep. 124 (1897); aff'd, 173 U. S. 99 (1899). See also § 844, *supra*. Creditors preferred by statute may not be shut out by reason of a foreclosure suit of which they had no legal no-

Questions relative to a conflict of jurisdiction between the state and federal courts are considered elsewhere.¹

§ 860. *Claims by contract and contractors—Contractor's lien by contract or possession—Fixtures—Taxes—Advances made to keep the company afloat—Damages to persons and property—General debts existing when foreclosure is commenced—How far the mortgage is affected as to its priority.*—When foreclosure of a railroad mortgage is commenced, the unsecured creditors seek at once by every means to obtain payment in preference to the mortgage bondholders, inasmuch as the property is generally insufficient to pay the latter, and the former get nothing. Hence the books are full of cases where the general creditors have sought to obtain payment. They have almost uniformly failed.

An unknown or unrecorded lien or equity in the property is cut off by the mortgage, the same as by a deed.²

Fixtures, being a part of the real estate, are of course subject to the mortgage. But there has been a vast amount of litigation to determine what are and what are not fixtures or accessions to the real estate. Machinery which is firmly attached to the building and is necessary to its character and use as a factory is a fixture, but portable articles or machines not so attached, or belting or shafting, which may be removed without disturbing the building, are not fixtures.³

tice. *Bell v. St. Johnsbury, etc. R. R.*, 76 Vt. 42 (1903). Where a judgment against a railroad is obtained in 1857 creating a lien thereon, and subsequently a mortgage is executed, which is subsequently foreclosed, and thereafter the property is again sold on execution based on the judgment, and the purchaser at the latter sale enters into possession and keeps possession for upwards of thirty years, the ten years' statute of limitations applies to the title acquired on the foreclosure sale. *Gunnison v. Chicago, etc. Ry.*, 130 Fed. Rep. 259 (1904).

1 See § 839, *supra*.

2 The trustees and bondholders without notice are *bona fide* purchasers to the extent of cutting off a claim against the mortgagor by a vendor, that the latter, in conveying to the mortgagor, made a mistake as to boundaries. *Western, etc. Co. v. Pey-*

tona, etc. Coal Co., 8 W. Va. 406, 441 (1875).

3 *In re Welch*, 108 Fed. Rep. 367 (1901). Electric lighting apparatus attached to property that has already been mortgaged does not become a part of the realty. *New York, etc. Co. v. Allison*, 107 Fed. Rep. 179 (1901). Where the owner of a majority of the stock of a corporation affixes chairs, curtains, etc., in an opera house owned by the corporation, they become fixtures and pass on an execution sale of the opera house, even though he affixed them without obligation or pay, but solely for his own benefit as a stockholder. *Murray v. Bender*, 125 Fed. Rep. 705 (1903). If the mortgage debt is fully paid, chattel improvements added by a purchaser of the equity of redemption may be removed by such purchaser, and will not go to the purchaser at

Railroad rails and ties may or may not be additions to the real estate, according to the circumstances of the case.¹

foreclosure sale. *Georgetown Water Co. v. Fidelity, etc. Co.*, 117 Ky. 325 (1904). Machinery and appliances annexed to a building as a part of the means to carry on its business may be fixtures, as between the mortgagor and mortgagee, even though they may be severed without injury and used elsewhere, and the building devoted to a different use. *Knickerbocker T. Co. v. Penn, etc. Co.*, 66 N. J. Eq. 305 (1904). A dynamo which is screwed to timbers spiked to the floor, although it is sufficiently heavy not to require such fastening, becomes a fixture, and the mortgagee has a claim on it prior to that of the vendor who delivered it on a contract whereby rent was to be paid and such rent was to apply on the purchase price. *Gunderson v. Swarthout*, 104 Wis. 186 (1899). As to whether machines become a part of the real estate subject to a mortgage depends on three things: (1) Actual annexation of some kind; (2) application to the uses to which the real estate has been applied; (3) annexation with the intent that they should become a permanent accession to real. Hence, even though machinery for the manufacture of cordage is fastened to the floors by adjustable attachments, in order to hold them in their place, yet if they can be removed without injury to the machines or to the building they are personal property and do not come under the real-estate mortgage. *Knickerbocker T. Co. v. Penn. etc. Co.*, 62 N. J. Eq. 624 (1901). Although a mortgage does not by its terms cover property subsequently acquired, yet it covers subsequent improvements, extensions, additions, etc., these being considered by the court as fixtures added to the property. *Wood v. Whelen*, 93 Ill. 153 (1879). Where the lessee of a street railway places upon the poles a feed wire for

its own convenience, and not in lieu of other equipment, the mortgagee of the lessor cannot claim a lien on such wire. *Kansas, etc. Co. v. Electric Ry. etc. Co.*, 116 Fed. Rep. 904 (1902). A mortgage on real estate and personal property covers the latter if recorded in the real-estate record, especially where the personal property consists of machinery and it was the intent that it should become a part of the real estate. *In re Goldville, etc. Co.*, 118 Fed. Rep. 892 (1902); *aff'd*, 122 Fed. Rep. 569.

1 Even though a railroad acquires its right of way from a mortgagor and the mortgage is afterwards foreclosed, yet the purchaser at such foreclosure sale does not acquire title to the rails, ties, fish-plates, etc., constituting a railroad. *Skinner v. Ft. Wayne, etc. R. R.*, 99 Fed. Rep. 465 (1900). Where, in a foreclosure suit and sale, the court has included rails and ties laid by the railroad on the land of another person, and has retained jurisdiction of the case to adjudicate adverse claims, the owner of such land cannot commence suit in a state court to recover damages for the removal of such rails and ties. The federal court will enjoin such suit in the state court. *Mercantile, etc. Co. v. Roanoke, etc. Ry.*, 109 Fed. Rep. 3 (1901). In *Pierce v. Emery*, 32 N. H. 484 (1856), the court held that subsequently-acquired personal property, such as railroad iron, became subject to the mortgage as an accession, even though there was no clause covering such subsequently-acquired personalty. A mortgage not purporting to cover after-acquired materials, except as they became a part of the road, does not cover railroad chairs not yet attached to the road, but a subsequent mortgage may be the first lien on them, even though such second mortgage refers to and

By statute taxes are generally a lien ahead of all other liens, except judicial costs.¹

affirms the first mortgage, in terms broader than the first mortgage and broad enough to cover the materials. *Farmers' L. & T. Co. v. Bank of Racine*, 15 Wis. 424 (1862). Rails which have been laid are covered by the mortgage as a part of the realty. *U. S. v. New Orleans R. R.*, 12 Wall. 362 (1870), unless there is some equity to the contrary. In Massachusetts the rails and ties of a street railway are personal property, because a street railway does not own the right of way in the manner that a steam railroad owns its right of way. Hence a contractor who by his contract retains title until he is paid may until so paid claim title, even as against a *bona fide* mortgagee of the street railway, and may sue for conversion if possession is refused. *Lorain, etc. Co. v. Norfolk, etc. Ry.*, 187 Mass. 500 (1905).

¹ Taxes are prior in right to all claims except judicial costs. Where a sale is made free from all claims, past-due taxes must be paid out of the earnings of the receiver or out of the proceeds of the sale. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). The legality of a tax sale, after the execution of a mortgage, may be contested in the foreclosure of the mortgage. *Appleton, etc. Co. v. Central Trust Co. etc.*, 93 Fed. Rep. 286 (1899). The holder of a tax lien on lands owned by a corporation may enforce his lien even though the corporation passes into the hands of a receiver, and he need not present his claim to the receiver. *Rice v. Jerome*, 97 Fed. Rep. 719 (1899). A person paying taxes on mortgaged property at the request of the mortgagor may have a lien prior to the mortgage. *Farmers' L. & T. Co. v. Stuttgart & A. R. R.*, 92 Fed. Rep. 246 (1899). The lien of the state for taxes is ahead of all other liens, except those for judicial costs. The

court will not allow a sale of parts of the property for taxes, but will see to it that on the final distribution the taxes are paid first. *Georgia v. Atlantic, etc. R. R.*, 3 Woods, 434 (1879); s. c., 10 Fed. Cas. 243. The New Jersey statute giving state taxes a preference in winding up an insolvent New Jersey corporation will not be enforced in North Carolina, in reference to a New Jersey corporation. *Holshouser Co. v. Gold Hill, etc. Co.*, 138 N. C. 248 (1905). A Massachusetts franchise tax is not a claim preferred to a mortgage. *Loring v. American, etc. Co.*, 138 Fed. Rep. 600 (1905). Taxes paid during the year will be apportioned among two sets of creditors, where one set was entitled to the income for a part of the year only. *Atlantic T. Co. v. Dana*, 128 Fed. Rep. 209 (1903). Bondholders are not bound by a decision against the corporation relative to taxation, the bonds having been issued before the decision, and no one representing them being a party to the suit. *Wicomie, etc. v. Bancroft*, 135 Fed. Rep. 977 (1905); rev'd on another ground in 203 U. S. 112. Persons advancing money to keep a street railway in operation, and for taxes, after it has become insolvent, have no preference over the mortgage, the trustee not having taken possession, and there having been no diversion of income to the bondholders, but money so advanced at the request of the trustee after the trustee takes possession may have priority over the mortgage. *Mersick v. Hartford, etc. Co.*, 76 Conn. 11 (1903). The state holding a policy of insurance of an insolvent insurance company has no preference over other creditors. *State v. Williams*, 101 Md. 529 (1905). The New Jersey yearly license fee or tax of one-tenth of one per cent. of the capital stock of corporations is a preferred claim even

Property in the receiver's hands cannot be sold for taxes except with the consent of the court.¹ Where a receiver is in charge of railroad property the court may enjoin the collection of taxes.²

But a tax upon personal property of a corporation in the hands of a receiver is not usually a lien ahead of other claims, unless the statute expressly makes it a lien.³ Such also is the rule as to pay-

though the corporation is in the hands of a receiver at the time when the tax accrues. *Duryea v. American, etc. Co.*, 133 Fed. Rep. 329 (1904). The court will order the receiver to pay the taxes upon the property in the receiver's hands. *Central T. Co. v. New York, etc. R. R.*, 110 N. Y. 250 (1888); *State v. Railroad Com'rs*, 41 N. J. L. 235 (1879); *Walters v. Western, etc. R. R.*, 68 Fed. Rep. 1002 (1895). Property in the hands of a receiver of a federal court cannot be reached by proceedings for the collection of state taxes, without the consent of such court. *Oakes v. Myers*, 68 Fed. Rep. 807 (1895). Poor rates and district rates do not have precedence over debentures after a receiver is appointed. *Richards v. Overseers*, [1896] 2 Ch. 212. Taxes are entitled to priority, but the tax collector must apply to the court instead of levying on the property. *Ledoux v. La Bee*, 83 Fed. Rep. 761 (1897).

¹ *Virginia, etc. Co. v. Bristol Land Co.*, 88 Fed. Rep. 134 (1898). Land may be sold for taxes due the state, even though a receiver has been ordered to take possession of it. *Metcalfe v. Commonwealth, etc. Co.'s Receiver*, 68 S. W. Rep. 1100 (Ky. 1902).

² *Clark v. McGhee*, 87 Fed. Rep. 789 (1898). Where a receiver appointed by a federal court is in possession of the property, even a tax collector cannot levy upon the property under state process. The tax collector must apply to the federal court. *Re Tyler*, 149 U. S. 164 (1893). Lands in the hands of a federal receiver cannot be sold for taxes. *Burleigh v. Chehalis County*, 75 Fed. Rep. 873 (1896). Tax collectors may levy on the property,

even though it is in the hands of receivers. *Stevens v. New York, etc. R. R.*, 13 Blatchf. 104 (1875); s. c., 23 Fed. Cas. 21. A receiver of an insolvent bank is not liable for taxes assessed on its capital stock before insolvency. *Hewitt v. Traders' Bank*, 18 Wash. 326 (1897). Where taxes are two years overdue, the court should direct the receiver, if there is no other means of paying them, to sell sufficient of the property to pay them. *Dysart v. Brown*, 100 Ga. 1 (1896).

³ *Wise v. Wise Co.*, 153 N. Y. 507 (1897). A receiver of an insolvent corporation should not pay city taxes assessed after the commencement of the suit, inasmuch as the status of all claims is fixed at that date. *In re United, etc. Co.*, 22 R. I. 108 (1900). A receiver of an insolvent bank is not liable for taxes assessed on its capital stock before insolvency. *Hewitt v. Traders' Bank*, 18 Wash. 326 (1897). Even though a mortgage deed of trust covers the personal property as well as the real estate, yet taxes subsequently assessed on the personal property are a lien prior to the mortgage where the statute expressly makes such taxes a lien. *State of Minnesota v. Central Trust Co. etc.*, 94 Fed. Rep. 244 (1899). A franchise tax levied after a corporation passes into the hands of a receiver does not participate in the assets unless all creditors are paid. *Crews v. U. S. etc. Co.*, 57 N. J. Eq. 357 (1899). But in *In re United States, etc. Co.*, 60 N. J. Eq. 514 (1899), the court held that in New Jersey the annual tax on a corporation must be paid by the receiver, even though it was imposed after the receiver was appointed. A franchise

ing assessments and bonds to cities where the statutes are silent as to their being a prior lien.¹

The contractor who constructs the road has no lien on the road. The fact that he has possession does not give him a lien. The statutes may give him a lien, as shown above. Or the company itself may by contract give him a lien, and so long as he continues in possession under such a contract lien, this lien may be good as against subsequent mortgages, but is not good as against mortgages prior to such contract. There has been a great deal of litigation on these rights of a contractor.²

tax levied during a receivership does not have preference over the receiver's allowance and the expenses of winding up the business. *Chesapeake, etc. Ry. v. Atlantic, etc. Co.*, 62 N. J. Eq. 751 (1901). As to whether a receiver will be ordered to pay the annual tax of one-tenth of one per cent. of the capital stock, see *Re George Mather's Sons' Co.*, 52 N. J. Eq. 607 (1894).

¹ Where a street railway is being foreclosed, the city has no lien for the expense of grading and macadamizing between the rails, and the receiver will not be ordered to pay it. *Union L. & T. Co. v. Southern Cal. etc. Co.*, 49 Fed. Rep. 267 (1892). A bond given by a street railroad to the city in regard to damages is not a lien, and upon foreclosure of a mortgage on the road the city will not be allowed to become a party. *Farmers' L. & T. Co. v. New Rochelle, etc. Ry.*, 57 Hun, 376 (1890); *aff'd*, 126 N. Y. 624. Where the charter of a street railway company requires it to do certain paving, any mortgage given by the company is subject to that provision, and materialmen who furnish paving material have a lien prior to such mortgage. *Cambria, etc. Co. v. Union, etc. Co.*, 154 Ind. 291 (1899). Paving assessments have no priority over a mortgage except for paving finished at the time of the recording of the mortgage or contemplated at that time. *City of Lincoln v. Lincoln St. Ry.*, 93 N. W. Rep. 766 (Neb.

1903). An assessment for paving is not a tax, and hence a two years' statute of limitations may apply to it as against a mortgage of a street railway. *City of Galveston v. Guaranty, etc. Co.*, 107 Fed. Rep. 325 (1901). A mortgage given by a street railway may have precedence over a liability to the city for paving. *Provisional Municipality v. Northrup*, 66 Fed. Rep. 689 (1895). In *Houston City St. Ry. v. Storrie*, 44 S. W. Rep. 693 (Tex. 1898), it was held that the lien of the city for paving was subject to a prior mortgage on the property.

² *Dunham v. Cincinnati, etc. Ry.*, 1 Wall. 254 (1863); *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 480 (1870). A contractor's lien for construction work does not exist merely because he still has possession of the work. Ambiguous words in the contract, such as entitled to the earnings "during construction" and "until accepted," give no lien. *Wright v. Kentucky, etc. Ry.*, 117 U. S. 72 (1886). Where a contractor is in possession of a railroad and holding it until paid therefor, and is forcibly ejected by the company, he may recover possession by action of forcible entry and detainer. *Iron Mountain, etc. R. R. v. Johnson*, 119 U. S. 608 (1887). "Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being

The creditors of a railroad corporation have no claim to come in ahead of the bondholders after foreclosure is commenced, even though

unaffected by a prior mortgage given by a railroad company covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company." A mortgage takes precedence over a contract giving a lien on a bridge. *Porter v. Pittsburg Steel Co.*, 122 U. S. 267 (1887); s. c., 120 U. S. 649 (1887). There is no lien for construction work done for a water-works company. *Wood v. Guarantee, etc. Co.*, 128 U. S. 416 (1888). The special lien of contractors is subordinate to an old general mortgage covering after-acquired property. *Thompson v. White, etc. R. R.*, 132 U. S. 68 (1889). A contractor is not entitled to priority for work done before the receivership. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). A contractor constructing a telegraph line has no lien thereon, although he retains possession. A contractor has no lien under the Indiana statute giving a lien to employees. *Bankers', etc. Tel. Co. v. Bankers', etc. Tel. Co.*, 27 Fed. Rep. 536 (1886). By claiming a mechanic's lien under the statute a person waives any common-law lien. Giving up possession gives up any common-law lien. There can be no common-law lien on real estate. *Vane v. Newcombe*, 132 U. S. 220 (1889). A contractor has no rights prior to holders of receivers' certificates secured by a mortgage on the property. *Postal, etc. Co. v. Vane*, 80 Fed. Rep. 961 (1897). After a mortgage has been recorded, the corporation cannot by contract give to a contractor a lien prior to the mortgage on property upon which such con-

tractor thereafter constructs a wharf. Contractors cannot obtain a prior lien even though they retain possession. *Toledo, etc. R. R. v. Hamilton*, 134 U. S. 296 (1890). A contractor and constructor of a railroad is given no lien in priority to the mortgage on the theory that he gave value to the mortgage and created the property. *Toledo, etc. R. R. v. Hamilton*, 134 U. S. 296 (1890). Contractors and creditors whose debts were created for money, labor, or materials used in the improvement acquire no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. *Hollister v. Stewart*, 111 N. Y. 644, 663 (1889). A contractor cannot claim a lien as against a mortgage duly made before the contract. *Reed's Appeal*, 122 Pa. St. 565 (1888). A contractor's right of possession of the road by contract and of the profits until the road is completed is waived in favor of a mortgage subsequent in time, where the contractor has taken and sold many of the bonds secured by it, and the mortgage provides for possession by the trustee in case of default. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. Although a receiver has been directed to carry out unfulfilled contracts of the corporation, yet this does not give the contractor a lien on the corporate assets for the part of the contract that is already fulfilled. *Olyphant v. St. Louis, etc. Co.*, 28 Fed. Rep. 729 (1884). A provision in a mortgage that the proceeds from the bonds shall be expended only upon the assent of one of the trustees does not give a construction contractor a lien upon such proceeds, although the trustee assented to the contract. *Dillon v. Barnard*, 21 Wall. 430 (1874), aff'g 1 Holmes, 386; s. c., 7 Fed. Cas. 714. A subcontractor has no lien on the bonds

such creditors advanced the money which enabled the company to continue business.¹ A surety on a bond to stay execution on a judg-

with which the contractor was to be paid. *Coe v. East, etc. R. R.*, 52 Fed. Rep. 531 (1892). Where a contractor taking stock and bonds in payment for work subcontracts the work for the stock and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock. *McLane v. King*, 144 U. S. 260 (1892). See also 2 Cent. L. J. 111, 729, 739, 772, 838; *Jessup v. Atlantic, etc. R. R.*, 3 Woods, 441 (1879); s. c., 13 Fed. Cas. 573. Where a contractor to construct a railroad owns all the stock and bonds for which he is to build the railroad, and he buys material and pays therefor in bonds, a chattel mortgage which he individually gives to a director of the company on the engines and cars which he turns over to the railroad company is not prior in right to the mortgage bonds of the company, even though such chattel mortgage was recorded. *Flanagan Bank v. Graham*, 71 Pac. Rep. 137 (Oreg. 1903). A construction company in possession of a road and operating it may give a mortgage on the rolling-stock before turning the road over to the railroad company. *Hardin v. Iowa, etc. Co.*, 78 Iowa, 726 (1889). Contractors' claims for work performed, whether performed before or after the mortgage was given, are second to the mortgage. *Tommey v. Spartanburg, etc. R. R.*, 4 Hughes, 640 (1881); s. c., 7 Fed. Rep. 429.

1 Even though a bank loans money to a failing corporation to enable it to pay the interest on its bonds and to keep the company afloat, yet the bank is not thereby entitled to share in the final assets on a parity with the mortgage bondholders. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 148 N. Y. 315 (1896). Persons advancing money to keep a street railway in operation and for taxes after it has

become insolvent have no preference over the mortgage, the trustee not having taken possession, and there having been no diversion of income to the bondholders, but money so advanced at the request of the trustee after the trustee takes possession may have priority over the mortgage. *Mersick v. Hartford, etc. Co.*, 76 Conn. 11 (1903). A city which has loaned funds to a railroad in order to complete it cannot claim payment in preference to mortgage bondholders. *Farmers' L. & T. Co. v. Logansville, etc. Ry.*, 4 Fed. Rep. 184 (1880). The mere fact that money loaned to a railroad corporation was expended in payment of interest on its first-mortgage bonds or of operating expenses does not entitle the lender to preference over the first-mortgage bonds by way of subrogation, or on the ground of superior equities. *Morgan's, etc. Co. v. Texas, etc. Ry.*, 137 U. S. 171 (1890). *Cf. Atkins v. Petersburg R. R.*, 3 Hughes, 307; s. c., 2 Fed. Cas. 90 (1879); *Farmers' L. & T. Co. v. Vicksburg, etc. R. R.*, 33 Fed. Rep. 778 (1888). See also *Blair v. St. Louis, etc. R. R.*, 23 Fed. Rep. 521 (1885). Where a bank loans a large sum of money to a railroad just before the latter is foreclosed, the bank comes in as a general creditor only. *Penn. v. Calhoun*, 121 U. S. 251 (1887); *Kelly v. Receiver*, 5 Fed. Rep. 846 (1881). A person advancing money to keep the company afloat has no priority. *Re Regents', etc. Co.*, L. R. 3 Ch. D. 411 (1875). A person advancing money to an insolvent corporation to continue its business does not thereby become personally liable to a person furnishing material to a corporation. *Perkins v. Huntington*, 19 N. Y. Supp. 71 (1892). No preference is allowed to a bank advancing money to a failing corporation. *Farmers', etc. Bank v. Waco, etc. Co.*, 36

ment obtained before the receivership has no priority over the mortgage bondholders.¹

The mortgage is not affected by contracts of the mortgagor made after the mortgage was given. This is necessarily the rule. Otherwise the mortgagor would be in a position to barter away all the rights of the mortgagee. The mortgagee is not bound by subsequent contracts of the mortgagor, whether those contracts are leases, sales, mortgages, guaranties, traffic contracts, or debts.² Nor is the

S. W. Rep. 131 (Tex. 1896). A stockholder who has advanced money for the improvement of real estate which the corporation has purchased on a land contract cannot prevent the vendor of the land rescinding the land contract by legal proceedings for non-payment. *Collins Park, etc. R. R. v. Short Elec. Ry.*, 25 S. E. Rep. 929 (Ga. 1895). A creditor obtaining judgment after a receiver is appointed has no preference, even though he advances money to keep the institution running. *Cowan v. Pennsylvania, etc. Co.*, 184 Pa. St. 1 (1898). A bank advancing money to pay interest on debentures is not subrogated to such debentures, even though the company is at that time insolvent. *Re Wrexham, etc. Ry.*, [1898] 2 Ch. 663; [1899] 1 Ch. 205; *aff'd*, [1899] 1 Ch. 440. Creditors who, after a receiver has been appointed, advance money in compromise of a claim against the corporation and take notes of the company for the money so advanced, are not entitled to a preference therefor. *Maxwell v. Wilmington, etc. Co.*, 101 Fed. Rep. 852 (1900). A person advancing money to pay interest is not entitled to a preference. *Illinois T. & S. Bank v. Ottumwa Elec. Ry.*, 89 Fed. Rep. 235 (1898). A person who loans money to pay the interest is not subrogated to the rights of the coupons so paid. *Illinois, etc. Bank v. Doud*, 105 Fed. Rep. 123 (1900). Money loaned to pay coupons has no preference over the bonds. *Contracting, etc. Co. v. Continental T. Co.*, 108 Fed. Rep. 1 (1900). Even though one railroad company advances money to

build a railroad of another company, yet the holder of notes of the former has no lien on the latter, although the money realized from such notes was the money advanced to the latter. *Farmers' L. & T. Co. v. Stuttgart & A. R. R.*, 92 Fed. Rep. 246 (1899). A person advancing money to an electric light company to enable it to erect its plant to fulfill its contract may be entitled to a preference over a mortgage. *Illinois T. & S. Bank v. Ottumwa Elec. Ry.*, 89 Fed. Rep. 235 (1898).

¹ *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 68 Fed. Rep. 36 (1895); *Blair v. St. Louis, etc. R. R.*, 23 Fed. Rep. 523 (1885). A surety on an appeal bond given before foreclosure is commenced does not come in ahead of the mortgage. *Whiteley v. Central Trust Co.*, 76 Fed. Rep. 74 (1896). Neither a judgment against the company for personal injury nor a bondsmen on appeal therefrom has any priority. *New York, etc. T. Co. v. Louisville, etc. R. R.*, 79 Fed. Rep. 386 (1897). But a surety who enables the receiver to preserve the property will be paid before the bondholders. *Union T. Co. v. Morrison*, 125 U. S. 591 (1888). In *Jones v. Central Trust Co.*, 73 Fed. Rep. 568 (1896), where a party had become surety on a bond in order to protect the corporate property, the court allowed his claim to come in as a preferred claim. And see *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 71 Fed. Rep. 245 (1895), allowing such a claim in behalf of a surety.

² The mortgagee coming in by su-

mortgage subject to the contracts existing prior to the mortgage, except in cases where the mortgage is in fraud of creditors or is

perior title takes the subject of his mortgage clear of all obligations contracted by the mortgagor, whether personal to himself or relating to his management of the property. *Ellis v. Boston, etc. R. R.*, 107 Mass. 36 (1871). The seller of locomotives who is partly paid and takes the remainder in indorsed notes of the company has no lien for such notes prior to the mortgage. *Continental T. Co. etc. v. Toledo, etc. R. R.*, 93 Fed. Rep. 532 (1899). Supplies have no preference unless there was a diversion of income to the benefit of the mortgagee. A claim for damages for breach of contract is not entitled to a preference. Rentals of locomotives and expenses of maintaining joint offices are not entitled to preference unless there has been a diversion of profits. A general claim has no priority over a mortgage except to the extent that the net income has been diverted to the benefit of the mortgagee after the claim was incurred. *Fordyce v. Omaha, etc. R. R.*, 145 Fed. Rep. 544 (1906). A contract whereby a mortgagor company guarantees a certain income to a bridge company does not bind the mortgagee, the guaranty having been made after the mortgage was given. Nor does it bind a mortgagee whose mortgage was subsequent to the date when the guaranty was made. *Newport, etc. Co. v. Douglass*, 12 Bush (Ky.), 673, 712 (1877). The mortgagee does not, by failing to commence foreclosure as soon as there is default, thereby enable all debts incurred after such default to come in ahead of the mortgage. *Blair v. St. Louis, etc. R. R.*, 22 Fed. Rep. 471 (1884). Damages for breach of a contract by a railroad to continue a switch does not take precedence of a mortgage. *Central T. Co. v. Wabash, etc. Ry.*, 32 Fed. Rep. 566 (1887). Where a receiver has gone into pos-

session, an employee having a long-time contract of employment is entitled to damages, and the amount will be ascertained by the court's directing an issue to be tried. *Spader v. Mural, etc. Co.*, 47 N. J. Eq. 18 (1890). A traffic contract containing a provision that for a breach thereof the other party shall have a lien for damages on the railroad, its equipment, and income, is not a lien running with the land. It is good as between the parties, but does not bind third persons into whose hands the property has passed, mortgagee or lessee. It does not convey any title or secure any particular sum of money. *Des Moines, etc. R. R. v. Wabash, etc. Ry.*, 135 U. S. 576 (1890). An agreement of a railroad with an express company to do certain things, for which the latter loans the former a sum of money, gives no precedent lien over a mortgage. *Express Co. v. Railroad Co.*, 99 U. S. 191 (1878). The contract price of steel, part of which had been delivered when the receiver was appointed, has no priority. *Olyphant v. St. Louis, etc. Co.*, 28 Fed. Rep. 729 (1886). To same effect on breach of contract in regard to a switch-line. *Central T. Co. v. Wabash, etc. Ry.*, 32 Fed. Rep. 566 (1887). See also § 890, *infra*. A lease of the railroad by the mortgagor, subsequently to the mortgage, does not prevent foreclosure of the equity of redemption and of the leasehold interest. *Hale v. Nashua, etc. R. R.*, 60 N. H. 333 (1880). In *Elmira, etc. Co. v. Erie Ry.*, 26 N. J. Eq. 284 (1875), the receiver cut off the contract right of another company to run its cars over the receiver's tracks, such company being in arrears of rent and having been notified of the receiver's intention. A reorganized company, after a strict foreclosure, is not liable on the contracts of the old

taken with notice of prior liens, or is a mortgage given in certain cases where one corporation buys out another.¹ An assignment by

company. *Sullivan v. Portland, etc. R. R.*, 94 U. S. 806 (1876). A lien created by contract has no priority over a mortgage or statutory lien. *Richmond, etc. Co. v. Richmond, etc. R. R.*, 68 Fed. Rep. 105 (1895). In *State v. Quintard*, 80 Fed. Rep. 829 (1897), the court held that a traffic contract with the state was binding upon the purchaser at the foreclosure sale, such purchaser being the reorganization committee. Contracts made by a creditor after the execution of a mortgage are not binding upon a purchaser of the property at foreclosure sale. *Sherwood v. Atlantic, etc. R. R.*, 94 Va. 291 (1897). A contract giving a lien on future earnings of an electric-light plant is more of an executory contract than a vested lien, and consequently a receiver is not bound by such a contract giving such a lien, and may compel future payments to the receiver. *General Elec. Co. v. Whitney*, 74 Fed. Rep. 664 (1896). In the case *Sammons v. Kearney, etc. Co.*, 110 N. W. Rep. 308 (Neb. 1906), it was held that a mortgage of an irrigation company does not take precedence over a usual contract of such company for supplying water to a person, and that the foreclosure sale should be made subject to such contract, the income from such contract, however, to go to the purchaser. A person claiming water rights from a company may file a bill against the company and its mortgagee to have those rights established and may join the bondholders as defendants. *Howe & Davidson Co. v. Haugan*, 140 Fed. Rep. 182 (1904).

¹ Mortgagees of a railroad are chargeable with notice of contracts which the deed of the road to the railroad company expressly refers to and is subject to. *Central T. Co. v. Wabash, etc. Ry.*, 29 Fed. Rep. 546 (1886). A creditor of a corporation

owning an uncompleted railroad cannot claim a lien thereon prior to that of the mortgage of a subsequent corporation which purchased the road, when there never was any record evidence of any lien, and the subsequent corporation had no actual notice of the claim. *Blair v. St. Louis, etc. R. R.*, 27 Fed. Rep. 176 (1886). A covenant in a lease that damages for a breach thereof, etc., shall be a lien upon the railroad is not a lien or obligation running with the land. *Des Moines, etc. Co. v. Wabash Ry.*, 135 U. S. 576 (1890). A claim against one company, which is assumed by another company upon the latter company buying out the former, is not to be paid out of the assets of the latter company in preference to a mortgage upon all of its property. *Fogg v. Blair*, 133 U. S. 534 (1890). Concerning this last principle of law, see ch. XI, *supra*. A mortgage is a first lien ahead of a lease, even though they were executed at the same time, it being shown that the mortgage became due ten years before the lease was to expire and that the lease provided for the execution of the mortgage. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899). Where a lease gives to the lessor thirty per cent. of the gross earnings, this thirty per cent. is not a rental or a mere obligation to pay, but is impressed with the trust, and having been made payable to the bondholders of the lessor they may collect it from the receiver of the lessee. *Terre Haute, etc. R. R. v. Cox*, 102 Fed. Rep. 825 (1900). Money deposited in a bank on a day when it closes its doors, it being hopelessly insolvent, may be recovered back from the receiver on the ground of fraud. *Richardson v. New Orleans, etc. Co.*, 102 Fed. Rep. 780 (1900); *Richardson v. New Orleans, etc. Co.*, 102 Fed. Rep. 785

a corporation of moneys to be earned by it in the future, under a contract to manufacture machinery, is not enforceable as regards moneys earned after a receiver was appointed.¹ A mortgage by a purchasing company takes precedence over an order of the selling company to pay a certain amount of money out of the sale of the bonds of the selling company.² A trustee has no right to personally loan money to the mortgagor and claim a first lien on property, which

(1900). A receiver of a national bank may be ordered to repay school district funds which had been received by it as a special deposit to pay bonds, even though the bank, as a matter of fact mingled such deposits with its general funds, it appearing that the bank had no power to receive such funds as an ordinary deposit. *Merchants', etc. Bank v. School Dist. etc.*, 94 Fed. Rep. 705 (1899). Where a chattel mortgage provides that the company may sell the property and replace it with other property, and that the price of such new property shall first be paid, that provision will be enforced for the benefit of persons selling the new property. *Reynolds, etc. Co. v. Eacock*, 61 N. E. Rep. 732 (Ind. 1901). Rails laid down under an agreement that title should not pass until they are paid for belong to the vendor until such payment is made, even as against a subsequent mortgage, where the trustee of the mortgage knew of the agreement. *Haven v. Emery*, 33 N. H. 66 (1856). A vendor's lien may be retained by contract on pumping machinery purchased by a contractor for a corporation, and if the corporation had notice thereof it takes subject thereto, although its stock was issued in payment therefor to the contractor. A mortgage given by the company does not take precedence over such lien. *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. Rep. 19 (1892). See § 855, *supra*. A mortgage has precedence over a prior contract. *Manhattan Trust Co. v. Sioux City, etc. R.*, 81 Fed. Rep. 50 (1897). Where

the bondholders purchased their bonds with knowledge of the fact that a manufacturing company has erected machinery on the property covered by the mortgage, under a contract by which said company reserved title in the machinery, and the right to take it away in default of payment, the lien of the manufacturing company is prior in right to that of the bondholders. *Central Trust Co. v. Arctic, etc. Co.*, 77 Md. 202 (1893). Where a railroad company contracts to give a mortgage to secure bonds to be given to the contractor, the bonds and mortgage are enforceable, although the bonds were issued by another company, and were secured by a mortgage on the company which made the contract. It was an equitable mortgage if nothing more, and prior in right to other liens. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753 (1893). Where, subsequently to the taking of leases of other roads, a railroad makes a mortgage, the interest to be paid after other obligations existing at the time of the mortgage are paid, the rental must be paid before the mortgage interest is paid. *Mercantile Trust Co. v. St. Louis, etc. Ry.*, 71 Fed. Rep. 601 (1896). In Texas the agreement of a contractor that parties loaning money to build a road shall own three-fourths of it may constitute a mortgage. *Armstrong v. Burkitt*, 34 S. W. Rep. 759 (Tex. 1896).

¹ *Cogan v. Conover, etc. Co.*, 60 Atl. Rep. 408 (N. J. 1905).

² *Roberts v. Central T. Co.*, 128 Fed. Rep. 882 (1904).

property the trustee was bound to know should have been placed under the mortgage.¹ A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state.²

Damages for injuries to freight or persons prior to the trustee or receiver taking possession cannot be collected prior to the payment of the bonds if not collected before such possession is taken.³

§ 861. *The "six months' rule," to the effect that labor and supply claims arising within six months prior to a receiver being appointed will be paid out of the income received by the receiver.*—When a receiver of a railroad is appointed he commences at once to take the income from the operation of the road. This income at first is due largely to supplies furnished and labor done prior to the receivership. Accordingly it is but just that such claims, for a reasonable length of time prior to the receivership, should be paid out of the income received by him, especially as that income would have been used by the company for that purpose if the court had refused to appoint a receiver. Six months have been fixed upon by the courts as the proper limit of past time during which labor and supply claims enter into the income received by the receiver. It is true that from a strictly legal and equitable standpoint this payment of back claims out of future income is an extraordinary exercise of judicial power, but it is justified and legalized on the ground that, unless the mortgagee consents to giving the receiver the power to pay these back claims, the court will refuse to appoint any receiver at all, the receivership being always a matter of discretion with the court.⁴

¹ Guaranty T. Co. v. Atlantic, etc. R. R., 138 Fed. Rep. 517 (1905).

² Dearing v. McKinnon, etc. Co., 165 N. Y. 78 (1900).

³ See § 861, *infra*.

⁴ Quincy, etc. R. R. v. Humphreys, 145 U. S. 82, 103 (1892). The rule and reason of the six months' rule laid down in Fosdick v. Schall, has been stated as follows: "As I understand the current of cases which began with Fosdick v. Schall, 99 U. S. 235 (1878), the rule is this: When holders of railroad bonds secured by mortgage, come into a court of equity

and ask, not only the foreclosure of the mortgage, but also the appointment of a receiver, into whose hands the corporation shall be compelled to deliver all its property, the court, as a condition precedent to granting this last request, can impose terms in reference to the payment from the income during the receivership of such outstanding claims as address themselves peculiarly to the protection of the court. . . . This is not a right vested in the employees, or an equity administered in their favor. It is a personal protection given

Judge Colt in 1895 laid down the following rules on this subject: "In respect to the payment by receivers of a railroad of pre-existing current debts, as constituting a preference over outstanding mortgage liens, out of current income coming into their hands, or even

to them by the court *ex gratia*, moved thereto by the fact that this class depend upon their daily labor for their daily food. Afterwards, when the court has assumed the administration of the property, and it appearing that there are certain outstanding claims in the hands of persons who furnished equipment materials, supplies, or anything which was necessary to keep the railroad a going concern, then the court administers an equity, and the benefits of this equity inure as well to the original parties keeping up the road as to their assignees." *Finance Co. v. Charleston*, etc. R. R., 49 Fed. Rep. 693 (1892). See also *Burnham v. Bowen*, 111 U. S. 776 (1884); *Miltenerberger v. Logansport*, etc. Ry., 106 U. S. 286 (1882); *Union T. Co. v. Illinois Mid. Ry.*, 117 U. S. 434 (1886); *Taylor v. Philadelphia*, etc. R. R., 7 Fed. Rep. 377 (1880). In *U. S. Trust Co. v. Wabash Ry.*, 150 U. S. 287, 304 (1893), the court said: "It is well understood that, in the foreclosure of railroad mortgages, it often becomes necessary to provide for the payment of preferred claims, and to postpone all rights of ordinary creditors, and even of mortgagees, to these preferred classes, and that this is sometimes done from the necessities of the case without notice to all who may be affected thereby." Where an employee assigns his claim before insolvency is declared, the claim is not entitled to a preference. *Cogan v. Conover*, etc. Co., 60 Atl. Rep. 408 (N. J. 1905). A creditor who files a mechanic's lien thereby waives the preferential right under the six months' rule. *State Trust Co. v. Kansas City*, etc. R. R., 129 Fed. Rep. 455 (1904). Services rendered in logging operations of a railroad are not entitled to a preference. *Security*, etc.

Co. v. Goble, etc. R. R., 44 Ore. 370 (1904).

In *Northern Pac. R. R. v. Lamont*, 69 Fed. Rep. 23 (1895), the court allowed a claim for board and for care of a stallion, although it accrued more than six months prior to the receivership. Services in getting right of way, etc., do not come within the six months' rule. *Central T. Co. v. Chattanooga*, etc. R. R., 69 Fed. Rep. 295 (1895).

Where receivers are in charge for twenty months at the instance of unsecured creditors, and apply over \$100,000 of income to the payment of interest, and then a receiver in behalf of the mortgagee is appointed and collects \$55,000 of income earned before his appointment, a claim for \$44,000 for engines furnished before the first receivership may be paid out of the \$55,000. *Farmers', etc. Co. v. American*, etc. Co., 107 Fed. Rep. 23 (1895). Claims for the price of cross-ties and small quantities of hardware accruing within six months prior to foreclosure may be given preference. *Gregg v. Mercantile T. Co.*, 109 Fed. Rep. 220 (1901). Where there is a contest as to whether a receiver appointed in a stockholder's suit shall be replaced by a receiver in a bondholder's suit, six months' claims may be for six months prior to the appointment of the first receiver, such receiver being the bondholder's receiver. *Penn. Co. v. Jacksonville*, etc. Ry., 93 Fed. Rep. 60 (1899). Preference under the six months' rule may be given where the foreclosure of the mortgage is commenced after a receiver has been appointed. *Grand Trunk Ry. v. Central Vermont R. R.*, 88 Fed. Rep. 620 (1898). Where a receiver uses materials for repairing the track which were on hand when he was appointed, the

out of the proceeds of the sale of the property under foreclosure, it may be observed—First, that no fixed and inflexible rule can be laid down, but that each case is to be largely governed by its own special circumstances; second, that the tendency of judicial

party who furnished the same may hold the receiver liable therefor. *Central, etc. Ry. v. Hitchcock*, 91 Fed. Rep. 209 (1899). Claims for labor and material used in rebuilding a power-house for a street railway have no priority over a mortgage. *Maryland, etc. Co. v. Gettysburg, etc. Co.*, 99 Fed. Rep. 150 (1900). Labor claims more than six months old at the time of the appointment of a receiver are not entitled to a preference. *Thomas v. Cincinnati, etc. Ry.*, 91 Fed. Rep. 195 (1898). The court will not allow interest on a six months' claim from the time when payment was stayed by the court. *Grand Trunk Ry. v. Central Vermont R. R.*, 91 Fed. Rep. 569 (1899), holding also that a claimant who does not come within the six months' rule should present his claim by petition and not by motion. A creditor who has furnished coal within three months, but who is under obligations to pay the bonds involved in the foreclosure, will not be allowed a preference under the six months' rule. *Guarantee Trust Co. v. P., R. & N. E. R. R.*, 31 N. Y. App. Div. 511 (1898). An electric heater furnished to a street railway prior to the receivership is not entitled to a preference. *McCornack v. Salem, etc. Ry.*, 34 Oreg. 543 (1899). A decree excluding a claim as regards preference is a bar to a subsequent application on such claim to be paid out of a final fund from earnings. *Manhattan, etc. Co. v. Trust Co. of N. A.*, 107 Fed. Rep. 328 (1901). Notes given before the receivership for labor and materials furnished eighteen months before the receivership will not be paid out of income prior to the mortgage bonds, even though the property was thereby preserved. *Guaranty, etc. Co. v. Gal-*

veston, etc. R. R., 107 Fed. Rep. 311 (1901). Machinery for a power-house purchased within six months prior to the receivership may be paid for in preference to the bonds. *Central Trust Co. v. Clark*, 81 Fed. Rep. 269 (1897). Six months is a reasonable time prior to receivership during which claims arising may be ordered paid. An advertising claim is not a supply or material claim. *Central Trust Co. v. East Tennessee, etc. R. R.*, 80 Fed. Rep. 624 (1897). Nor notes given at various times from four years to nine months prior to the receivership. *Morgan's, etc. Co. v. Farmers' L. & T. Co.*, 79 Fed. Rep. 210 (1897). Nor money advanced to pay floating debts and interest, nor bonds loaned to the company. *Southern Development Co. v. Farmers' L. & T. Co.*, 79 Fed. Rep. 212 (1897).

The arrears of salary of the president will not be paid by the receiver under the six months' rule. *National Bank of Augusta v. Carolina, etc. R. R.*, 63 Fed. Rep. 25 (1894). In New York, etc. Co. *v. Tacoma Ry. etc. Co.*, 83 Fed. Rep. 365 (1897), the vendor of a cable to a street railway cable company was given priority over the mortgage bondholders, although the cable was sold in 1892, and the receivership on the foreclosure suit was not commenced until 1895. Mileage due for palace cars is not a preferred claim. *Pullman's P. C. Co. v. American L. & T. Co.*, 84 Fed. Rep. 18 (1897). A contractor does not come within the six months' rule, nor does an attorney. *Ten Eyck v. Pontiac, etc. R. R.*, 114 Mich. 494 (1897). In *Central T. Co. v. Utah Cent. Ry.*, 16 Utah, 12 (1897), a claim two and a half years old was allowed to come in ahead of the mortgage, and claims that existed before the mortgage were

decision is to narrow rather than enlarge the class of such preferred claims; third, that the allowance of such claims does not depend upon any fixed or arbitrary rule as to the time when the debts were contracted, further than that they must have been incurred within

allowed to come in. Upon appointing a receiver a court may impose such terms as it sees fit in regard to the application of the income to labor, supplies, improvements, etc. *Union T. Co. v. Souther*, 107 U. S. 591 (1882). An order for the payment of prior claims by the receiver should be made when he is appointed, but, if not so made, may be made thereafter. *Central T. Co. v. St. Louis, etc. Ry.*, 41 Fed. Rep. 551 (1890). These six months' claims may be ordered paid by an order entered after the receiver is appointed. *Blair v. St. Louis, etc. R. R.*, 22 Fed. Rep. 471 (1884). Certain car-supply debts incurred within two months prior to the receivership may be paid by the receiver. *Hale v. Frost*, 99 U. S. 389 (1878).

The wages of street-car employees for sixty days prior to the commencement of foreclosure will be paid before any payment is made to the mortgage bondholders. *Litzenberger v. Jarvis, etc.*, 8 Utah, 15 (1892). Gas equipment and supplies, although apparently furnished a long time prior to the receivership, may be allowed to be paid from income only. *U. S. Trust Co. v. New York, etc. Ry.*, 25 Fed. Rep. 797 (1885).

The rule that "back claims" for materials, labor and supplies may be ordered by the court to be paid out of the income received by the receiver, and sometimes out of the proceeds of the sale, was reviewed, explained, and affirmed in *Turner v. Indianapolis, etc. Ry.*, 8 Biss. 315 (1878); s. c., 24 Fed. Cas. 366, on the ground that the court exacted this concession as a condition of appointing a receiver at all, and on the ground that work and supplies lately done and furnished were the source of the immediate income of the

receiver. Hence claims running back as far as the state statute for liens for supplies and labor were allowed, such a rule by analogy being just. The decision in *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320 (1878); s. c., 22 Fed. Cas. 274, refusing payment of past-due wages, and of steel rails and supplies, was reversed in *Duncan, etc. v. Atlantic, etc. R. R.*, 4 Hughes, 125, 151 (1880). This last case, as reported in 88 Fed. Rep. 840, does not state that point in the above decisions. Admissions contained in the books of the corporation may be sufficient proof of a claim where there is no contest. *Blair v. St. Louis, etc. R. R.*, 22 Fed. Rep. 471 (1884). In *Dow v. Memphis, etc. R. R.*, 20 Fed. Rep. 260 (1884), the court appointed a receiver subject to the following terms, which the mortgagee was compelled to assent to: That the debts, if any, due from the railroad company for ticket and freight balances; and for work and labor performed by its employees and laborers; and for supplies and materials furnished for equipping, operating, repairing or improving the road; and all obligations incurred in the transportation of passengers and freight, or for injuries to person or property, which have accrued within six months last past, shall be paid by the receiver out of the earnings of the road. Construction work done more than six months prior to the appointment of a receiver does not entitle the contractor to priority in payment over the bondholders. *Re Kelly*, 5 Fed. Rep. 846 (1881). Ordinarily no claim older than six months prior to the appointment of the receiver will be paid in preference to the mortgage. *Blair v. St. Louis, etc. Ry.*, 22 Fed. Rep. 471 (1884). The six months' rule does not

a reasonable time before the appointment of receivers, such reasonable time depending upon the circumstances of each particular case; fourth, that the allowance of such claims does not depend upon the order of court appointing receivers; fifth, that the current income of a railroad is primarily to be devoted to the payment of current debts, and that where such income has been used for the payment of interest upon mortgage indebtedness, or for permanent improvements, or in any manner has been diverted for benefit of the mortgagees at the expense of the current debt fund, there must be a

apply and protect a merchant who supplies rations to the employees and obtains his pay from the company. *Finance Co. v. Charleston, etc. R. R.*, 49 Fed. Rep. 693 (1892). Supplies for bridges, sidetracks, and repairs furnished after default in payment of interest are entitled to payment out of earnings before the mortgages, although two years intervened before foreclosure. *Blair v. St. Louis, etc. Ry.*, 23 Fed. Rep. 704 (1885); *s. c.*, 22 Fed. Rep. 769 (1885). The assignee of those claims which are payable by a receiver may collect. *Union T. Co. v. Walker*, 107 U. S. 596 (1882); *Burnham v. Bowen*, 111 U. S. 776 (1884); *Columbus, etc. R. R. Appeals*, 109 Fed. Rep. 177 (1901). A person paying a judgment against the company a short time prior to the receivership, under an agreement of the company to repay to him the amount, has no right to payment from the receiver's funds. *Blair v. St. Louis, etc. R. R.*, 23 Fed. Rep. 521 (1885). Nor is a surety on an appeal bond given to allow an appeal by the company. *Blair v. St. Louis, etc. R. R.*, 23 Fed. Rep. 523 (1885). See also § 860, *supra*; *Douglas v. Cline, etc.*, 12 Bush (Ky.), 609 (1877), seems to have been the first of the cases laying down the six months' rule. Judgment creditors of a railroad which was sold to the mortgagor corporation have no equitable claim on the receiver's assets. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884). Concerning claims for breach of contract generally in such

cases as these, see § 860, *supra*. The six months' rule was applied in *Farmers' L. & T. Co. v. Vicksburg, etc. R. R.*, 33 Fed. Rep. 778 (1888), for moneys advanced for necessary betterments. In *Central Trust Co. v. Thurman*, 94 Ga. 735 (1894), the court refused to apply the six months' rule to many of the claims. Where a receiver is appointed, and a mortgagee intervenes and asks for a foreclosure, and does not object to the receiver, the mortgagee is bound by the receiver's acts. Under the Texas statute the disbursements, contracts, etc., of the receiver must be first paid, including receiver's certificates; but claims of creditors prior to the receivership are not to be paid in priority to the mortgage. *Ellis v. Vernon, etc. Co.*, 4 Tex. Civ. App. 66 (1893). In Texas, by statute, the receiver must pay claims, judgments, etc. arising prior to his appointment provided he has profits to do so. *Yoakum v. Richards*, 24 S. W. Rep. 308 (Tex. 1892); *Giles v. Stanton*, 24 S. W. Rep. 556 (Tex. 1893). A person furnishing materials that go into a leased road, and who obtains a judgment therefor against the lessee after the lessee has passed into a receiver's hands, has no lien on the property or against the receiver. The court said that the present tendency of the supreme court is not to extend the doctrine laid down in *Fosdick v. Schall*, 99 U. S. 235 (1878). *Clyde v. Richmond, etc. R. R.*, 56 Fed. Rep. 539 (1893). In England, by act of parliament of 1897, workmen's wages and certain other debts have

restoration to the extent of such diversion; sixth, that independently of the question of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road.”¹

The supreme court of the United States has recently held that current debts should be paid out of the current receipts in priority to the mortgage debt, provided such current debts are part of the operating expense in the ordinary course of business and such as are ordinarily met out of current receipts; hence, steel rails furnished to repair the road so as to make it safe may be paid out of the current earnings, although some of the rails were furnished more than six months prior to the receivership.² The earnings of

priority over debentures which are a floating charge. *Re Waverly, etc. Lim.*, [1898] 1 Ch. 699. As to payment of attorney's fees see § 879, *infra*.

¹ *Wood v. New York, etc. R. R.*, 70 Fed. Rep. 741 (1895).

² *Southern Ry. v. Carnegie, etc. Co.*, 176 U. S. 257 (1900). In another case, however, the same court held that steel rails delivered prior to foreclosure to be used in reconstruction “were not such as are made in the ordinary course of the operations of a railroad, and cannot be deemed current debts within the rule that a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company, contracted in the ordinary course of its business, in order to keep it a going concern, shall be paid out of current receipts before he has any claim upon such income. They are rather to be regarded as extraordinary expenditures, outside of the ordinary course of business and incurred for the purposes not of repair but of construction. This court has said that it is the exception, not the rule, that the priority of mortgage liens can be displaced. We have said that priority of unsecured claims is recognized only in a few specified cases in which equity and good conscience require that the vested liens of mortgage creditors

shall be postponed in the application of current earnings to current debts. Sound principle forbids that a court of equity should imply an agreement upon the part of mortgage creditors to subordinate their claims to such debts as those due to the Lackawanna Company. To so hold would place their rights at the mercy of the railroad company having charge of the property upon which their recorded liens rest.” *Lackawanna, etc. Co. v. Farmers' Loan, etc. Co.*, 176 U. S. 298 (1899). Six months from the impounding of the property by the mortgage bondholders is the limit of time for preferences, except in cases of peculiar equities. *Westinghouse, etc. Co. v. Kansas City, etc. Ry.*, 137 Fed. Rep. 26 (1905). In the case *State Trust Co. v. Kansas City, etc. R. R.*, 129 Fed. Rep. 455 (1904), the court allowed claims for a year prior to the receivership. A guarantor of payment for rails is not entitled to a prior lien where the sellers of the rails would not be, and the law is well settled that a seller of rails to complete a railroad has no lien ahead of a prior mortgage. *Farmers' L. & T. Co. v. Stuttgart & A. R. R.*, 92 Fed. Rep. 246 (1899). Persons furnishing rails which are necessary to keep the road running have an equitable lien upon the income of the road

a railroad both before and after a receiver is appointed may be applied to the payment of a bill for coal which was furnished to the road before the receivership.¹ Neither the purchase price nor rentals of engines, freight and passenger cars, nor ballast cars, are current expenses of the ordinary operation of a railroad company, and hence are not entitled to payment either out of the income or *corpus* of the mortgaged property, even though they were incurred within six months prior to foreclosure.² Rentals on cars prior to the commencement of foreclosure and the appointment of a receiver have no priority over the mortgage debt, but rentals during the receivership may be allowed.³ Permanent improvements, even though very valuable, cannot be paid for under the six months' rule, and this applies to labor and materials as well as additions.⁴ Where the

in priority to second mortgagees who have caused a receiver to be appointed. *Bound v. South Carolina Ry.*, 47 Fed. Rep. 30 (1891). The cost of rails purchased eighteen months before the receivership will not be ordered paid by the receiver. *Bound v. South Carolina Ry.*, 58 Fed. Rep. 473 (1893). The vendor of a locomotive to the company more than six months prior to the receivership has no priority. *Manchester Loco. Works v. Truesdale*, 44 Minn. 115 (1890).

1 *Virginia, etc. Co. v. Central R. R., etc. Co.*, 170 U. S. 355 (1898).

2 *Rodger, etc. Co. v. Omaha, etc. R. R.*, 154 Fed. Rep. 629 (1907).

3 *Thomas v. Western Car Co.*, 149 U. S. 95 (1893). Rent accruing prior to the receivership has no preference over the mortgage. *Louisville & N. R. R. v. Central Trust Co.*, 87 Fed. Rep. 500 (1898). Car rentals accruing before a receivership do not come in ahead of the mortgage. *Mather, etc. Co. v. Anderson*, 76 Fed. Rep. 164 (1896). Under the six months' rule a connecting company may collect a fair rental for terminal property. *Savannah, etc. Ry. v. Jacksonville, etc. Ry.*, 79 Fed. Rep. 35 (1897). Car rentals are not entitled to a preference. *Grand Trunk Ry. v. C. Vermont R. R.*, 90 Fed. Rep. 163 (1898). Rental due on a leased railroad may not be entitled to payment out of the in-

come in preference to mortgage debts where the lessor had the right to retake the property will all improvements. *Gregg v. Mercantile T. Co.*, 109 Fed. Rep. 220 (1901). Rent of a leased railroad is not a six months' claim, neither are taxes due under such lease, nor are the construction of new tracks by the lessor, nor ordinary operating expenses of such lessor. *St. Louis, etc. Ry. v. Continental T. Co.*, 111 Fed. Rep. 669 (1901). Where a person sells rolling-stock to a railroad with knowledge that it is to be used on a leased line which is not subject to the railroad mortgage, he cannot obtain a priority of payment over such mortgage, even though the sale was within sixty days of the appointment of a receiver. *Southern Ry. v. Ensign, etc. Co.*, 117 Fed. Rep. 417 (1902). So also as to other apparatus purchased for use on a leased road not covered by the mortgage. *Southern Ry. v. Chapman, etc. Co.*, 117 Fed. Rep. 424 (1902).

4 In regard to preference for labor claims, etc., the court said in *Central Trust Co. etc. v. Chattanooga, etc. R. R.*, 94 Fed. Rep. 275 (1899): "The warnings of the supreme court indicate that the bounds have been extended as far as sound judicial discretion can go, and that, if further relief is needed, it can be granted only by the legislature." Current operat-

repair of a bridge within six months prior to a receivership was one-fourth necessary and three-fourths unnecessary, a preference will be allowed for one-fourth only.¹

It is still an open question as to whether payments, under the six months' rule, may be made out of the *corpus* of the estate. The better opinion is that such payments are allowed from the income alone. If the operation of the road costs the receiver more than the income, he will not be ordered to pay the back claims. Under such a state of facts money received upon the foreclosure of the property will not be used to pay such back claims, except to the extent that the receiver has used the income for the improvement of the mortgaged property so sold.² The supreme court of the United

ing expenses for a limited time before the receivership may be paid in preference to the mortgage, but claims for material and labor in making permanent improvements cannot claim such priority, either as to income or the *corpus* of the estate. *Farmers', etc. Co. v. American, etc. Co.*, 107 Fed. Rep. 23 (1895). In the case of *Illinois, etc. Bank v. Doud*, 105 Fed. Rep. 123 (1900), the court said that *Fosdick v. Schall*, 99 U. S. 235, has been disapproved and modified, so far as it allowed payment for permanent and beneficial improvements in priority to the mortgage bonds. Such priority is limited to current expenses and the ordinary operation of the road for a limited time prior to the receivership. A contract of a railroad company to repay to a quarry company the cost of a branch road, built by the latter for the former, is not a preferred claim as against the receiver of the railroad company. *Farmers' L. & T. Co. v. Cape Fear, etc. R. R.*, 73 Fed. Rep. 712 (1896). A seller of car wheels to the lessee of a railroad cannot collect the price thereof from the receivers of the lessor, even though the lessor took possession before the car wheels were used and afterwards paid the lessee for such car wheels, it being shown that the seller was guilty of laches for over a year in presenting his claim to the lessor. *Stewart v. Wisconsin, etc.*

R. R., 95 Fed. Rep. 577 (1899). Where a poorly equipped railroad buys six hundred cars in March and a receiver takes charge in June, and most of the cost of the cars has already been paid, the court may authorize the receiver to pay the balance in priority to the mortgage. *St. Louis, etc. R. R. v. O'Hara*, 177 Ill. 525 (1898).

¹ *Guaranty, etc. Co. v. Philadelphia, etc. Co.*, 160 Fed. Rep. 761 (1908).

² Car rentals for the four months before the commencement of foreclosure cannot be allowed, where the road did not pay operating expenses. *Kneeland v. American L. & T. Co.*, 136 U. S. 89 (1890). Claims prior to the receivership should not be allowed where the earnings have all been consumed and the order appointing the receiver did not provide for such payments. *Cutting v. Tavares, etc. R. R.*, 61 Fed. Rep. 150 (1894). Unless the order for a receiver so provides, the court has no power to order that out of the moneys received on the foreclosure sale of railroad property the wages of the employees of the company should be paid, even though the latter claim that betterments had been made out of the earnings. *Franklin, etc. Co. v. Northern, etc. R. R.*, 11 N. Y. App. Div. 249 (1896). In regard to certain debts to be paid in priority to mortgage bondholders, "the rule governing in all these cases was stated by Chief Justice Waite, in *Burnham*

States has recently held that supplies furnished within six months

v. Bowen, 111 U. S. 776, 783 (1884), as follows: 'If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all." *St. Louis, etc. R. R. v. Cleveland, etc. Ry.*, 125 U. S. 658, 673 (1888); *Union T. Co. v. Illinois Mid. Ry.*, 117 U. S. 434 (1886).

In the case of *International Trust Co. v. Townsend, etc. Co.*, 95 Fed. Rep. 850 (1899), the court carefully reviewed the decisions in regard to claims being paid out of the *corpus* of the estate in priority to a mortgage, and held that a bridge constructed before the receiver was appointed could not be paid for out of such *corpus*. The preference does not apply to the *corpus* of the mortgaged property unless the current income has been diverted by the company or a receiver to the benefit of the mortgagee, in which case the preference is limited to the amount of income so diverted. Where income is used to pay car-trust certificates the amount thereof may be repaid from the *corpus* of the property. *Gregg v. Mercantile T. Co.*, 109 Fed. Rep. 220 (1901). Mileage tickets issued by an insolvent railroad company over another line and redeemed by the latter within six months prior to the receivership may be repaid out of the income of the receivership, but not out of the *corpus* of the mortgaged property. Such mileage tickets having been issued under an agreement between two companies, the tickets actually issued are good as against the solvent company, and the agreement of the receiver to pay such of the old mileage tickets as are honored during the receivership does not change the obligation of the in-

solvent company therefor into a debt of the receiver. *Monsarrat v. Mercantile T. Co.*, 109 Fed. Rep. 230 (1901). A laborer's claim incurred prior to the receivership is not entitled to payment out of assets in the hands of the receiver in priority to the bondholders, unless it is shown that the gross income during or prior to the receivership was diverted from paying current expenses and was appropriated to the use of the bondholders. *Hammerly v. Mercantile, etc. Co.*, 123 Ala. 596 (1899). Rail joints and track bolts furnished within six months and used for repairs are entitled to a preference and are payable even from the body of the estate, on the theory that the property really belonged to the bondholders, and that when they allowed the insolvent corporation to continue to operate it, they, as principals, are liable for necessary repairs. *Lee v. Pennsylvania, etc. Co.*, 105 Fed. Rep. 405 (1900). A claim for machinery used in shops which are not covered by the mortgage will not be paid in preference to the mortgage debt out of the *corpus* of the estate. *Niles, etc. Co. v. Louisville, etc. Ry.*, 112 Fed. Rep. 561 (1902). A supply claim is not entitled to preference unless the net earnings in excess of operating expenses have been used for the benefit of the mortgagee. *Kansas, etc. Co. v. Electric Ry. etc. Co.*, 108 Fed. Rep. 702 (1901). The vendor of locomotives, who is paid partly in cash and partly in notes, has no preference over bondholders where the locomotives were not necessary, except to handle increased traffic, and no net earnings are in the hands of the receiver, and the current income had been consumed wholly by current expenses. *Rhode Island, etc. Works v. Continental T. Co.*, 108 Fed. Rep. 5 (1900).

The six months' rule does not allow payment out of the *corpus* of the property for materials used in the

before the receiver was appointed are not chargeable to the *corpus* of the fund.¹

construction of the road more than six months prior to the receivership, there being no proof of a diversion of the income. *American L. & T. Co. v. East, etc. R. R.*, 46 Fed. Rep. 101 (1891). In *U. S. Trust Co. v. New York, etc. Ry.*, 25 Fed. Rep. 800 (1885), the court refused to allow payment of claims for more than three months prior to the receivership, it being shown that the running expenses of the company exceeded the receipts. Labor claims incurred prior to the appointment of a receiver in foreclosure are not entitled to payment out of the *corpus* before the mortgage bondholders. *Metropolitan Trust Co. v. Tonawanda, etc. R. R.*, 103 N. Y. 245 (1886), reversing 40 Hun, 80 (1886). It is an extraordinary case that will make any of the six months' claims a lien upon the *corpus* of the property. Ordinarily they are to be paid from the income only. *Blair v. St. Louis, etc. R. R.*, 22 Fed. Rep. 471 (1884); s. c., 25 Fed. Rep. 232 (1885). Railroad ties furnished prior to the receivership cannot be paid out of the *corpus* of the state. *Bayliss v. Lafayette, etc. R. R.*, 9 Biss. 90 (1879); s. c., 2 Fed. Cas. 1080. Claimants for labor, supplies, and materials within six months prior to the commencement of foreclosure may be paid out of the income prior to payment to the bondholders, where such labor, etc., was necessary to keep the road running, and may be paid out of the property itself to the extent that the past six months' earnings have been paid to the bondholders, or in making permanent improvements.

Finance Co. v. Charleston, etc. R. R., 48 Fed. Rep. 188 (1891); *Calhoun v. St. Louis, etc. Ry.*, 14 Fed. Rep. 9 (1880). An appeal will lie from an order directing the receiver to pay certain sums out of the proceeds of the sale. *Rome, etc. R. R. v. Sibert*, 97 Ala. 393 (1893). In 1864 Judge Drummond, in *Denniston v. Chicago, etc. R. R.*, 4 Biss. 414 (1864); s. c., 7 Fed. Cas. 482, refused to order the payment of claims for supplies out of the funds realized at the sale. Where the receiver was appointed at the instance of stockholders, and no earnings have been used to pay interest during the receivership, the six months' rule does not apply. The net earnings received by the receiver are applicable to payment for labor, but receiver's certificates cannot be issued in such a case except by agreement of all parties. *Street v. Maryland Cent. Ry.*, 59 Fed. Rep. 25 (1893). In *Whiteley v. Central Trust Co.*, 76 Fed. Rep. 74, 77 (1896), the court said that these decisions "seem to rest upon the doctrine that railroad mortgagees impliedly agree that current earnings shall be first applied to current operating expenses, and, if diverted to the payment of interest on the mortgage debts, may be followed, or such creditors subrogated to the rights of mortgagees, to the extent of such diversion. That those cases have carried the rule of displacing mortgage debts as far as the courts feel justified is made very clear by the emphatic declarations of the supreme court." On this subject see § 876, *infra*, where receiver's certificates

¹ *Gregg v. Metropolitan T. Co.*, 197 U. S. 183 (1905). Preferred creditors are not entitled to have their claims paid from the *corpus* of the estate, even though the earnings have been diverted to the benefit of the mort-

gagees, where it is shown that an equal amount of money borrowed for the company by means of the bonds was used for payment of general claims. *Gregg v. Metropolitan T. Co.*, 124 Fed. Rep. 721 (1903).

It has been intimated that the six months' rule will be applied irrespective of the income, and that it should be applied whether a receiver is appointed or not. Such an intimation, however, is contrary to the current of authority, and would be disastrous and inequitable if carried to its logical conclusion.¹ Where the trustee sells the property without suit and without applying for a receiver, preferential claims are cut off.²

The six months' rule applies to railroads only. It does not apply to manufacturing and other companies.³ In Massachusetts and Mis-

were issued to pay such claims. The court may, as a condition of appointing a receiver, prescribe that receiver's certificates, payable out of the proceeds of the sale, be issued to pay claims, or may prescribe that the claims themselves shall be paid from the proceeds of the sale. *Finance Co. v. Charleston, etc. R. R.*, 62 Fed. Rep. 205 (1894). Where, upon the appointment of the receiver, he was ordered to pay balances due other carriers, such payment may subsequently be ordered to be made from the proceeds of the final sale, although there were no earnings over and above running expenses. The fact that the applicant had taken bonds as security did not waive its right to a preference. *Finance Co. v. Charleston, etc. R. R.*, 62 Fed. Rep. 205 (1894). The cost of operating for a limited time prior to the receivership may be paid out of the *corpus* of the estate. *Ames v. Union Pac. Ry.*, 74 Fed. Rep. 335 (1896). The receiver will be ordered to pay for coal furnished under contract within six months before and after the receivership, and to pay for it out of the *corpus* of the property if the income is used to pay interest. *Clark v. Central R. R. etc. Co.*, 66 Fed. Rep. 803 (1895). *Cf.* § 876, p. 2460, *infra*.

¹ In *Farmers' L. & T. Co. v. Kansas City, etc. R. R.*, 53 Fed. Rep. 182 (1892), the court said in a dictum: "It is not to be implied from what is here said that a mortgagee of a railroad can escape the payment of preferential debts by a foreclosure of

this mortgage without asking for a receiver. Liabilities of a railroad company which fall within the definition of preferential debts have priority over a mortgage on its road, without regard to the question of receivership;" the court saying also that the supreme court of the United States, "in numerous later cases for the foreclosure of railroad mortgages, has recognized the justice and necessity of modifying the common-law rule as to the priority of liens, and adopted to a limited extent, as applicable to suits for the foreclosure of railroad mortgages, some of the principles of the maritime law."

² *Louisville, etc. R. R. v. Memphis Gaslight Co.*, 125 Fed. Rep. 97 (1903), holding that the principle that earnings obtained by the use of supplies and used to pay interest and betterments may be repaid out of the money realized on a foreclosure sale, does not apply to a gas plant and certainly does not apply where the trustees sell without suit and without a receiver, and does not apply where a bill of complaint filed before such application does not set forth dates and amounts of the diversion and of the use of the coal and coke.

³ The court cannot authorize the receiver of a mining company to pay unsecured labor and supply claims in preference to a mortgage debt. *Merriam v. Victory, etc. Co.*, 37 Oreg. 321 (1900); *Snively v. Loomis Coal Co.*, 69 Fed. Rep. 204 (1895). The six months' rule may be applied to an irrigation company. *Atlantic Trust*

Mississippi, however, it has been held that in a purely private corporation a court of equity has power to give precedence to debts due to laborers.¹

Co. v. Woodbridge, etc. Co., 79 Fed. Rep. 39 (1897). In *California, etc. T. Co. v. Yakima, etc. Co.*, 82 Fed. Rep. 542 (1897), the court intimated that the six months' rule would not be applied to irrigation companies. Claims for work and material in keeping in operation an irrigation plant have priority over a mortgage, but not claims for extensions. *Atlantic Trust Co. v. Woodbridge, etc. Co.*, 86 Fed. Rep. 975 (1897). The six months' rule does not apply to an irrigation company as to materials furnished in constructing the works. *Savings & T. Co. v. Bear Valley, etc. Co.*, 93 Fed. Rep. 329 (1899). A claim against a private railroad which is used by a mine has no preference over the mortgage. *First Nat. Bank v. Wyman*, 66 Pac. Rep. 456 (Colo. 1901). Preference over a mortgage may be given to labor and supply claims against a telegraph company. *Keelyn v. Carolina, etc. Co.*, 90 Fed. Rep. 29 (1898).

The rule that claims arising within six months prior to the receivership may be paid by the receiver is not applicable to manufacturing corporations. *Fidelity, etc. Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372 (1889). The principle that six months' back wages, etc., will be paid before mortgage bondholders of a railroad are paid does not apply to manufacturing corporations. *Seventh Nat. Bank v. Shenandoah Iron R. R.*, 35 Fed. Rep. 436 (1887). The six months' rule applies to railroads only. It does not apply to steamship lines. *Bound v. South Carolina Ry.*, 50 Fed. Rep. 312 (1892). Material furnished for construction of works is not paid for upon foreclosure of a mortgage in preference to the mortgage. The six months' rule applies only to operating material. So held as regards meters for a gas plant which was afterwards foreclosed. *Reyburn v. Con-*

sumers', etc. Co., 29 Fed. Rep. 561 (1887). In the foreclosure of a mortgage given by any corporation, even though not a railroad, the court may order the receiver to pay employees in full for services rendered within six months prior to his appointment. *Olyphant v. St. Louis, etc. Co.*, 22 Fed. Rep. 179 (1884). The six months' rule cannot be applied to a hotel company. *Raht v. Attrill*, 106 N. Y. 423 (1887). In *Wood v. Guarantee, etc. Deposit Co.*, 128 U. S. 416 (1888), the court held that no claims arising against a water-works company prior to a receivership had any claim upon the income in his hands, and the court intimated that the six months' rule applied to railroads only. In Alabama, in a private mining and coke manufacturing company, laborers' wages for six months prior to the appointment of a receiver will be allowed out of the gross earnings of the company into which such labor had entered, so far as such gross earnings come into the receiver's hands, and even though the mortgage covers the income. *Drennen v. Mercantile, etc. Co.*, 115 Ala. 592 (1897). Preference cannot be given for labor and supplies of a manufacturing corporation. *Merchants' Bank v. Moore*, 106 Ala. 646 (1895). In *Pickering v. Townsend*, 118 Ala. 351 (1898), the court, in passing upon the right of an employee to be paid for his services for six months last past out of the property in preference to the mortgagee, limited such right to cases where the earnings have been diverted to the mortgagee, or the services were for his benefit, or were to continue the company for his benefit, or where the receiver has income sufficient to pay for the services. See also § 876, *infra*.

¹ *Jones v. Arena Pub. Co.*, 171 Mass. 22 (1898). Labor claims against a

The six months' rule does not apply to claims growing out of negligence or personal injuries or injuries to property prior to the receivership.¹

lumber company incurred just before its insolvency and the appointment of a receiver are allowed in preference to ordinary and mortgage creditors. *Le Hote v. Boyet*, 85 Miss. 636 (1905). A federal court which has appointed a receiver of a foreign corporation has power to give a preference to labor claims over other unsecured claims, even though the corporation is a private corporation. *Dickinson v. Saunders*, 129 Fed. Rep. 16 (1904).

1 A judgment for a tort committed prior to the receivership has no priority. *Hampton v. Norfolk, etc. Ry.*, 127 Fed. Rep. 662 (1904). A judgment obtained for the negligence of the mortgagor causing the death of a person, whether an employee or not, is not entitled to a preference over the mortgage. *Atlantic T. Co. v. Dana*, 128 Fed. Rep. 209 (1903). Damages for an accident prior to the receivership will not be paid, unless the order appointing the receiver so provided. *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 74 Fed. Rep. 431 (1896). Damages for negligence prior to a receivership of a street railway are not paid out of earnings accruing during the receivership. *St. Louis Trust Co. v. Riley*, 70 Fed. Rep. 32 (1895). A judgment for negligence prior to the receivership does not come in ahead of the mortgage. *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 79 Fed. Rep. 227 (1897). Earnings in the hands of a receiver appointed at the instance of a stockholder may be applicable to damages for negligence occurring prior to the receivership, but not the earnings of a receiver appointed at the instance of mortgage bondholders. *Veatch v. American L. & T. Co.*, 79 Fed. Rep. 471 (1897). Where the net earnings of a lessee road are to go to the bondholders of the lessor, claims for

damages prior to a receivership of both companies do not take such net earnings during the receivership in preference to the bondholders. *Grand Trunk Ry. v. Central Vt. R. R.*, 81 Fed. Rep. 60 (1897). Income received during the receivership may be applied to damages for negligence prior to the receivership. *Green v. Coast Line R. R.*, 97 Ga. 15 (1895). The court will not authorize suit against the receiver for injuries incurred prior to the receivership. *Finance Co. v. Charleston, etc. R. R.*, 46 Fed. Rep. 508 (1891); *Re Dexterville, etc. Co.*, 4 Fed. Rep. 873 (1880). Claims for damages for the loss of grain three years prior to the receivership have no priority over the mortgages, although negotiations for a settlement had been going on continuously. *Central T. Co. v. Wabash, etc. Ry.*, 28 Fed. Rep. 871 (1886). A claim for loss of freight prior to a receivership in a foreclosure suit is not allowed to be paid before the mortgage bondholders are paid. *Easton v. Houston, etc. Ry.*, 38 Fed. Rep. 12 (1889). Damages due to fire from locomotives, causing timber, etc., to be burned, such fire having occurred after default in a mortgage but before foreclosure was commenced, cannot be paid out of earnings in the hands of the receiver. *Hiles v. Case*, 14 Fed. Rep. 141 (1880). For an injury occurring before the receiver is appointed it is proper to bring an action against the receiver as such, upon leave of the court, in order to ascertain the amount due. The collection of the amount, however, will follow the same course as other claims of the same class. *Combs v. Smith*, 78 Mo. 32 (1883). A judgment commenced and recovered against the company after a receiver is appointed, but for injuries before he was ap-

pointed, is not enforceable against the receiver. *Hopkins v. Connell*, 2 Tenn. Ch. 323 (1875). Damages recovered in an action for injuries incurred prior to the receivership are not entitled to payment out of income, in preference to the payment of the mortgage bondholders. *Central T. Co. v. East Tennessee, etc. R. R.*, 30 Fed. Rep. 895 (1886). A judgment for a tort committed before the receivership is not entitled to payment out of the earnings of the receivership in priority over the bonds. *Fidelity, etc. Co. v. Norfolk, etc. R. R. Co.*, 114 Fed. Rep. 389 (1902); *aff'd*, 127 Fed. Rep. 662. The court will not order to be paid out of the property damages for injuries, although such injuries occurred within the six months. It being uncertain whether the income will suffice for other prior claims, the court ordered an ascertainment of the damages and authorized an application thereafter. *Farmers' L. & T. Co. v. Green Bay, etc. Ry.*, 45 Fed. Rep. 664 (1891). A claim for damages to freight incurred three years prior to the receivership is not collectible from the receivers, although negotiations for a settlement have been pending during all that time. *Central T. Co. v. Wabash, etc. Ry.*, 28 Fed. Rep. 871 (1886). Damages for breach of contract do not come within the rule. *Central T. Co. v. Wabash, etc. Ry.*, 32 Fed. Rep. 566 (1887). Under the North Carolina statute damages for a tort do not have priority over a mortgage unless enforced within sixty days after the mortgage was recorded. *Williams v. West Asheville, etc. Ry.*, 126 N. C. 918 (1900).

CHAPTER LI.

RECEIVERS.

A. APPOINTMENT OF RECEIVER—EFFECT AS TO TITLE TO THE PROPERTY.

- § 862. When a receiver will be appointed in behalf of a foreclosing mortgagee.
863. Receivers upon the application of judgment creditors, general creditors, the state, the corporation itself, stockholders, and in other cases—Procedure in making the appointment—Collateral attack on legality of receivership.
864. Who will be selected for receiver.
865. A second receiver will not be appointed where one receivership already exists—Receiver of railroad running into two or more states—Receiver of assets of a foreign corporation.
866. The receivership takes effect from the date of the order appointing the receiver—Vesting of title.

B. SUITS AND CLAIMS BY AND AGAINST RECEIVERS.

867. The receiver should obtain the leave of his court before bringing a suit.
868. When may a receiver sue in other courts of the state or of other states, or in the federal courts?
869. Suits which the receiver may institute—Suits to obtain possession of the property—Other suits—Set-off—Compromises—Proof of appointment of receiver.
870. Suits against receivers—Suits pending at the time of appointment—Leave of court to bring suit—Taxes—"Strikes" against a receiver—Levy of execution, attachment, and garnishee process in the state after the order for receivership is made—Interference with possession of receiver.
871. Levy of execution, attachment, and garnishee process in an-

other state after a receivership has been ordered in one state—Status of a corporation during a receivership.

C. DUTIES AND POWERS OF RECEIVERS.

- § 872. What a receiver may do without order of the court, and what he may do under order of the court—Books of the company.
873. Rolling-stock—Liability of the receiver and the fund for car rentals—Purchases of rolling-stock.
874. Contracts in force when the receiver is appointed—Leaseholds which pass into the hands of a receiver—Rent paid by the receiver on lines of railroad leased to him—Royalties, etc., paid by the receiver.
875. Payment of operating expense, car rentals, damages, etc., incurred during the receivership—Liability of the company.
- 876, 877. Receiver's certificates—Loans of money to the receiver—Purchasing on credit.

D. LIABILITY, COMPENSATION, ACCOUNTS, AND DISCHARGE OF RECEIVERS.

878. A receiver is not personally liable or responsible for any debts legally incurred or contracts legally made or damages done by him as receiver or by his subordinates and employees—He is liable for personal misconduct or neglect.
879. Compensation of receivers and the foreclosing trustees, and allowances to them and to bondholders and stockholders, who have instituted the suit, for disbursements for counsel, etc.
880. Accounts and accounting by receiver—Control over his acts.
881. Distribution by the receiver.
882. Removal, resignation, and discharge of receivers.

A. APPOINTMENT OF RECEIVER—EFFECT AS TO TITLE TO THE
PROPERTY.

§ 862. *When a receiver will be appointed in behalf of a foreclosing mortgagee.*—A corporation which has become hopelessly insolvent may consent to a foreclosure of its mortgage.¹ But generally the mortgagor objects to giving up possession to the mortgagee and also objects to a receiver being appointed. Nevertheless, where the mortgage of a corporation is being foreclosed by suit in equity, the court will appoint a receiver if the mortgagor is insolvent and the mortgage covers income and profits, inasmuch as otherwise the income and profits would go to the mortgagor.² Moreover, a receiver will

¹ *Dickerman v. Northern T. Co.*, 176 U. S. 181, 191 (1900), the court saying: "If the company had become insolvent and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of the stockholders cannot question their right to do so."

² See § 853, *supra*, to the effect that until foreclosure the rents go to the mortgagor. Where the mortgage covers the income and profits and foreclosure has been commenced for default in interest, this is sufficient for the appointment of a receiver, in order to secure the future income and profits, even though it is not shown that the security is inadequate or in jeopardy or the company insolvent. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. In *Wilmer v. Atlanta, etc. Ry.*, 2 Woods, 409 (1875); s. c., 30 Fed. Cas. 73, Judge Woods held that where the mortgage covered the income, and the trustee was entitled to take possession after default, but refused to do so, and the company is being managed in the interest of another railroad company, the court will appoint a receiver "independent of any probable deficiency of the trust property

to pay the debt secured by the deed of trust. The application for a receiver in such a case is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms." Where the mortgage covers the income, rents, and profits, and the mortgagor is insolvent, and foreclosure is commenced, a receiver will be appointed as of course, even though the corporation denies the validity of the bonds and mortgage. *Des Moines, etc. Co. v. West*, 44 Iowa, 23 (1876). To same effect, *American Bridge Co. v. Heidelberg*, 94 U. S. 798 (1867), a dictum. See also *Mercantile T. Co. v. Missouri, etc. Ry.*, 36 Fed. Rep. 221 (1888). Although the mortgage covers the income, yet a receiver is not a matter of right during the foreclosure suit. The court may compel the company to pay the profits into court without a receiver being appointed. "Unquestionably there may be a right to foreclose without the right to appoint a receiver or change the possession of the property. This latter depends upon the danger of ultimate loss to the bondholders by permitting the property to remain in possession of its owners until the final decree and sale, if one is to be made." Mr. Justice Miller refused the application in this case. *Union T. Co. v. St. Louis, etc. R. R.*, 4 Dill. 114 (1877); s. c., 24 Fed. Cas. 706. In *Dow v. Memphis*,

be appointed in behalf of a foreclosing mortgagee where there is danger that executions will be levied on the mortgaged property and thus dismember it.¹ A receiver will also be appointed where the mortgagor is insolvent and the mortgaged property is insufficient to pay the mortgage debt, and there is danger of loss unless a receiver is appointed.² So also where the trustee of the mortgage is by its

etc. R. R., 20 Fed. Rep. 260 (1884), a receiver was appointed, the mortgage covering the income and earnings, and the company being insolvent. For an approved form of an order appointing a receiver and granting an injunction, see *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 334-337 (1879); s. c., 22 Fed. Cas. 274.

¹ A receiver will be appointed where the company is insolvent and has parted with all its bills receivable and available assets, and there is imminent danger that executions will be levied on the property piecemeal. *Re South Carolina R. R.*, 11 Chic. Leg. N. 8 (1878). See also *Sage v. Little, etc. R. R.*, 125 U. S. 361 (1888), where a judgment creditor applied.

² In an application for a receivership, although the insolvency of the company is denied, yet, where the company is unable or unwilling to pay the interest, a receiver may be appointed. If the security is adequate, and there is no danger of ultimate loss to the mortgagee, a receivership will be denied; but where the owner of a conflicting claim controls the company, a receiver will be appointed. *Farmers' L. & T. Co. v. Winona, etc. Ry.*, 59 Fed. Rep. 957 (1893). A mortgagee is entitled to the income and a receiver therefor upon default, if the mortgagor is insolvent and the security is inadequate, even though the mortgage does not cover the income. *Central Trust Co. v. Chattanooga, etc. R. R.*, 94 Fed. Rep. 275 (1899), holding also that a mortgagor is technically insolvent and the security inadequate if it is unable to pay its accruing interest; hence a receiver will be appointed. A receiver will be appointed if the corporation

is insolvent and there is no reasonable prospect that it will soon become solvent. *Ft. Wayne, etc. Corp. v. Franklin, etc. Co.*, 57 N. J. Eq. 7 (1898). A receiver will not be appointed at the instance of a second mortgagee, where there is no evidence of waste, fraud, or probable loss by continuing the management, even though the corporation is insolvent. *Trust & Deposit Co. v. Spartanburg, etc. Co.*, 91 Fed. Rep. 324 (1898). Where the mortgagor company is insolvent and interest is in arrears, and the property is an insufficient security, and foreclosure has been commenced, the court will appoint a receiver. *Kerp v. Michigan, etc. R. R.*, 14 Fed. Cas. 382 (1873), holding also that the receiver may take the property from the lessee of a mortgagor, the lessee being made a party, and the lease being subject to the mortgage. Where the company is insolvent and there are arrears of interest, and the property is insufficient to pay the debt, and the equity of redemption has been sold, and the purchaser is in possession, and the mortgage covered the rents and profits, a clear case for a receiver is made out. *Kelly v. Alabama, etc. R. R.*, 58 Ala. 489 (1877). Even though the mortgage does not cover rents and profits, yet, "when a mortgagor in possession has made default in the payment of the mortgage debt and is insolvent, the mortgage not being an adequate security for the payment of the debt, or there is imminent danger of waste or destruction of the property, the mortgagee, instituting a suit in equity for a foreclosure, may obtain the appointment of a receiver to take possession and secure the rents and prof-

terms authorized to take possession of the property upon default, but

its, and in this way fasten a specific lien upon the rents to meet any deficiency of the mortgage debt." *Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567, 597 (1879). Ordinarily the question of whether a receiver shall be appointed is one upon which there is no appeal from the decision of the court below. *Milwaukee, etc. R. R. v. Soutter*, 2 Wall. 510 (1864). In *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32, the court said: "The power of courts of chancery to appoint receivers is a discretionary power, to be exercised with great caution. To dispossess the owner of property of its possession before a final hearing is a strong measure, not to be adopted but in a strong case. I think it should never be done, unless without it the complainant would be in danger of suffering irreparable loss." The court refused to appoint a receiver where, although there had been ten years' default, the bill failed to allege that the mortgaged property was not a sufficient security for the debt. But the court appointed a receiver to examine the books and affairs of the road, and ascertain the net earnings, and receive a specified proportion thereof for the bondholders, and the court ordered the company to comply with those directions. Although a suit is pending by a stockholder to obtain a receiver, yet the mortgage bondholders upon default may institute a foreclosure suit and have a receiver appointed in such suit. The court will not stay the latter suit at the instance of the stockholder who brought the first suit. *Pennsylvania Co. etc. v. Jacksonville, etc. Co.*, 55 Fed. Rep. 134 (1893).

Mr. Justice Bradley said in *Vose v. Reed*, 1 Woods, 647 (1871); s. c., 28 Fed. Cas. 1298, that the appointment of a receiver was discretionary, and that the court would appoint one where the complainant had an equita-

ble interest, and the defendant, being in possession, was wasting or removing the property. But he refused the application of the bondholders for a receiver where the property was in the hands of state officials who indorsed the bonds in behalf of the state. Every other remedy against them—injunction suit for damages and a suit to follow the fund—should be exhausted before a receiver is appointed in such a case. Justice Harlan, in *Tysen v. Wabash Ry.*, 8 Biss. 247 (1878); s. c., 24 Fed. Cas. 479, said that the appointment of a receiver "has depended largely upon the peculiar circumstances of each case," and he refused to appoint a receiver where the mortgage did not cover the rents and profits, and a large majority of the bondholders were opposed to it on the ground that it would interfere with a proposed reorganization, and where the appointment would disrupt the system of roads and would destroy any possibility of the second-mortgage bondholders, who instituted this suit and application, from realizing anything on their bonds. "The appointment of a receiver rests in the sound discretion of the court; mere insolvency may or may not call for such action." A motion for a receiver will be deferred when the necessity is not clear. *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 27 Fed. Rep. 146 (1886). A federal court to which a case has been removed after an *ex parte* appointment of a receiver will remove him where the property is not in jeopardy and no particular occasion therefor exists. *McHenry v. New York, etc. R. R.*, 25 Fed. Rep. 114 (1885). In a bondholder's suit for foreclosure for non-payment of coupons, a receiver will be appointed where the company is seriously embarrassed, and the road in dangerous physical condition, and the rolling-stock is insufficient, and current expenses are not met, except by

he refuses to do so, the court upon a foreclosure suit will appoint a receiver.¹ It is to be borne in mind, however, that a court of equity has

personal guaranties. The defense that the bonds were fraudulent and without consideration is insufficient to prevent the receivership. *Heinsheimer v. Dayton, etc. R. R.*, 3 Ry. & Corp. L. J. 268 (O. Com. Pl. 1888). The inadequacy of the security must be clearly made out. *Burlingame v. Parce*, 12 Hun, 144 (1877), not, however, a corporation case. A receiver will be appointed where it is necessary in order to save the property from going to absolute destruction. *Wallace v. Loomis*, 97 U. S. 146 (1877). A receiver will be appointed to take the receipts for the time between the decree of foreclosure and the sale itself. *Benedict v. St. Joseph, etc. R. R.*, 19 Fed. Rep. 173 (1883). "In equity actions applications for the appointment of receivers are not uncommon, and in actions to foreclose real-estate mortgages, where the security is weak or inadequate, the court may appoint a receiver of the income and profits of the property covered by the mortgage, in anticipation of the judgment and sale, and such appointments are made on general principles of equity independent of all statutes." *U. S. Trust Co. v. New York, etc. Ry.*, 35 Hun, 341 (1885). "After foreclosure is commenced, the plaintiff may, if the security is in jeopardy, intercept, through the aid of a receiver, the rents or emblements, or both, upon the theory that the whole estate is pledged as security for the debt, and that the creditor is immediately entitled to his money or the property pledged." *Hamilton v. Austin*, 36 Hun, 138 (1885). In *Mercantile T. Co. v. Missouri, etc. Ry.*, 36 Fed. Rep. 221 (1888), where the interest was in default and insolvency inevitable, the court appointed a receiver, and said: "The right to foreclose does not

carry with it the right to a receiver. There are many considerations which bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of various holders, require possession by the court before the receiver should be appointed. It does not go as a matter of course, and yet it is not a matter that a court can refuse simply because it is an annoyance. If, looking at the situation of the litigating parties and of the property, with the prospects of the future, it should appear to a court that they would be benefited, that their interests would be subserved by the appointment of a receiver, why no court—although a matter resting, as it is said, in its discretion—could refuse to make the appointment."

¹ *Warner v. Rising Fawn Iron Co.*, 3 Woods, 514 (1878); s. c., 29 Fed. Cas. 261. See also § 822, *supra*. A receiver may be appointed pending a bondholder's bill to have a strict foreclosure decreed. *Ellis v. Boston, etc. R. R.*, 107 Mass. 1, 28 (1871). The fact that the trustee has power to take possession, but does not do so, is no bar to the appointment of a receiver. A receiver is not appointed as a matter of course upon a foreclosure for the non-payment of interest. Although the company, instead of paying the coupons, uses the income for improvements, the court will not appoint a receiver. If a receiver had been in charge the same thing would have been ordered. *Williamson v. New Albany, etc. R. R.*, 1 Biss. 198 (1857); s. c., 30 Fed. Cas. 12.

no power to appoint a receiver to carry on the business except with a view to winding up its affairs and selling its property.¹

In extreme cases and where delay in the appointment of a receiver will be dangerous, the court may appoint a receiver in a suit instituted before a default has occurred and before foreclosure has been commenced.²

Yet there is a limit beyond which the court will not go in regard to appointing receivers. A strong case must be made out to deprive the mortgagor of possession before foreclosure is complete. With railroads the rule has been relaxed because such foreclosures generally mean great loss to the bondholders anyway, and because the public will be served better by a receiver than by the insolvent mortgagor corporation, embarrassed by attachments, suits, and liens.³

1 *Gutterson & Gould v. Lebanon, etc. Co.*, 151 Fed. Rep. 72 (1907).

2 Where the mortgagor railroad company has become insolvent and is unable to meet its floating debt or the coupons which are about to become due, and is unable to borrow money, and its business is liable to be broken up and destroyed, and the company admits all this, a mortgage bondholder may before default file a bill for a receiver and an injunction. "Although as a rule a mortgagee cannot ask for relief until his mortgage debt has become due, he can go into a court of equity before that time has arrived and ask for an injunction and a receiver to prevent the subject-matter of his mortgage from being impaired and wasted." It is immaterial that the company desires the application to succeed. *Brassey v. New York, etc. R. R.*, 19 Fed. Rep. 663 (1884). A receiver will be appointed when there is a larger deficit in interest, business is decreasing, repairs are needed, the bondholders are not in harmony, and a foreclosure is probable, and there is no other way of applying profits to debts. A receiver over the part located in another circuit was denied, the right being doubtful. *Mercantile T. Co. v. Missouri, etc. Ry.*, 36 Fed. Rep. 221 (1888). A bill in equity to foreclose a mortgage given by a water-works

corporation showed that its assets were insufficient to pay its mortgage debts, that it was in a failing condition, and would not be able to continue its business or carry out its contracts; that while a default had not taken place under the mortgage, it was certain to occur very soon; that many of its creditors, without liens, had attached and levied upon mortgaged property, and had garnisheed debts due the corporation, which debts were also covered by such mortgage; that it was impossible for it to collect its revenues; that it was without resources to carry on its business; and that its property was in imminent danger of waste and loss. The bill prayed for the appointment of a receiver. All persons interested were made parties to the suit. The corporation, by its president, gave written consent to the appointment of a receiver. *Held*, that such bill was improperly dismissed on demurrer of defendants, who were attaching creditors of the corporation. *Thompson v. Natchez, etc. Co.*, 68 Miss. 423 (1891). A receiver of rents and profits of land will not be appointed when the right to sell has not yet accrued and part of the debt is not yet due. *Hollenbeck v. Donnell*, 94 N. Y. 342 (1884), *rev'g* 29 Hun, 94 (1883).

3 A court will not appoint a receiver as a matter of course in the foreclos-

Hence a foreclosure may be commenced and a receiver appointed

ure of a railroad mortgage. Fraud, incompetency, preservation of the property, or some other sufficient reason must be given. *Blair v. St. Louis, etc. R. R.*, 20 Fed. Rep. 348 (1884). The court may deny the receivership, but require the company to make stated reports to the court pending a bondholder's suit to foreclose. *Williamson v. New Albany, etc. R. R.*, 1 Biss. 198 (1857); s. c., 30 Fed. Cas. 12. In *Central T. Co. v. Wabash, etc. R. R.*, 25 Fed. Rep. 693 (1885), the court refused to appoint a receiver because negotiations were pending to adjust the whole matter. In *Cheever v. Rutland, etc. R. R.*, 39 Vt. 653 (1863), the court refused to appoint a receiver on the application of the first-mortgage bondholders, who had filed a bill to foreclose and to obtain possession, or to have a receiver appointed, although the second mortgagees were in possession and the interest on the first-mortgage bonds had not been paid. The management of the second mortgagees was capable and honest, and the court refused to disturb it. No receiver will be appointed where the mortgage provides that the mortgagor's possession shall not be disturbed for default due to a failure of business, and the default was due to that. But the court will retain the suit to require quarterly reports from the company and to take action thereafter as may be deemed best. *Stewart v. Chesapeake, etc. Canal Co.*, 5 Fed. Rep. 149 (1881); *American, etc. T. Co. v. Toledo, etc. Ry.*, 29 Fed. Rep. 416 (1886). In *Meyer v. Johnston*, 53 Ala. 237, 335, 336, 349, 350 (1875), strict rules in regard to the appointment of a receiver were laid down, yet the appointment of a receiver in that case was upheld. A receiver will not be appointed unless the suitor has a clear right, and this extraordinary remedy is necessary to prevent loss or great danger and there is no other mode of protection. Over-

ton v. Memphis, etc. R. R., 10 Fed. Rep. 866 (1882).

A temporary receiver will not be appointed of a corporation, whose only assets consist of stock in various gas companies, which stocks have been mortgaged by the former company, where all charges of fraud and mismanagement are denied. *Brady v. Bay State, etc. Co.*, 106 Fed. Rep. 584 (1901). The court will not refuse a receivership on the ground that the motive of the complainant is to acquire the property of the insolvent defendant at a low figure. *Ft. Wayne, etc. Corp. v. Franklin, etc. Co.*, 57 N. J. Eq. 16 (1898). Where a railroad has been leased at a rental insufficient to pay the interest on its bonds, a receiver will not be appointed at the instance of a creditor or a stockholder, inasmuch as all the receiver could do would be to collect and apply the rental on the bonds. Neither will a receiver be appointed of the lessee where its assets consist merely of earnings, which are insufficient to pay the rental. *City of Cape May v. Cape May, etc. R. R.*, 44 Atl. Rep. 973 (N. J. 1899). In a stockholder's suit to set aside a sale by a Maine corporation of all its assets to a New Jersey corporation, the suit being in New Jersey, the Maine corporation is a necessary party defendant, and a court in Maine will not appoint a receiver of the same for the sole purpose of appearing in the suit in New Jersey. *Hutchinson v. American, etc. Co.*, 104 Fed. Rep. 182 (1900). Where a majority of the bondholders are opposed to a receivership and there is a reasonable prospect that the interest will soon be paid, the court will not appoint a receiver, even though interest has not been paid for seventeen years, there being no proof of insolvency or dishonesty in the management. *Romare v. Broken, etc. Co.*, 114 Fed. Rep. 194 (1902). Even though an insolvent corporation has

for non-payment of taxes, general insolvency being alleged.¹ Where a city is about to forfeit its grant to a street railway on account of non-payment of taxes, the grant providing for such forfeiture, a mortgagee of the street railway may have a receiver appointed to borrow money and pay such taxes.² The receivership, however, is never a matter of right,³ and conditions may be imposed⁴ relative to the "six months' " rule.

In Michigan, by statute, the courts are not allowed to appoint a receiver, on the ground that the security is inadequate, during foreclosure of a mortgage that does not cover rents and profits.⁵ But even in Michigan a minority of the mortgage bondholders may have a receiver appointed, where the mortgage trustees have resigned, the corporation is without officers, executions are being levied, and a forfeiture of charter is imminent.⁶ A divisional mortgage bondholder cannot have a receiver appointed over the whole property as against the

assigned for the benefit of creditors, and afterwards a receiver of the same has been appointed by a court, yet bankruptcy proceedings take precedence over the assignment and receivership. *Lea v. Geo. M. West Co.*, 91 Fed. Rep. 237 (1899). The national bankruptcy act does not prevent a court of equity appointing a receiver of an insolvent corporation. *State v. Superior Court*, etc., 20 Wash. 545 (1899).

¹ *Putnam v. Jacksonville, etc. Ry.*, 61 Fed. Rep. 440 (1893). In a foreclosure suit the court may appoint a receiver where the property is insufficient to pay the debt and the mortgagor is insolvent and the income is not being applied to taxes, insurance, and repairs. *American Nat. Bank v. Northwestern, etc. Co.*, 89 Fed. Rep. 610 (1898). *Cf.* § 799, *supra*.

² *Union St. Ry. v. City of Saginaw*, 115 Mich. 300 (1897).

³ The appointment of a receiver "is not a matter of right, but rests in the sound discretion of the court, and is a power to be exercised sparingly and with great caution." *Farmers' L. & T. Co. v. Kansas City, etc. R. R.*, 53 Fed. Rep. 182 (1892).

⁴ See § 861, *supra*.

⁵ Under the statutes of Michigan the

courts are not allowed to appoint a receiver of farm lands during the foreclosure suit, where the mortgage does not cover rents and profits. *Wagar v. Stone*, 36 Mich. 364 (1877). The federal court in Michigan will follow the state statute to the effect that the mortgagee cannot take possession until the foreclosure sale is confirmed, and hence will not appoint a receiver on the ground of the inadequacy of the security. *Union, etc. Ins. Co. v. Union, etc. Co.*, 37 Fed. Rep. 286 (1884). A receiver was appointed at the instance of a mortgagee of a manufacturing company in *Longley v. Amazon, etc. Co.*, 128 Mich. 194 (1901). Even though a mortgage gives the mortgagee a right to a receivership in case of default, yet the court will not appoint a receiver unless there is danger of ultimate loss to the bondholders by permitting the mortgagor to remain in possession. *Union T. Co. v. Charlotte, etc. Co.*, 116 N. W. Rep. 379 (Mich. 1908). The Colorado statute does not prevent the appointment of a receiver in behalf of a foreclosing mortgagee. *Elmira, etc. v. Stanchfield*, 160 Fed. Rep. 811 (1908).

⁶ *Ralph v. Shiawassee Circuit Judge*, 100 Mich. 164 (1894).

objection of the bondholders secured by mortgage on the remainder of the property.¹ The bondsman for a receiver is liable for his embezzlements, even though the receivership was illegal for want of jurisdiction.²

In England a railroad mortgage covers the income and earnings only, and hence no foreclosures are possible. The court, on the insolvency of a railway, will appoint a receiver to receive payment of the profits, but will not give the receiver power to take charge of and manage the property. In England the receiver with power to take charge of and manage the property is called "manager."³ If the company does not pay the interest on the mortgage, the court will appoint a receiver to receive the income for the benefit of the mortgagee.⁴

¹ *Merriam v. St. Louis, etc. Ry.*, 136 Mo. 145 (1896).

² *Baltimore, etc. Assoc. v. Alderson*, 99 Fed. Rep. 489 (1900).

³ *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36. In England the court of chancery refuses to appoint a receiver for the purpose of carrying on a business until a debt can be paid, especially where the property of a quasi-public corporation is involved. "The court does not assume the management of a business or undertaking except with a view to the winding-up and sale of the business or undertaking. The management is an interim management; its necessity and its jurisdiction spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends." If a receiver has been improperly appointed it binds only the parties to the action, except that possession of the property by the court must be respected. *Pegge v. Neath Co.*, [1895] 2 Ch. 508.

⁴ *Bowen v. Brecon Ry.*, L. R. 3 Eq. 541 (1876). In England the duty of a receiver is merely to receive the profits and not the entire income, and hence no receiver of an unfinished railroad will be appointed, inasmuch as there can be no profits. *Re Knott End Ry.*, [1901] 2 Ch. 8. In 1876 the

court of chancery in England decided (*Gardner v. London, etc. Ry.*, L. R. 2 Ch. App. 201—1867) that a mortgage on the "undertaking" and tolls, but not on the railway itself, was such that the court had no inherent power to appoint a manager of the railroad upon default in the mortgage, but had power only to appoint a receiver of the tolls from the company itself. Thereupon parliament, in the Railway Companies Act of 1867, conferred such power on the courts. Under this act the English courts may appoint a manager as well as receiver. *Re Manchester, etc. Ry.*, L. R. 14 Ch. D. 645 (1880). A receiver of the docks owned by a dock company may be appointed by the court at the instance and suit of a mortgagee to manage the docks and pay any surplus profits into the court. *Ames v. Birkenhead Docks*, 20 Beav. 332 (1855). "It is the ordinary remedy of a mortgagee of tolls to come here for a receiver. That is one of the oldest remedies in this court." *Hopkins v. Worcester, etc. Canal*, L. R. 6 Eq. 437 (1868). In the early case of *Fripp v. Chard Ry.*, 21 Eng. L. & Eq. 53 (1853), the court appointed a receiver to operate a railroad for the benefit of mortgagees where the company was hopelessly insolvent, and interest and principal were in arrears. But the court will not appoint a receiver of a railway company that has

§ 863. *Receivers upon the application of judgment creditors, general creditors, the state, the corporation itself, stockholders, and in other cases—Procedure in making the appointment—Collateral attack on legality of receivership.*—Usually, of course, a receiver is appointed on the application of a mortgagee or a trustee of a mortgage deed of trust.¹ Sometimes, however, the trustee is reluctant or slow to act, and then the application is generally made by some one else. The right of various parties to make the application will now be considered. A judgment creditor of a corporation, who has caused execution to be issued, may, after the execution is returned unsatisfied, file a bill in equity to cause the corporate assets to be applied to his debt, and may have a receiver appointed. Especially is this the case with railroad corporations, inasmuch as the railroad itself or the company's equity therein cannot be sold on execution.² Even the re-

never done anything towards proceeding with its enterprise. *Re Birmingham, etc. Ry.*, L. R. 18 Ch. D. 155 (1881). In England a receiver and manager will be appointed in behalf of debenture-holders when the company is insolvent and executions are about to be levied. *Edwards v. Standard, etc. Syndicate*, [1893] 1 Ch. 574. Concerning receiverships in England, see also *Hodges on Railways*, and § 833, *supra*.

1 See § 862, *supra*, as to such applications.

2 See § 899, *infra*. A receiver of a railroad may be appointed at the instance of judgment creditors. *Hervey v. Illinois Mid. Ry.*, 28 Fed. Rep. 169 (1884); s. c. on appeal, *sub nom. Union T. Co. v. Illinois, etc. Ry.*, 117 U. S. 434 (1886). Where the mortgage provides that the bonds shall become due in case of an execution issuing against the company and being unpaid, it is legal for a holder of coupons to obtain judgment and issue such execution, and the mortgage may thereby be declared due, even though the judgment on the coupons was obtained by consent for the purpose of having the mortgage become due. *Dickerman v. Northern T. Co.*, 176 U. S. 181 (1900). Upon the return of an execution against a corporation unsatisfied, a court of equity has inher-

ent power to appoint a receiver of the corporation. *Palmer v. Clark*, 4 Abb. N. Cas. 25 (1877). Judgment creditors in England, by the Railway Companies Act of 1867, cannot levy execution, but they may have a receiver appointed. *Re Manchester, etc. Ry.*, L. R. 14 Ch. D. 645 (1880). An execution creditor cannot have a receiver appointed as against a mortgagee in possession, even though collusion be charged. An injunction requiring the mortgagee to apply the rents and profits to the mortgage will be granted. *U. S. v. Masich*, 44 Fed. Rep. 10 (1890). "The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law, and was exercised in a proceeding brought by the attorney-general in the name of the sovereign. The court of chancery never assumed jurisdiction in such cases until it was conferred by act of parliament. It declined, until the power was conferred by statute, to sequester corporate property through the medium of a receiver, or to dissolve corporate bodies, or to restrain the usurpation of corporate powers." *Decker v. Gardner*, 124 N. Y. 334 (1890). Where, under levy of execution, the tolls of a bridge company are sold, a court of equity will appoint a receiver to collect the tolls

turn of execution unsatisfied is not necessary if it clearly would not result in reaching any property.¹ After a judgment creditor has applied for a receiver the corporation cannot avoid the receivership by assigning for the benefit of its creditors.²

Where, however, the receivership is obtained merely to delay other and apply them on the judgment. *Covington, etc. Co. v. Shepherd*, 21 How. 112 (1858). As to the form of a decree in a creditor's action, and as to the right of a creditor to discontinue a suit brought in behalf of himself and other creditors, see *Salisbury v. Binghamton Pub. Co.*, 85 Hun, 99 (1895). In a creditor's bill for a receiver, stockholders are not necessary or proper parties. *Bristol, etc. Co. v. Thomas*, 93 Va. 396 (1896). Supplementary proceedings lie against a corporation, and a receiver may be appointed. *South Bend, etc. Co. v. Pierre F. & M. Ins. Co.*, 4 S. D. 173 (1893). A judgment creditor of an insolvent corporation may have a receiver appointed. *Youree v. Home, etc. Co.*, 79 S. W. Rep. 175 (Mo. 1904). Where the directors are winding up a corporation properly the court will not appoint a receiver to do so. *Brookshire v. Farmers', etc.*, 73 S. C. 131 (1905). A creditor of an insolvent bank cannot cause to be set aside a cancellation of a lease taken by the bank when prosperous, even though the bank built a building on the leased premises, it appearing that at the time of the cancellation the property was not paying fixed charges and the stockholders assented to the cancellation which was made prudently and in good faith and was known to the creditor who subsequently complained on account of a rise in values. *Brown v. Schleier*, 194 U. S. 18 (1904).

¹ A judgment creditor need not sue out execution upon his judgment and have a return *nulla bona*, in order to file a bill in equity for a receiver and other relief, if such execution would be an idle ceremony. The court has power, but is not bound, to appoint

a receiver at the instance of a single judgment creditor suing for himself alone. The net income received by the receiver goes to such creditor and not to a mortgagee who did not become a party thereto. Other and later creditors who come in are not entitled to anything until after the original complainant is paid. It is immaterial that the judgment creditor obtained judgment by confession of the defendant. *Sage v. Memphis, etc. R. R.*, 125 U. S. 361 (1888). Where a corporation is insolvent and owns valuable properties widely scattered, and by consent, upon the filing of a creditor's bill, a receiver is appointed and has possession for nine months, it cannot then attack the receivership on the ground that the creditors' actions were not based on judgments, etc. *Brown v. Lake Superior Iron Co.*, 134 U. S. 530 (1890). The appointment of a receiver at the instance of a judgment creditor without an execution being returned unsatisfied is nevertheless legal as against the objection of another creditor, the corporation not having objected. *Enos v. New York, etc. R. R.*, 103 Fed. Rep. 47 (1900). A judgment creditor in one state cannot have a receiver appointed in another state. He must first obtain judgment in the latter state. *Barber v. International Co.*, 48 Atl. Rep. 758 (Conn. 1901). Before a receiver of an insolvent corporation can be appointed at the instance of a creditor, execution unsatisfied on his judgment must be returned in the county where the corporation is located. *Minkler v. U. S. Sheep Co.*, 4 N. D. 507 (1895). See also p. 3033, *infra*.

² *Monarch Co. v. Bank, etc.*, 44 S. W. Rep. 956 (Ky. 1898).

creditors, the court will discharge the receiver, even though the judgment is a valid one.¹ A court of equity has no power to appoint a receiver to carry on the business except with a view to winding up its affairs and selling its property.² If the interested parties delay for an unreasonable length of time in proceeding to a sale or in reorganizing, the court will discharge the receiver.³ Where a stockholder and creditor, at the instigation and with the connivance of the officers

1 In *Duncan v. Treadwell Co.*, 82 Hun, 376 (1894), the court said: "We are not aware of a statute or law which justifies the continuance of the receivership for the purpose of giving the corporation time to raise money to pay its debts." In *Re Philadelphia, etc. R. R.*, 14 Phila. 501 (1881), the circuit court of the United States said: "The modern practice prevailing to some extent, elsewhere, of transferring corporate property to the custody of the courts, to be thus held and managed for an indefinite period of years, to suit the convenience of parties, whereby general creditors and stockholders are kept at bay, I regard as a mischievous innovation." Where a judgment creditor for \$16,000 has had a receiver in possession for four years and has realized only \$1,000, and has not pursued any other remedy, and the security is ample, and the lien of the judgment creditor is of doubtful validity, the court will discharge the receiver. *Howard v. La Crosse, etc. R. R.*, Woolw. 49 (1864); s. c., 12 Fed. Cas. 641. Where, by previous agreement with the officers of the company, a judgment creditor applies for and obtains a receiver by consent, and this receiver for nine months receives the income and applies it all to improvements, no effort being made to pay the judgment, the object being to delay all creditors and to apply all profits to improvements and to pay off a bonded debt before it is due, it is an abuse of the process of the court and the receiver will be discharged. *Sage v. Memphis, etc. R. R.*, 5 McCrary, 643 (1883); s. c., 18 Fed. Rep. 571, and 125 U. S. 361

(1888). See also *Moran v. Alvas, etc. Co.*, N. Y. L. J., Dec., 1891, where the court refused to appoint a receiver, and said: "The power of the court to appoint a receiver to preserve the assets of a corporation, foreign or domestic, it seems to me does not apply where the corporation is a solvent and going concern, and where it is perfectly apparent that the only purpose of the application for the appointment of a receiver is to prevent creditors enforcing their claims by the ordinary and due process of law against such solvent corporation." *East Tennessee, etc. R. R. v. Atlanta, etc. R. R.*, 49 Fed. Rep. 608 (1892), where the federal court appointed a receiver because the state court on a prior bill was about to appoint one to merely nurse the property. A court cannot appoint a receiver of a foreign corporation at the instance of a judgment creditor where the company is solvent and the receivership is to carry along the business in order to pay creditors and save something to the corporation. A court of equity has no power to operate a business as a going concern, the main purpose being to delay creditors until the corporation has time to raise money, the corporation being a private manufacturing one. The court may merely continue the business to preserve the assets and sell the same for the benefit of creditors. *Cronan v. District Court*, 96 Pac. Rep. 768 (Idaho, 1908).

2 *Gutterson & Gould v. Lebanon, etc. Co.*, 151 Fed. Rep. 72 (1907).

3 *Platt v. Philadelphia, etc. R. R.*, 65 Fed. Rep. 872 (1895). See also § 882.

and other stockholders, files a bill to keep the corporation a going concern and obtains a receiver for that purpose, another creditor may file a bill to subject the property of the corporation to the payment of his debt, an allegation being made that the first bill was to hinder and defraud creditors.¹ The supreme court of the United States has recently held, however, that the circuit court of the United States for the southern district of New York has jurisdiction to appoint receivers of an insolvent New York street railway company, under a bill of a general creditor alleging diverse citizenship of the parties, and that more than \$2,000 and interest and costs is involved, and alleging also the insolvency of the defendant, and praying for the administration of its assets, where the defendant answers, admitting the allegations of the bill, and joins in the prayer for the appointment of the receiver. The defense that complainants are not judgment creditors is waived by such an answer.²

A general creditor of a corporation, however, cannot ordinarily obtain a receiver. The general rule is that until he obtains judgment, and execution is returned unsatisfied, he will not be given the extraordinary remedy of a receivership.³ There is, however, the above ex-

¹ Quoted and approved in *Cronan v. District Court*, 96 Pac. Rep. 768 (Idaho, 1908); *Coliseum v. Interstate, etc. Co.*, 123 Ala. 512 (1899). A collusive suit by officers for dissolution and the appointment of a receiver does not prevent a creditor filing an independent bill. *Taber v. Royal, etc. Co.*, 124 Ala. 681 (1899).

² *In re Metropolitan*, 208 U. S. 90 (1908). The president has no authority to consent to a receiver being appointed. *Nesbit v. North Georgia, etc. Co.*, 156 Fed. Rep. 979 (Ga. 1907).

³ Simple-contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity to obtain a seizure of their debtor's property and collect unpaid subscriptions and apply the same to the payment of their debts, even though they allege that an existing mortgage on the property is fraudulent and that the company is insolvent, and a suit for foreclosure of the mortgage is going on. They might, under certain conditions, inter-

vene. The federal courts will not even follow a state statute authorizing such a suit, nor does the fact that the foreclosure suit is in the federal court give jurisdiction of the creditor's suit. "Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, give to a simple-contract creditor of a corporation any lien on its property, or charge any direct trust thereon." The capital stock is a trust fund rather in the administration of the assets after possession by a court of equity than a trust attaching to the property as such for the direct benefit of either creditor or stockholder. *Hollins v. Brierfield Coal, etc. Co.*, 150 U. S. 371 (1893); *Texas, etc. Assoc. v. Storrow*, 92 Fed. Rep. 5 (1899); *Smith-Dimmick, etc. Co. v. Teague*, 119 Ala. 385 (1898). A simple creditor cannot have a receiver appointed. *Hobson v. Pacific, etc. Co.*, 89 Pac. Rep. 866 (Cal. 1907). A claim for unliquidated damages for a tort is no basis for a creditor's bill against a

ception to this rule. If the corporation acknowledges the debt, and it is clear that the corporation is insolvent, and that the obtaining of a judgment and the return of an execution unsatisfied will be a useless

corporation on the ground that the latter will lose or misapply its property. *Slover v. Coal Creek, etc. Co.*, 82 S. W. Rep. 1131 (Tenn. 1904). Before a corporate creditor can complain of the method in which the corporation has disposed of its property he must obtain a judgment. *McKee v. City Garbage Co.*, 103 N. W. Rep. 906 (Mich. 1905). A general creditor must first obtain a judgment against the corporation before filing a bill in equity to enforce such claim. *Virginia, etc. Co. v. Fisher*, 104 Va. 121 (1905). Even though a corporation has allowed judgment to be taken against it, yet a general creditor cannot have a receiver appointed on the ground that such judgment constitutes an illegal preference. *Builders', etc. Co. v. Lucas*, 119 Ala. 202 (1898). The creditors of an insolvent partnership are not entitled to a receiver of a corporation, even though they allege that one of the partners is president and is mingling the business of the two concerns in such a manner as to defraud the partnership. *Cabaniss v. Reco, etc. Co.*, 116 Fed. Rep. 318 (1902). Labor claimants cannot have a receiver appointed, though the company is insolvent, there being no judgment. *Putnam v. Jacksonville, etc. Ry.*, 61 Fed. Rep. 440 (1893), holding that not even though the accounts, etc., of three companies were commingled was there good cause for a receiver. A general creditor of an insolvent corporation cannot have a receiver appointed and obtain a marshaling of the assets. *Steele, etc. Co. v. Laurens, etc. Co.*, 98 Ga. 329 (1896). *Quere*, as to whether the court will appoint a receiver on the application of the receiver of another road. *Putnam v. Jacksonville, etc. Ry.*, 61 Fed. Rep. 440 (1893). A court of equity has no power to appoint a receiver

at the instance of a simple creditor for the purpose of operating the property until the creditors are paid. *Etowah Min. Co. v. Wills, etc. Co.*, 106 Ala. 492 (1895). In the federal court, following as it does the English practice on its equity side, a corporation will not be placed in a receiver's hands at the instance of a general creditor who has not obtained judgment and had execution returned unsatisfied. *Brown v. Lake Superior Iron Co.*, 134 U. S. 530 (1890). Mortgagees in trust cannot be compelled to yield to receivers representing creditors at large. *Re Home Assoc.*, 129 N. Y. 288 (1891). The courts have no power to appoint a receiver of the property of any corporation, whether domestic or foreign, upon the filing of a bill by a creditor-at-large on behalf of himself and of all others similarly situated. *Lehigh Coal, etc. Co. v. Central R. R.*, 43 Hun, 546 (1887). Mere insolvency is not sufficient ground for the appointment of a receiver where there is no charge of fraud, mismanagement, or wasting of assets, especially where the insolvency is denied. *Lawrence, etc. Co. v. Rockbridge Co.*, 47 Fed. Rep. 755 (1891). A general creditor cannot restrain the levy of execution by a judgment creditor, and the appointment of a receiver of the corporation in such a suit without making the corporation a party or giving it notice is void. *Gravenstine's Appeal*, 49 Pa. St. 310 (1865). A general creditor cannot enjoin the corporation from making a lease of its property to another general creditor nor have a receiver appointed. Although the corporation is insolvent, "this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation." *Pond v. Framingham, etc. R. R.*, 130 Mass. 194

formality, the court has power to appoint a receiver at the instance of a simple creditor.¹ A stockholder and bondholder of an insolvent

(1881). The general creditor must first get a lien by attachment, judgment, or otherwise. *Pond v. Framingham, etc. R. R.*, 130 Mass. 194 (1881). A simple creditor of an insolvent railroad corporation cannot obtain the appointment of a receiver, even though he files a bill in behalf of himself and others. *Smith v. Los Angeles Superior Court*, 97 Cal. 348 (1893). For the statutory rule in New Jersey and other states, see notes, p. 3040, *infra*. A policy-holder in a mutual benefit association may have a receiver appointed where it is alleged that the officers have converted three-quarters of the assets to their own use, and that the officers refused to call meetings of the directors and refused to publish the proceedings as required. *Order of Iron Hall v. Baker*, 134 Ind. 293 (1893). Where the directors of a bank, upon its dissolution, are winding it up, the court will not appoint a receiver where there is no special reason for doing so. *Watkins v. Lawrence Nat. Bank*, 51 Kan. 254 (1893). Where debenture-holders are foreclosing their lien, the company may appoint a temporary manager as well as receiver. *Makins v. Ibotson*, [1891] 1 Ch. 133. Where a company is insolvent to such an extent that the mortgage bondholders will take all the assets, and there is no possibility of general creditors realizing anything, the latter cannot apply to have the company wound up. *Re London, etc. Institute*, 75 L. T. Rep. 658 (1896); *aff'd*, 76 L. T. Rep. 98 (1897). Debenture-holders may have a receiver. *Strong v. Carlyle Press*, [1893] 1 Ch. 268. In England a receiver may be appointed before default in the interest of debentures, where the company is clearly insolvent. *Re Victoria Steamboats*, [1897] 1 Ch. 158. Parties who have intervened in a suit in equity, commenced to dissolve the corpora-

tion and appoint a receiver, cannot in that suit attack the order appointing a receiver. *Commercial Nat. Bank v. Burch*, 141 Ill. 519 (1892).

¹ *In re Metropolitan*, 208 U. S. 90 (1908). A simple-contract creditor may obtain a receiver where his debt is acknowledged by the corporation. *Tompkins Co. v. Catawba Mills*, 82 Fed. Rep. 780 (1897). A receiver appointed at the instance of a creditor with the consent of the corporation is legally appointed. *Horn v. Pere Marquette R. R.*, 151 Fed. Rep. 626 (1907). A simple-contract creditor cannot have a receiver appointed without the consent of the corporation. *Leary v. Columbia River, etc. Co.*, 82 Fed. Rep. 775 (1897). In Indiana simple creditors may obtain the appointment of a receiver of an insolvent railroad corporation, it being shown that the obtaining of a judgment at law and the issue of an execution would be useless. *Chicago, etc. Ry. v. Kenney*, 62 N. E. Rep. 26 (Ind. 1901). Where a general creditor files a bill and has a receiver appointed of an insolvent corporation which appears and admits the debt due the complainant and admits insolvency, an intervening stockholder cannot raise the objection that only a judgment creditor could file such a bill, it appearing that the stock is worthless. Insolvency means inability to meet obligations. *Citizens', etc. Co. v. Union, etc. Co.*, 106 Fed. Rep. 97 (1900). A receiver will be appointed only where the claimant has exhausted his legal remedies, or where a refusal will result in waste or loss of property which otherwise would be applicable to the corporate debts. The mere fact that the company is insolvent or in confusion is not enough. *Falmouth, etc. Bank v. Cape, etc. Co.*, 166 Mass. 550 (1896). A federal court will sometimes appoint a receiver of an insolvent corporation

railroad corporation may have a receiver appointed to continue it as a going concern and prevent dismemberment by judgments.¹ In England a receiver and manager may be appointed at the instance of a debenture holder on the ground that the company's assets are not sufficient to pay the debentures and executions are about to be levied, even though there has been no default on the debentures.² A general creditor may have a receiver appointed where the company is not only insolvent, but its property has been fraudulently transferred by its officers, and it has ceased business, and the property is about to be fraudulently sold out.³ Moreover, it is too late for the corporation to object that the creditor was only a simple creditor, where the proceedings are

although no judgment has been obtained. After the commencement of proceedings therefor an assignment by it for the benefit of creditors is ineffectual. *Belmont Nail Co. v. Columbia, etc. Co.*, 46 Fed. Rep. 8 (1891). Where a manufacturing company is insolvent and has turned over its property to a trustee for some of its creditors, the court, under the circumstances of the case, will appoint a receiver. *Consolidated, etc. Co. v. Kansas, etc. Co.*, 43 Fed. Rep. 204 (1890). A judgment creditor's action to reach corporate assets may be based on a judgment obtained in another state. And where violation of trust, dissipation and concealment of assets and conspiracy are charged, no prior judgment at law at all is necessary. *Merchants' Nat. Bank v. Chattanooga Const. Co.*, 53 Fed. Rep. 314 (1892). Where a company is insolvent and has ceased business and been abandoned by the directors, a simple-contract creditor may have a receiver appointed. *Nunnally v. Strause*, 94 Va. 255 (1897). See note 1, p. 3029.

¹ *Cole v. Philadelphia, etc. Ry.*, 140 Fed. Rep. 944 (1905), holding also that a purchaser of stock and bonds of an insolvent railroad company may maintain a suit in equity in the United States court for the appointment of a receiver, even though the stock and bonds were transferred to

him for that purpose, the transfer being absolute.

² *Re London, etc. Co.*, 92 L. T. Rep. 409 (1905).

³ *Doe v. Northwest, etc. Co.*, 64 Fed. Rep. 928 (1894). Where a corporation is insolvent and such insolvency is due to the gross mismanagement of its directors, who are also charged with a breach of trust, a court of equity may appoint a receiver at the instance of stockholders or mortgage bondholders. *United States, etc. Co. v. Conklin*, 126 Fed. Rep. 132 (1903). A simple creditor may have a receiver appointed in Kentucky where the corporation is insolvent and its assets would otherwise probably be lost or fraudulently disposed of. *Kentucky, etc. Ass'n v. Galbreath*, 77 S. W. Rep. 371 (Ky. 1903). Persons who have been induced by fraud to purchase the debentures of a company which has become insolvent may file a bill in equity to wind up its affairs and to prevent the officers illegally taking its assets, even though the debentures are not yet matured. *Christian v. Michigan, etc. Co.*, 134 Mich. 171 (1903). A creditor of an insolvent bucket-shop corporation may have a receiver appointed and its affairs wound up without obtaining a judgment against it, such creditor not knowing of the fraudulent character of the concern when he paid money to

ready for a decree.¹ A mortgagee who intervenes in a suit instituted by a general creditor cannot raise the objection that only a judgment creditor had a right to institute such a suit.² The objection that the creditor has not obtained judgment against the insolvent corporation is waived unless raised.³ A lessor having a lien upon the lessee's property for rent may have a receiver of the lessee appointed where other creditors of the lessee are levying on the property.⁴ A bondholder may have a receiver appointed where he shows that promoters are defrauding the company by selling the bonds and appropriating the proceeds and disabling the company from meeting its bond obligation, various defaults and misfeasances being alleged.⁵

The mortgagor corporation itself may in certain extreme cases, where it is insolvent and its assets will be largely lost and rendered unavailable to its creditors if it continues in possession, apply for and obtain a receiver of its own property.⁶

it. *Weiss v. Haight, etc. Co.*, 148 Fed. Rep. 399 (1906).

¹ *Brown v. Lake Superior Iron Co.*, 134 U. S. 530 (1890).

² *Grand Trunk Ry. v. Central Vt. R. R.*, 85 Fed. Rep. 87 (1898).

³ *State v. Circuit Court*, 98 Wis. 143 (1898).

⁴ *Kanawha, etc. Co. v. Ballard, etc. Co.*, 43 W. Va. 721 (1898).

⁵ *Bird v. People's, etc. Co.*, 158 Fed. Rep. 903 (1908).

⁶ Parties seeking payment of rent out of a receiver's fund cannot question the legality of the appointment of receivers at the instance of the mortgagor. *Quincy, etc. R. R. v. Humphreys*, 145 U. S. 82 (1892), the court saying: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property." Prior to this decision it was commonly supposed that such a receivership was unauthorized by law. The decision of the court below in appointing the receiver was se-

verely criticised, and the abuses which would arise in allowing the corporation to practically name its own receiver were vigorously set forth. The decision of the court below is found in *Wabash, etc. Ry. v. Central Trust Co.*, 23 Fed. Rep. 513 (1888); also 22 Fed. Rep. 272. This decision was seriously questioned in *Atkins v. Wabash, etc. Ry.*, 29 Fed. Rep. 161 (1886), but sustained in *Central T. Co. v. Wabash, etc. Ry.*, 29 Fed. Rep. 618 (1886). The appointment of a receiver at the instance of the corporation itself was again referred to without objection in *U. S. Trust Co. v. Wabash, etc. Ry.*, 150 U. S. 287 (1893). See also *Clarke v. Central, etc. Co. of Georgia*, 54 Fed. Rep. 556 (1893), where the court said: "The receivership, as it then existed, constituted a trust of a somewhat unusual but entirely salutary character. It was created, as stated, in an effort to tide over the present difficulties of vast, valuable, and probably solvent, though badly embarrassed properties, an embarrassed condition mainly occasioned by unlawful causes." In *Cleveland, etc. R. R. v. Knickerbocker Trust Co.*, 64 Fed. Rep. 623 (1894), a receiver was appointed on a bill filed by the insolvent company against the trustees of the mortgages for that purpose. An insolvent

A receiver will not readily be appointed in a suit by a stockholder to remedy the frauds or *ultra vires* acts of the directors or of the corporation itself. The court will not injure the whole enterprise in order to correct a wrong done to the enterprise. Other remedies will be applied.¹ The tendency of the courts, however, as shown above, is to allow receiverships of insolvent corporations, irrespective of who applies for the receivership. This is in order to preserve the property from dismemberment and forced sales. Hence, sometimes the court will appoint a receiver of an insolvent corporation at the instance of a stockholder. A receivership at the instance of a stockholder, in order to protect the assets of an insolvent corporation, has never been approved or disapproved by the supreme court, but is "tolerated on ac-

bank cannot have a receiver of itself appointed on its own application. *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009 (1894). In *State v. Ross*, 122 Mo. 435 (1894), it was vigorously denied that a court had jurisdiction to appoint a receiver upon the application of the corporation itself, and the authorities on the subject were carefully reviewed and discussed. The court held the receivership to be void, and subject to collateral attack. The fact that an insolvent corporation, at the request of its creditors, has had a receiver appointed, is not a disposition of its property with intent to defraud creditors. *Thompson Co. v. Queen City Cycle Co.*, 16 N. Y. App. Div. 522 (1897). Where a receiver has been appointed practically at the instance of an insolvent corporation, the bill being filed by the president, and such president is appointed receiver, a simple-contract creditor may file another bill attacking the first bill and the receivership as fraudulent, and allege that it is a scheme to deprive the general creditors of their rights. *Alabama, etc. Co. v. McKeever*, 112 Ala. 134 (1896). In *Kimball v. Goodburn*, 32 Mich. 10 (1875), the court, in holding that a deed of release by a corporation was valid, although a receiver claimed its assets, said: "We are aware of no case where a corporation, in its corporate capacity and name, can apply to be put in the custody of a receiver." The in-

solveny of a corporation is in itself alone not sufficient ground for the appointment of a receiver. The court will not appoint a receiver of an insolvent bank, even though the bank itself applies for the appointment. *Hugh v. McRae*, Chase's Dec. 466 (1869); s. c., 12 Fed. Cas. 829. Where the president, secretary and treasurer, with intent to wreck a corporation, and without the consent of the board of directors, cause a receiver to be appointed, the court will discharge him. *Walters v. Anglo-American, etc. Co.*, 50 Fed. Rep. 316 (1892). In the old case of *Macon, etc. R. R. v. Parker*, 9 Ga. 377 (1851), it seems that the company filed a bill and obtained an administration and sale of all its assets, it being insolvent. The question of whether an insolvent railroad company may file a bill for the appointment of a receiver and the administration of its assets cannot be raised for the first time on appeal. *International Trust Co. v. Townsend, etc. Co.*, 95 Fed. Rep. 850 (1899). An insolvent corporation may legally consent to a foreclosure of its mortgage. *Dickerman v. Northern T. Co.*, 176 U. S. 181, 191 (1900). A court of equity has no power to appoint a receiver to carry on the business except with a view to winding up its affairs and selling its property. *Gutterson & Gould v. Lebanon, etc. Co.*, 151 Fed. Rep. 72 (1907).

¹ Quoted and approved in *Miller v.*

count of the public and general interests involved, for which legislatures have given no protection under such emergencies.”¹ Nevertheless it must be admitted that the theory of the law is opposed to this view.² The state cannot have a receiver appointed, even though it

Kitchen, 103 N. W. Rep. 297 (Neb. 1905). See § 746, *supra*.

¹ *New England, etc. R. R. v. Carnegie Steel Co.*, 75 Fed. Rep. 54 (1896), the court holding also that such a receiver stands for the corporation itself, and the court may authorize him to pay old as well as new claims, and that where subsequent mortgagees come in to obtain foreclosure and have the receivership extended to them, the court may provide for payment of prior claims. See also *Scott v. Farmers' L. & T. Co.*, 69 Fed. Rep. 17 (1895). Where a lessee railroad is insolvent and in the hands of a receiver, and the rent is not paid, and it controls the board of directors of the lessor railroad, a stockholder of the latter may have a receiver appointed of such of the lessor's property as is not already in the hands of a receiver, and such second receiver may be authorized to sue for the rent due, and the court may also authorize him to issue receiver's certificates to pay the expense of prosecuting such suit. *Town of Vandalia v. St. Louis, etc. R. R.*, 209 Ill. 73 (1904). A stockholder in a dissolved national bank may have a receiver appointed by a state court, and especially so where the funds are being diverted. *Cogswell v. Second Nat. Bank*, 56 Atl. Rep. 574 (Conn. 1903). A non-resident stockholder in a non-resident corporation may institute suit asking that the property in the state be applied to the debts, showing that otherwise it would be lost by attachments and by the extravagant management of the officers. *Culver, etc. Co. v. Culver*, 99 S. W. Rep. 391 (Ark. 1906). A receiver may be appointed at the instance of stockholders to protect their interests in the insolvent corporation, and no notice need be given, the cor-

poration appearing and consenting. *Olmstead v. Distilling, etc. Co.*, 67 Fed. Rep. 24 (1895). Where a corporation has been dissolved at the instance of the state, a stockholder may file a bill for the appointment of a receiver to administer the assets. *Olmstead v. Distilling, etc. Co.*, 73 Fed. Rep. 44 (1895), the court holding also that the appointment could not be questioned collaterally. "Courts of equity have the ultimate power of administering the assets of insolvent corporations." A stockholder of a building and loan corporation which is insolvent and is being mismanaged may have a receiver appointed. The federal court will take jurisdiction where the assets are scattered through many states, even though it is charged that the bill is collusive. *Towle v. American Bldg. etc. Soc.*, 60 Fed. Rep. 131 (1894). Where there are but two stockholders and one dies, and his administrator takes possession of the corporate property as though it belonged to the estate, the other stockholder may have a receiver appointed. *Re Belton*, 47 La. Ann. 1614 (1895). A stockholder cannot cause a receiver to be appointed merely on the ground that the liabilities exceed the assets and the company has ceased to do business. *Murray v. Superior Court*, 129 Cal. 628 (1900).

² Where a receiver has been appointed at the instigation of stockholders, and for the purpose of furthering the interests of the company and not its creditors, the trustee of a mortgage by the company may, upon foreclosing, have a new receiver appointed and the old one discharged. *Phinizy v. Augusta, etc. R. R.*, 56 Fed. Rep. 273 (1893). Although a suit is pending by a stockholder to obtain

repeals the charter. The property then belongs to the stockholders, and the state cannot interfere with it through a receiver.¹ The court has no power to appoint a receiver in *quo warranto* proceedings. A receiver can be appointed only in a suit in equity, unless the statute provides otherwise.² A court of equity cannot appoint a receiver of a state bank under a statute authorizing the attorney-general to institute suit to enjoin the bank from violating the statutes.³ A corporation may be enjoined from doing criminal acts—in this case, prize-fighting—and a receiver may be put in.⁴

In Indiana a lower court made the remarkable decision that where a "strike" had tied up a street railroad, and cars were not run on

a receiver, yet the mortgage bondholders, upon default, may institute a foreclosure suit and have a receiver appointed in such suit. The court will not stay the latter suit at the instance of the stockholder who brought the first suit. *Pennsylvania Co. v. Jacksonville, etc. Ry.*, 55 Fed. Rep. 131 (1893). Stockholders cannot have a receiver appointed on the ground that the corporation is insolvent and that judgments have been obtained against it. *Bell v. Wood*, 181 Pa. St. 175 (1897); *Steele, etc. Co. v. Laurens, etc. Co.*, 24 S. E. Rep. 755 (Ga. 1896). A bill filed by a stockholder against an insolvent corporation for a receiver on the ground that otherwise the assets would be wasted is not sufficient for the appointment of a receiver. *Becker v. Hoke*, 80 Fed. Rep. 973 (1897). A stockholder cannot have a receiver appointed of a mining company merely because judgments are imminent. *Little Warrior Coal Co. v. Hooper*, 105 Ala. 665 (1895). A stockholder in an insolvent corporation cannot have a collusive appointment of a receiver and decree of distribution set aside, inasmuch as it would be of no benefit to him. *Darragh v. Wetter Mfg. Co.*, 78 Fed. Rep. 7 (1897). The court will not allow every stockholder to intervene in a suit by a creditor in behalf of himself and all other creditors and stockholders for a receiver. *Fowler v. Jarvis, etc. Co.*, 64 Fed. Rep. 279

(1894). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife, and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. *Marbury v. Stone*, 17 N. Y. App. Div. 352 (1897); *aff'd*, 160 N. Y. 701.

1 The legislature cannot, upon dissolving a corporation, order that its property be placed in the hands of a receiver. This is not due process of law. *People v. O'Brien*, 111 N. Y. 1 (1888), *rev'g* 45 Hun, 519 (1887).

2 *Commonwealth v. Order of Vesta*, 156 Pa. St. 531 (1893); *Re Fraternal Guardians' Estate*, 159 Pa. St. 603 (1894); *Vila v. Grand Island, etc. Co.*, 94 N. W. Rep. 136 (Neb. 1903). In an information by the state to test the corporate existence a receiver cannot be appointed. *State v. Superior Court*, 15 Wash. 668 (1896). See also *In re Brant*, 96 Fed. Rep. 257 (1899).

3 *Murray v. American Surety Co.*, 59 Fed. Rep. 345 (1894).

4 *Columbia Ath. Club v. State*, 143 Ind. 98 (1895).

account of violence, a citizen might by bill in equity have a receiver appointed to run the road. This was a case where the state failed to protect property, and then added to the injury by taking the property away from the owner because the owner himself was not strong enough to protect the property.¹

A receiver, in a few instances, has been appointed to conduct an election, where none of the registered stockholders are entitled to vote.²

In addition to receiverships, specified above, receivers are often appointed under the statutes of the various states. These statutes in many instances have extended the powers of courts of equity very greatly in regard to the appointment of receivers.³ Especially is this

¹ Fishback v. Citizens' St. R. R. Nat. Corp. Rep., Super. Ct. Ind., March 4, 1892.

² King v. Barnes, 51 Hun, 550 (1889); aff'd, 113 N. Y. 655; ch. XXXVII, *supra*.

³ Jurisdiction to appoint receivers of corporations is wholly statutory, except receivers appointed to care for property during the pendency of a suit. The appointment does not dissolve the corporation nor stop its business, except as to the mortgaged property. The receiver is not a proper party to suits against the corporation. Decker v. Gardner, 124 N. Y. 334 (1890). Proceedings under a statute for a receiver must be in strict accordance with the statute. Chamberlain v. Rochester, etc. Co., 7 Hun, 557 (1876). Upon a voluntary dissolution under a statute the court has no power to appoint a temporary receiver unless the statute authorizes it. *Re Boynton, etc. Co.*, 34 Hun, 369 (1884). If the directors, who by statute are made trustees to wind up the corporation upon dissolution, delay in so doing, the court will appoint a receiver. *Re Pontius*, 26 Hun, 232 (1882). Where the statute provides for a receiver and no defense is set up, the court is bound to appoint. *State v. Bank of New England*, 55 Minn. 139 (1893). Under the Delaware statute, a court of equity may appoint a receiver of an insolvent

corporation at the instance of a simple creditor. *Jones v. Mutual, etc. Co.*, 123 Fed. Rep. 506 (1903). In Louisiana by statute a simple creditor may have a receiver appointed of an insolvent corporation. *Oil City, etc. v. Pelican, etc. Co.*, 115 La. 265 (1905). A court of equity in dissolving a corporation under a statute cannot appoint a receiver, unless such statute authorizes the appointment. *State, etc. Ins. Co. v. San Francisco Super. Ct.* 101 Cal. 135 (1894). Under the statutes of Arkansas a simple contract creditor may have a receiver appointed of the property of an insolvent corporation. *Darragh v. Wetter Mfg. Co.*, 78 Fed. Rep. 7 (1897). Under the Texas statutes a simple creditor may obtain a receiver. *San Antonio, etc. R. R. v. Davis*, 30 S. W. Rep. 693 (Tex. 1895). A stockholder or lien creditor cannot have a receiver of an insolvent corporation appointed on the sole ground of insolvency, even though the statutes authorize the court to appoint a receiver of an insolvent corporation. The court will refuse to make such appointment in a time of financial stringency when only a few applicants having a small interest desire it. *Espuela, etc. Co. v. Bindle*, 5 Tex. Civ. App. 18 (1893). The Louisiana statute allowing insolvent individuals to apply to the court and obtain an extension of time on their debts does not apply to corpo-

true in the state of New Jersey, where by statute a simple creditor of an insolvent corporation may have a receiver appointed.¹ The United

rations. *Isabella Lumber Co. v. Creditors*, 48 La. Ann. 269 (1896).

1 In New Jersey, by statute, the court is empowered to appoint a receiver when a company shall become insolvent or shall suspend its business for want of funds to carry on the same. The courts hold that such "insolvency means a general inability of a debtor to answer pecuniary engagements; and it does not follow that he is not insolvent because he may ultimately have a surplus after winding up his affairs." The court will discharge the receiver, however, whenever the debts and receiver's charges are paid. *Sewell v. Cape May*, etc. R. R., 30 Am. & Eng. R. R. Cas. 155 (N. J. 1887). Under the New Jersey statutes, where a receiver has been put in possession by reason of insolvency, and a mortgagee is foreclosing and asks that the receiver be made a party, the receiver may have perishable property sold on the ground that there is a conflict as to the priority of liens. *Emmons v. Davis*, etc. Co., 16 Atl. Rep. 157 (1888). This statute, authorizing the receiver to sell property free from incumbrances, is constitutional. *Potts v. New Jersey Arms*, etc. Co., 17 N. J. Eq. 395 (1866). But on appeal the court held that the receiver selling real estate under this statutory power must sell subject to existing liens thereon. *Potts v. New Jersey*, etc. Co., 17 N. J. Eq. 516 (1866), overruling *Kelly v. Neshanic Min. Co.*, 7 N. J. Eq. 579 (1849). Under the above statute, although such a receiver is in possession, yet the trustees may commence foreclosure, and the court will order the receiver to deliver possession to them, and will direct the questions of the time, etc. of sale to be considered thereafter. *Randolph v. Larned*, 27 N. J. Eq. 557 (1876), reversing *Middleton v. New Jersey*,

etc. R. R., 26 N. J. Eq. 270 (1875). Where, pending an application by a shareholder for a receiver of a corporation which has become insolvent by the misconduct of the directors, the directors cause voluntary dissolution proceedings to be commenced, and their representatives to be elected liquidators, the court will remove them and appoint a receiver. *Fitzgerald v. State*, etc. Assoc., 69 Atl. Rep. 564 (N. J. 1908). In *Re Long Branch*, etc. R. R., 24 N. J. Eq. 398 (1874), the court, by its power under the New Jersey statutes, appointed a receiver to operate a railroad which has ceased to operate for many weeks. The court stated that it would discharge the receiver whenever the company was ready and willing to operate the road. Where the court has put in a receiver under the New Jersey statute for failure to run trains, it will not in that proceeding decide who is entitled to the road when the receiver is discharged. The road will be returned to the company that had it. *Long Branch*, etc. R. R. v. *Sneden*, 26 N. J. Eq. 539 (1875). In New Jersey, by statute, a receiver of the assets in the state of an insolvent corporation may be appointed with or without notice to the corporation. The proceeding is *in rem*. *Albert v. Clarendon*, etc. Co., 23 Atl. Rep. 8 (N. J. 1891). Under the New Jersey statute authorizing the court to appoint a receiver of an insolvent corporation upon the application of a stockholder or creditor, insolvency must not only be alleged, but must be clearly shown by facts and details. *Atlantic Trust Co. v. Consolidated*, etc. Co., 49 N. J. Eq. 402 (1892). Insolvency sufficient for a receiver under the New Jersey statute is sufficiently proven by showing that the company has no money or credit, and its road is being built by another company,

States courts have jurisdiction to appoint a receiver on the application of stockholders or creditors, in accordance with a state statute authorizing such appointment.¹ The resignation of all of the directors and officers in order to have a receiver appointed under the New York statute is illegal.² General creditors cannot obtain a receiver in the federal courts, even though the statutes of the state provide otherwise.³ A receivership is a drastic remedy and is not readily granted. Thus, although parties are litigating over the right to a railroad, this is no ground for a receivership of it pending the litigation.⁴ But where a claimant to the office of the director has with violence illegally taken possession of the corporate property, the court may appoint a custodian of the property and direct the custodian to deliver

and suits are pending against it. *Tuckahoe, etc. Ry. v. Baker*, 49 N. J. Eq. 581 (1892). In *Avery v. Bles Mfg. Co.*, 27 N. J. Eq. 412 (1876), the court appointed a receiver on the bill of general creditors, two of whom were also stockholders, for the purpose of preserving the corporate assets during litigation, where the company was insolvent and the board of directors had executed a fraudulent mortgage which was about to be enforced. As to a receiver upon insolvency under the New Jersey statute, see also *Cook v. East Trenton Pottery Co.*, 53 N. J. Eq. 29 (1894). A receiver will not be appointed, even in New Jersey, unless insolvency is clear and the best interests of the creditors require a receivership. *Ft. Wayne, etc. Corp. v. Franklin, etc. Co.*, 40 Atl. Rep. 441 (N. J. 1898). Later in this case a receiver was appointed. See 57 N. J. Eq. 7. Even though by statute a receiver may be appointed at the instance of a general creditor if the corporation is in imminent danger of insolvency, yet a strong case must be made out before the court will act. *Miller v. Southern, etc. Co.*, 53 S. C. 364 (1898). Where the directors of an insolvent corporation who have paid dividends illegally, assign all its assets to an assignee for the benefit of its creditors, the assignee being one of their number, the court may appoint a receiver and

remove the assignee, under the New Jersey statute. *Gilroy v. Somerville, etc. Mills*, 58 Atl. Rep. 651 (N. J. 1904). Under the statutes of New Jersey a stockholder or a creditor may apply for a receiver of an embarrassed corporation, even though its condition is due to his misconduct. *McMullin v. McArthur, etc. Co.*, 68 Atl. Rep. 97 (N. J. 1907).

¹ *United States, etc. Co. v. Conklin*, 126 Fed. Rep. 132 (1903). The federal courts may appoint a receiver of an insolvent New Jersey corporation at the instance of a stockholder or mortgagee as allowed by the statutes of that state. *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903). A simple-contract creditor cannot maintain a bill in equity in the federal court to establish his claim and apply the corporate property thereto, even though by statute he may do so in the state court. *Jacobs v. Mexican Sugar Co.*, 130 Fed. Rep. 589 (1904). Not even the statutes of Illinois authorizing a receiver at the instance of unsecured creditors will enable the federal court to appoint at their instance. *Morrow, etc. Co. v. New England Shoe Co.*, 60 Fed. Rep. 341 (1894).

² *Zeltner v. Zeltner, etc. Co.*, 174 N. Y. 247 (1903).

³ *Harrison v. Farmers' L. & T. Co.*, 94 Fed. Rep. 728 (1899).

⁴ Where two railroad companies are

to the proper officers.¹ Where the corporation has made a valid assignment for the benefit of creditors, the court cannot appoint a receiver and order delivery to him,² except, of course, at the instance of a mortgagee.

It is still undecided whether the supreme court of the United States may appoint a receiver of property pending an appeal,³ but it seems that the circuit court below has that power during the appeal.⁴

In regard to the procedure in appointing a receiver a court of equity, as already stated, has no power to appoint a receiver, except in a pending suit.⁵ The court, however, may appoint a receiver, even though the bill in equity did not ask for such relief.⁶ The court will not appoint an ancillary receiver unless an independent bill is filed. An appointment *ex parte* on the petition of the chief receiver will be vacated.⁷ It requires an extraordinary case to justify a court in appointing a receiver without notice to the corporation and the opportu-

in litigation over the construction of a contract which gives both companies the right to use a certain track and tunnel in company, the court will not appoint a receiver of the tunnel and track, but will enforce its decree when reached by other means. Delaware, etc. R. R. v. Erie Ry., 21 N. J. Eq. 298 (1871). Where two parties are litigating by a bill to quiet title to obtain title and possession of an unused railroad track, both parties being out of possession, the court will not appoint a receiver. St. Louis, etc. R. R. v. Dewees, 23 Fed. Rep. 519 (1885).

¹ Ciancimino v. Man, 20 N. Y. Supp. 702 (1892). A receiver will not be appointed even though the promoters have elected directors in violation of promises made, and purchased stock for the company, it appearing that they endeavored to correct these acts when objected to by the attorney-general. State v. People's, etc. Bank, 94 S. W. Rep. 953 (Mo. 1906). A promoter cannot have a receiver of the corporation appointed on the ground that the other directors have not dealt with him according to agreement, and that the company has failed to carry out its objects and that the property

should be vested in the promoters. State v. Dearing, 84 S. W. Rep. 21 (Mo. 1904). Where the corporate property is being wasted by reason of a contest between two rival boards of directors, one board having been declared illegal by the court and the other refusing to act, the court will at the instance of a minority stockholder appoint a receiver to protect the property until a reorganized board is elected, and the stockholder need not request the directors to bring suit before he himself brings suit. Jasper, etc. Co. v. Wallis, 123 Ala. 652 (1899). See also § 618, *supra*.

² Garden City, etc. Co. v. Geilfuss, 86 Wis. 612 (1893).

³ Pacific R. R. v. Ketchum, 95 U. S. 1 (1877).

⁴ In May v. Printup, 59 Ga. 128 (1877), the court said that the circuit court of the United States had power to appoint a receiver pending an appeal to the supreme court of the United States.

⁵ See note 2, p. 3038, *supra*.

⁶ Elk, etc. Co. v. Foster, 99 Fed. Rep. 495 (1900).

⁷ Greene v. Star, etc. Co., 99 Fed. Rep. 656 (1900). See also § 840, *supra*, and § 865, *infra*.

nity to it to be heard.¹ A receiver should not be appointed on allegations made on information and belief.²

1 A receiver cannot be appointed without notice merely on the ground that the company is insolvent and has defaulted in its interest on mortgage bonds. *Merriam v. St. Louis, etc. Ry.*, 136 Mo. 145 (1896). Notice of an application by a corporate creditor for a receiver should be given to the corporation, where no harm can come by delay. *Hobson v. Pacific, etc. Co.*, 89 Pac. Rep. 866 (Cal. 1907). In a stockholder's suit for a receiver of an insolvent corporation, notice must be given to the corporation before a receiver can be appointed. *Continental, etc. Co. v. Bryson*, 81 N. E. Rep. 210 (Ind. 1907). Where a receiver of a bank has been appointed without notice to the bank, a suit by him against the stockholders to enforce the statutory liability will fail. *Andrews v. Holcomb*, 113 N. W. Rep. 204 (Neb. 1907). In a case of urgent emergency a receiver may be appointed without notice, especially where the defendant is beyond the jurisdiction or cannot be found and waste or destruction is liable to occur in case of delay. *Mann v. Gaddie*, 158 Fed. Rep. 42 (1907). In a foreclosure suit against a railroad a receiver cannot be appointed over railroads owned by other companies, although operated by the defendant railroad, the other companies not being made parties defendant. *Hook v. Bosworth*, 64 Fed. Rep. 443 (1894). "To appoint a receiver without notice is a jurisdiction and power that should be rarely used, and never except in a clear case of imperious necessity, when the right of the complainant, on the showing made by him, is undoubted, and when such relief and protection can be given in no other way. When such notice can be given it should be given, unless

there is imminent danger of loss, or great damage, or irrevocable injury, or the greatest emergency, or when by the giving of notice the very purpose of the appointment of a receiver would be rendered nugatory; and such instances are of rare occurrence in the federal courts, because of their power, when an injunction is asked for, to grant a temporary restraining order (Rev. St. U. S. sec. 718), which may be served at the same time that the notice is served, to prevent action by the defendant or his agent, and to preserve the existing conditions until the application for an injunction and for a receiver can be heard." *Cabaniss v. Reco, etc. Co.*, 116 Fed. Rep. 318 (1902). A receiver appointed at the instance of minority stockholders without notice is illegally appointed. *State v. Clancy*, 20 Mont. 284 (1897). It must be a very strong case which will justify a court in appointing a receiver without notice. *Florida v. Jacksonville, etc. R. R.*, 15 Fla. 201 (1875), holding that the proper remedy is an injunction until the hearing. It is illegal to appoint a receiver of a corporation *ex parte* where the defendant might be served in the jurisdiction, even though the suit is by a stockholder of a lessor corporation, and he sets forth facts showing that the property has been practically ruined by the lessee and by collusion between the lessee and the board of directors of the lessor, and that the lessee is about to have a receiver appointed of the property. *Wabash R. R. v. Dykeman*, 133 Ind. 56 (1892). An appointment should be *ex parte* only when there is fraud, or the property is being wasted or removed, or great loss will occur during the time of giving notice. Hence judgment creditors cannot have a receiver *ex*

2 *Weber v. Wallerstein*, 111 N. Y. App. Div. 700 (1906).

A receiver of the assets in the jurisdiction belonging to a foreign corporation is more readily appointed *ex parte*, especially where it

parte, although the rolling-stock has been levied on and the road not operated, and trains are being delayed and freight not moved. *Chicago, etc. Ry. v. Cason*, 133 Ind. 49 (1892). An *ex parte* appointment of a receiver of a solvent corporation which attempted to make a consolidation, which consolidation was thereafter declared void by the courts, is void, even though some of the stockholders have disobeyed an injunction. *Railway Co. v. Jewett*, 37 Ohio St. 649 (1882). The appointment of a receiver of a company on an *ex parte* application and on a bill which does not allege the insolvency of the corporation is void. *Turgeon v. Brady*, 24 La. Ann. 348 (1872). An *ex parte* appointment of a receiver, and the *ex parte* granting of an injunction against the officers acting, the charge being fraudulent mismanagement, are void. *Port Huron, etc. Ry. v. Judge*, 31 Mich. 456 (1875). A judgment creditor is not entitled to notice of an application for the appointment of a receiver. *Morrison v. Menhaden Co.*, 37 Hun, 522 (1885). Where the road has been sold under a judgment and the purchaser is in possession, a receiver of the property cannot be appointed unless he is made a party. *Searles v. Jacksonville, etc. R. R.*, 2 Woods, 621 (1873); s. c., 21 Fed. Cas. 929. In *McHenry v. New York, etc. R. R.*, 25 Fed. Rep. 114 (1885), the court discharged a receiver who had been appointed *ex parte* in the state court before the case was removed.

A receiver may be appointed *ex parte* at the instance of a mortgagee where the company is probably insolvent and has numerous suits pending against it, and the purpose of the suit is to continue business during the season. *Pacific etc. Co. v. Allen*, 109 Fed. Rep. 515 (1901). A receiver may be

appointed *ex parte* where a leased road is not being operated by either the lessor or the lessee. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899). A statutory provision that five days' notice of an application for a receiver must be given may be waived. *Farmers' etc. Bank v. German, etc. Bank*, 80 N. W. Rep. 820 (Neb. 1899). A receiver should not be appointed without notice to the insolvent corporation on an allegation that creditors threaten to begin actions. *Davelaar v. Blue, etc. Co.*, 110 Wis. 470 (1901). The appointment of a receiver of a corporation without notice is illegal where the ground of such appointment is that one person in fraud of creditors transferred property to another and the latter to the corporation for its stock, it not being shown that the latter person or the corporation was insolvent. *Gilreath v. Union Bank, etc. Co.*, 121 Ala. 204 (1899). A receiver appointed *ex parte* on a petition of the stockholder on the ground that the corporation is insolvent, no suit being instituted, is illegally appointed. *Smith v. Ely, etc. Co.*, 79 Miss. 266 (1901). A receiver should never be appointed *ex parte* except in case of the greatest emergency or in view of imminent danger of great damage, especially where an injunction may serve to protect all rights until a hearing has been had. *North American, etc. Co. v. Watkins*, 109 Fed. Rep. 101 (1901), a case involving a receivership at the instance of a minority stockholder. In New York, by statute, the ordinary business of a corporation cannot be interfered with except upon notice. Code of C. P., § 1809. The general manager of a corporation cannot appeal from an order appointing a receiver. *McFarland v. Pierce*, 47 N. E. Rep. 1 (Ind. 1897).

is difficult to obtain service.¹ There is some doubt as to whether a receiver may be appointed by a judge in vacation time where there is no statutory power given to him for that purpose.² The appointment of a receiver is not complete where a commissioner or referee has made the appointment. The court must confirm.³ It is within the discretion of the court whether the receiver shall give a bond.⁴

If the mortgage bonds, upon which the foreclosure suit and the appointment of the receiver are based, are void, the receivership itself is void.⁵ But the fact that the service of the summons was irregular

¹ See § 865, *infra*.

² The court has power in vacation time to appoint a receiver. *Greeley v. Provident Sav. Bank*, 103 Mo. 212 (1891). A receiver of a railroad cannot be appointed in vacation time by a judge of an Illinois court, but the appointment may be validated by confirmation of the court. *Hervey v. Ill. Mid. Ry.*, 28 Fed. Rep. 169 (1884); *Hammock v. Loan & T. Co.*, 105 U. S. 77 (1881). A receiver may be appointed at chambers in another district on presentation to the judge of the bill and answer. *Horn v. Pere Marquette R. R.*, 151 Fed. Rep. 626 (1907). A judge has no power to appoint a receiver of a corporation in vacation time without notice. *State v. Dearing*, 84 S. W. Rep. 21 (Mo. 1904). Concerning the limited powers of a judge at chambers in vacation time, see *Blair v. Reading*, 99 Ill. 600 (1881). A judge may appoint a receiver where he has power to grant an injunction out of court. *Cincinnati, etc. R. R. v. Sloan*, 31 Ohio St. 1 (1876). "The appointment of a receiver is an equitable remedy, and bears a similar relation to courts of equity that proceedings in attachment bear to courts of law. Hence the appointment of a receiver has been said to be an equitable execution. . . . A promiscuous receivership is, in effect, an injunction, and something more stringent still." Where a judge has power to appoint a receiver out of court he has power to vacate the appointment. *Cincinnati, etc. R. R. v. Sloan*, 31 Ohio St. 1 (1877). A

judge of the United States supreme court may grant an injunction, though he is out of the circuit to which he has been assigned. *U. S. v. Louisville, etc. Canal Co.*, 4 Dill. 601 (1873); s. c., 26 Fed. Cas. 1002. The receiver may be discharged at chambers. *Walters v. Anglo-American, etc. Co.*, 50 Fed. Rep. 316 (1892). In *Re Tampa, etc. R. R.*, 168 U. S. 583 (1897), the court stated that its decision was not to be taken as holding that a circuit judge has power to grant injunctions and appoint receivers, or enter orders or decrees *in invitum*, outside of his circuit.

³ The report of a commissioner that he has appointed a receiver is insufficient to complete the appointment unless the report is confirmed. *Kimball v. Goodburn*, 32 Mich. 10 (1875).

⁴ *Wilson v. Welch*, 157 Mass. 77 (1892). As to proof that the receiver filed the requisite bond, see *Hegewisch v. Silver*, 140 N. Y. 414 (1893). Where the order appointing a receiver required him to give a bond, the bond must be proved in any action brought by him, where the issue is raised. *Hegewisch v. Silver*, 21 N. Y. Supp. 294 (1892). A receiver may be *de facto*, even though he has not given a bond, and as such may maintain a suit. *Metropolitan Nat. Bank v. Commercial St. Bank*, 104 Iowa, 682 (1898). If a bond is not required from the receiver, it is not necessary for him to give one. *Wilson v. Welch*, 157 Mass. 77 (1892).

⁵ Where the mortgage bonds are invalid, a receiver appointed in the fore-

and void does not necessarily vitiate the receivership.¹ Mandamus will not lie to vacate an order appointing a receiver where there is a remedy by appeal.² In an appeal from an order appointing a receiver a bond may be required to the extent of the full value of the property.³ Where a corporation takes an appeal from an order appointing a receiver and gives a bond superseding the receiver, and this order is affirmed, the receiver will not be reinstated, but recourse may be had to the bond.⁴ Where an order appointing a receiver at the instance of a stockholder is reversed on appeal, and a sale of the corporate property by such receiver is set aside, the purchaser holds the property for the benefit of the corporation, but is entitled to a return of the purchase price, even though in the meantime judgment creditors have had additional sales of the property.⁵ If a person causes a receiver to be appointed of a growing and solvent corporation, and such appointment is afterwards declared void, he is liable for all damages by reason thereof without proof of malice or probable cause.⁶

The regularity, propriety, and validity of the appointment of a receiver can be questioned only in the court that appointed him, and only in a direct proceeding to test that question.⁷ The appointment

closure suit has no power to collect subscriptions. *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 49 Fed. Rep. 188 (1892). See §§ 876, 877, *infra*. Even though the upper court reverses an order appointing a receiver, yet this does not interfere with the foreclosure, neither does it relieve a surety. *Michigan, etc. Co. v. Lansing, etc. Co.*, 121 Mich. 438 (1899).

¹ It seems that a court of equity has power to appoint a receiver of an insolvent corporation to preserve its property, even though the service of the summons, etc., on the corporation was void, but the court cannot in such a case authorize a sale of the land of the corporation. *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 111 Ill. 32 (1884).

² *Pontiac, etc. R.R. v. Oakland Circuit Judge*, 105 N. W. Rep. 745 (Mich. 1905).

³ *Home, etc. Co. v. District Court*, 95 N. W. Rep. 522 (Iowa 1903).

⁴ *Oudin, etc. Co. v. Conlan*, 80 Pac. Rep. 283 (Wash. 1905).

⁵ *Lutey v. Clark*, 77 Pac. Rep. 305 (Mont. 1904).

⁶ *Thornton, etc. Co. v. Bretherton*,

80 Pac. Rep. 10 (Mont. 1905); 47 S. Rep. 141.

⁷ Quoted and approved in *Basting v. Ankeny*, 64 Minn. 133 (1896); *Hatfield v. Cummings*, 152 Ind. 280 (1898); *Pitts v. New Mammoth, etc. Co.*, 23 Utah, 623 (1901). The regularity of the appointment of a receiver by a court which had jurisdiction of the parties and the subject-matter cannot be collaterally attacked. *Gunby v. Armstrong*, 133 Fed. Rep. 417 (1904). A corporate creditor who does not question the jurisdiction of the federal court for sixteen months, during which time a receiver has sold the property and creditors' claims proved, cannot then question such jurisdiction on an issue of fact. *Briggs v. Traders' Co.*, 145 Fed. Rep. 254 (1906). The regularity of the receiver's appointment cannot be questioned in a suit brought against him in another court. *McKay v. Van Kleeck*, 94 N. W. Rep. 367 (Mich. 1903). In a suit brought by a receiver it is no defense that he was appointed without notice. *Miller v. Brown*, 95

of a receiver does not prevent the company from holding its regular elections.¹ Although an order appointing a receiver is not appealable, yet an appeal from an order refusing to vacate it may be taken.²

§ 864. *Who will be selected for receiver.*—As a general rule the court will not make one of the officers, or directors, or stockholders of the corporation the receiver,³ nor will it appoint one of the counsel

N. W. Rep. 797 (Neb. 1901). Where the court has decreed the dissolution of a building association and appointed a receiver, stockholders cannot institute a suit to enjoin the receiver from acting, on the ground that his appointment was due to the fraud of the officers. *Neun v. Blackstone, etc. Assoc.*, 149 Mo. 74 (1899). The validity of the appointment of a receiver cannot be attacked in a suit in which he applies to be made a party. *Andrews v. Steel City Bank*, 57 Neb. 173 (1898). Even though a corporation is put into a receiver's hands, under a statute relative to insolvent corporations, and notice for the presentation of claims is given, and, in accordance with the statute, all claims not presented within four months are barred and the property is then sold, yet a non-resident creditor who had no actual notice may attack the proceedings on the ground that they were fraudulent and for the purpose of reorganizing the company in fraud of creditors. *Dobson v. Peck Bros. & Co.*, 103 Fed. Rep. 904 (1900). In the case of *McNary v. Bush*, 35 Oreg. 114 (1899), being a suit brought by a receiver, the court held that in such suit the legality of the appointment of the receiver could not be questioned, even though such receiver was appointed on the application of a stockholder without the pendency of any suit. The validity of the appointment of a receiver cannot be attacked in a suit instituted by him on the ground of defects in the original suit in which he was appointed. *Florence, etc. Co. v. Hanby*, 101 Ala. 15 (1893). The validity and propriety of the appointment of a receiver cannot be ques-

tioned or tried in a different court and case from that in which the receiver was appointed. The remedy of the party complaining is to move to set it aside. *Vermont, etc. R. R. v. Vermont Cent. R. R.*, 46 Vt. 792 (1873). See also a dictum in *Klein v. Jewett*, 26 N. J. Eq. 474 (1875), to the effect that the power of the court to appoint a receiver is to be determined solely by the court appointing him. Where the receiver sues on a note, the defendant cannot attack the regularity of the proceedings by which he was appointed. *Case v. Marchand*, 23 La. Ann. 60 (1871). In proceedings to commit a person for contempt in garnisheeing assets after the receiver has been appointed, the validity and regularity of the receiver's appointment cannot be attacked or questioned. *Richards v. People*, 81 Ill. 551 (1876). A receiver may be disregarded where the court had no jurisdiction of the case. *State v. District Court*, 21 Mont. 155 (1898).

1 *Taylor v. Philadelphia, etc. R. R.*, 7 Fed. Rep. 381 (1881).

2 *Forrester v. Boston, etc. Co.*, 22 Mont. 430 (1899).

3 *Covert v. Rogers*, 38 Mich. 363 (1878); *Re Eagle Iron Works*, 8 Paige, 385 (1840), modifying s. c., 3 Edw. Ch. 385 (1840); *Re Bowery Bank*, 16 How. Pr. 56 (1857). Cf. *Attorney-General v. Bank of Columbia*, 1 Paige, 511 (1829), N. Y. Code Civ. Proc., § 2429, expressly authorizing such appointments; *Atkins v. Wabash, etc. Ry.*, 29 Fed. Rep. 161 (1886), the court saying that such an appointment should never be made except upon consent of all parties. The receiver will not be chosen from the directors of the insolvent company,

of either party,¹ nor any party interested on either side, unless all

nor from the parties to or counsel in the case. *Finance Co. v. Charleston, etc. R. R.*, 45 Fed. Rep. 436 (1891). The president of the company was appointed receiver in the case of *Clarke v. Central, etc. Co. of Georgia*, 54 Fed. Rep. 556 (1893). The court will not appoint as receiver an officer or director of an insolvent corporation except under unusual circumstances. *Coy v. Title, etc. Co.*, 157 Fed. Rep. 794 (1907). An officer of the corporation should not be appointed its receiver, and if after his appointment charges or fraud are made which it will be the duty of the receiver to investigate, he will be removed. *McCullough v. Merchants', etc. Co.*, 29 N. J. Eq. 217 (1878). In *Richards v. Chesapeake, etc. R. R.*, 1 Hughes, 28 (1876); s. c., 20 Fed. Cas. 692, the court refused to appoint the vice-president receiver, "notwithstanding the almost unanimous consent of parties." In *Freeholders v. State Bank*, 28 N. J. Eq. 166 (1877), the court refused to appoint as receiver any one connected with the management of the insolvent corporation. Even though an officer is made receiver he may be served with process as an officer. *Venner v. Denver, etc. Co.*, 90 Pac. Rep. 623 (Col. 1907). Where a director is appointed receiver he may sue himself as a director. *Murphy v. Penniman*, 66 Atl. Rep. 282 (Md. 1907). Cf. p. 2450, *supra*. Where all the parties in interest, excepting a few bondholders, unite in asking the court to appoint a person receiver who has been familiar with the property, it is no objection that he is a relative of other persons, who are large stockholders and bondholders and that he formerly was an officer and director of the company. *Bowling*

Green T. Co. v. Virginia, etc. Co., 133 Fed. Rep. 186 (1904).

In New Jersey a corporate officer is held to be ineligible to the position of receiver. *Middlesex Freeholders v. State Bank*, 28 N. J. Eq. 166 (1877); *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 217 (1878).

In *Young v. Montgomery, etc. R. R.*, 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850, it appeared that in another suit pending in the same court the president of the insolvent corporation had been appointed receiver. In *Re Fifty-four, etc. Bonds*, 15 S. C. 304 (1880), the court appointed the president and directors as receivers, inasmuch as the foreclosure was by the state, and the state could not be required to give security upon the appointment of a receiver. See also *Gibbes v. Greenville, etc. R. R.*, 15 S. C. 518 (1880). Later, however, the court decided that such officers were not receivers to the extent of rendering the property liable for expenses in continuing to run the road, where the company's note had been taken in payment. *Ex parte Williams*, 17 S. C. 396 (1881). In England the appointment of the board of directors as receivers is looked upon with favor. In *Re Manchester, etc. Ry.*, L. R. 14 Ch. D. 645 (1880), the court said: "If they were acting fairly and working fairly, they would, most likely, be appointed; and in fact, in practice, I believe, as a general rule, either the directors are appointed, or some of them, or the secretary, so as to keep the management in the board of directors." The court will not appoint as receiver the general manager of the company. *Fripp v. Chard Ry.*, 11 Hare, 241 (1853). In *Ralston v. Washington, etc. Ry.*, 65 Fed. Rep. 557 (1895),

¹ *Finance Co. v. Charleston, etc. R.* the complainant should not be made R., 45 Fed. Rep. 436 (1891). A person connected with the counsel for receiver. *State Trust Co. v. National etc. Mfg. Co.*, 72 Fed. Rep. 575 (1893).

consent thereto.¹ A trust company may be appointed,² and in a famous litigation in Vermont a railroad company was for many years the receiver of another railroad company.³ A trustee of the mortgage

the court appointed the president the receiver, he being a suitable man and the foreclosing mortgagee having nominated him. An officer of the company will be appointed receiver where millions of the company's money are invested in small mortgages and the officers are the only persons capable of taking charge. Such officer, however, must resign from a reorganization committee that is in conflict with other interests. *Fowler v. Jarvis, etc. Co.*, 63 Fed. Rep. 888 (1894). The court will not remove a receiver simply because he was an officer and director and manager of the company before its failure. *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 61 Fed. Rep. 546 (1894). A creditor of the corporation may be appointed receiver. *Barber v. International Co.*, 48 Atl. Rep. 758 (Conn. 1901); *State v. Johnson*, 103 Wis. 591 (1899). A stockholder may be made receiver. *McGilliard v. Donaldsonville, etc. Works*, 104 La. 544 (1900). A creditor, stockholder, or officer may be receiver. *Moran v. Hosmer*, 125 Mich. 6 (1900). A creditor and stockholder may be made receiver. *In re Eckhardt Mfg. Co.*, 114 La. 119 (1905).

¹ In *Cowdry v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660, where by consent one of the foreclosing bondholders was made receiver, the court refused to remove him subsequently to his appointment and service. Where two receivers have been appointed, each party naming one, and this leads to dissensions and unnecessary expense, the court will remove both and appoint a new one. *Meier v. Kansas, etc. Ry.*, 5 Dill. 476 (1878); s. c., 16 Fed. Cas. 1321. Where a court appoints a receiver on the supposition that all the parties in interest agree to the appointment of

that particular person, and it afterwards transpires that such was not the case, he will be removed and a new one appointed, the first appointment having really been one-sided and partisan. *Wood v. Oregon Development Co.*, 55 Fed. Rep. 901 (1893). Where debenture-holders are given the power to appoint a receiver the appointment must be a fair one, otherwise the court will remove the receiver and appoint a receiver of its own. *Re Maskelyne, etc., Ltd.*, [1898] 1 Ch. 133. The eligibility of one to act as a receiver can be raised only in a direct proceeding for that purpose. *Metropolitan Nat. Bank v. Commercial St. Bank*, 104 Iowa, 682 (1898). The high character of men whom the court is able to obtain as receivers is well described by Judge Lacombe in *Central Trust Co. v. Third Avenue Ry. Co.*, 159 Fed. Rep. 959 (1908).

² A trust company was receiver in *Kimmerle v. Dowagiac Mfg. Co.*, 105 Mich. 640 (1895). A trust company may be appointed receiver of a savings bank. *Re Knickerbocker Bank*, 19 Barb. 602 (1855). A corporation was receiver in *Roby v. Title, etc. T. Co.*, 166 Ill. 336 (1896). The author has himself caused The Central Trust Company of New York to be appointed receiver of bonds in a railroad case.

³ In *Vermont, etc. R. R. v. Vermont Cent. R. R.*, 46 Vt. 792 (1873); s. c. on appeal, 50 Vt. 500 (1877), a railroad company was made receiver, and the court refused to consider in a collateral attack the power of the company to accept the position. *Langdon v. Vermont, etc. R. R.*, 54 Vt. 593, 613 (1882). See also *Roxbury v. Central Vt. R. R.*, 60 Vt. 121 (1887).

may be made receiver in another suit.¹ The courts do not favor the appointment of a receiver from a distant state.² The receiver should not select his counsel from either side.³

§ 865. *A second receiver will not be appointed where one receivership already exists—Receiver of railroad running into two or more states—Receiver of assets of a foreign corporation.*—Even though the application for the second receiver is by a first mortgagee who has filed his bill to foreclose, yet the court will not appoint a second receiver where one receiver has already been appointed in that state.⁴

¹ Patterson v. Northern T. Co., 82 N. E. Rep. 837 (Ill. 1907).

² Mr. Justice Miller, in Meier v. Kansas, etc. Ry., 5 Dill. 476 (1878); s. c., 16 Fed. Cas. 1321, said that it was improper and unnecessary to appoint for a Kansas railroad a receiver located in New York. Where two receivers have been appointed to act jointly, one appointed by each party, and they cannot agree, the court will remove them and appoint a new single resident receiver. One is enough. Meier v. Kansas, etc. Ry., 5 Dill. 476 (1878); s. c., 16 Fed. Cas. 1321. A mortgagee who names the receiver may be liable for his misfeasances. Sorchan v. Mayo, 50 N. J. Eq. 288 (1892). The court will not appoint a foreign receiver where it would serve no good purpose and would be against the interests of citizens of the state. Borton v. Brines-Chase Co., 175 Pa. St. 209 (1896). A non-resident may be appointed receiver, even though he is not a railroad expert. Farmers' L. & T. Co. v. Cape Fear, etc. R. R., 62 Fed. Rep. 675 (1894). See also § 865, *infra*. Where the purpose of the receivership was to save the concern, one of the receivers at least should be familiar with the management. A non-resident receiver should be required to insert in his bond a provision that he would appear when required. Lotte Bros. v. American Silk Co., 159 Fed. Rep. 499 (1907).

³ See § 879, *infra*.

⁴ Where receivers have been appointed at the instance of the insol-

ent corporation, additional receivers will not be appointed on the application of mortgagees who file a cross-bill for foreclosure. Wabash, etc. Ry. v. Central T. Co., 22 Fed. Rep. 272 (1884). Where a receiver has been appointed by the federal court in a foreclosure suit by second-mortgage bondholders, the first-mortgage bondholders cannot subsequently, by starting a foreclosure suit on the first mortgage, oust such receiver, and have one appointed in their suit. They cannot have a receiver until the first receiver is discharged. Young v. Montgomery, etc. R. R., 2 Woods, 606 (1875); s. c., 30 Fed. Cas. 850. The federal court of bankruptcy, when in existence in 1873, held that it would not appoint a receiver of a railroad company where the circuit court of the United States had already appointed one, even though the latter receiver had abandoned his duties. Alabama, etc. R. R. v. Jones, 1 Fed. Cas. 281 (1873). See also Alden v. Boston, etc. R. R., 1 Fed. Cas. 328 (1871), where a state court had appointed a receiver. Where several mortgages on the same property cover the income, and the junior mortgagee causes a receiver to be appointed, the prior mortgagees being made parties defendant, a prior mortgagee may apply to the court to order the receiver to apply the income to the prior mortgage. Seibert v. Minneapolis, etc. Ry., 52 Minn. 246 (1893). Where receivers appointed over property in two circuits have been removed as to property in one of those circuits, the court

Where a receiver has been appointed of the lessee of various street railways, a separate receiver of the lessors will not generally be appointed.¹

Even if a second one is appointed he takes subject to the rights of the first receiver, except as to property not included in the first receivership.² The usual rule is to apply to the court to have the first

will order the receivers to turn over the property, money, rolling-stock, etc., in the circuit where their powers have ceased. *Central T. Co. v. Wabash, etc. Ry.*, 29 Fed. Rep. 618 (1886). Where a receiver is in charge of a street railway system, a separate receiver will not be appointed of a part of the system, even though the title thereto is in doubt. *Clap v. Interstate St. Ry.*, 61 Fed. Rep. 537 (1894). Where a judgment creditor has caused a receiver to be appointed, and the mortgagee then commences to foreclose, the court will not appoint a new receiver. The mortgagee might have intervened. *National Bank v. Richmond Factory*, 91 Ga. 284 (1893). Where all the directors have resigned but one, and he files a bill to preserve the corporate assets and is himself appointed receiver, a mortgagee commencing thereafter a suit to foreclose cannot have a second receiver appointed. *Mercantile, etc. Co. v. Florence Water Co.*, 111 Ala. 119 (1895). Although a receiver has been appointed under a junior mortgage, yet upon the foreclosure of the first mortgage a new receiver may be substituted for the former one, on the application of the first mortgagee. *Holland Trust Co. v. Consolidated, etc. Co.*, 85 Hun, 454 (1895). The second receiver may by implication displace the first receiver, appointed many years prior. *Daniel v. Wilson*, 91 Ga. 238 (1892). Under the South Dakota statutes a receiver of an insolvent corporation will be appointed at the instance of a stockholder. After such appointment another court cannot appoint another receiver at the instance of another stockholder, even though it is charged that fraud was involved in

the first appointment. *State v. McGee*, 88 N. W. Rep. 115 (So. Dak. 1901). Where a lessee railroad is insolvent and in the hands of a receiver, and the rent is not paid, and it controls the board of directors of the lessor railroad, a stockholder of the latter may have a receiver appointed of such of the lessor's property as is not already in the hands of a receiver, and such second receiver may be authorized to sue for the rent due, and the court may also authorize him to issue receiver's certificates to pay the expense of prosecuting such suit. *Town of Vandalia v. St. Louis, etc. R. R.*, 209 Ill. 73 (1904). Where an appeal is taken from an order appointing a receiver, and on a bond being given the assets are turned back to the corporation, another court cannot appoint a receiver of such assets. *State v. Reynolds*, 107 S. W. Rep. 487 (Mo. 1907).

¹ *Pennsylvania Steel Co. v. New York, etc. Ry.*, 160 Fed. Rep. 221 (1907).

² Where a receiver is in possession of a fund, another receiver subsequently appointed in another action in the same state is not entitled to the fund, and if he gets it he will be compelled to restore it to the first receiver. *O'Mahony v. Belmont*, 37 N. Y. Super. Ct. 380 (1874). There may be a second receiver appointed on the application of judgment creditors of such corporate assets as are not included in the mortgage of the foreclosure of which the first receiver has been appointed. *Whitney v. New York, etc. R. R.*, 32 Hun, 164 (1884). A receiver may apply to the court to have another receivership declared void. *Whitney v. New York, etc. R. R.*, 32 Hun, 164 (1884). The rights

receiver made receiver in the second action also, or to have him take possession of property not already included.¹ The federal court will not on the application of receivers appointed in a state court at the instance of the state, turn over to them property already in the hands of federal receivers, unless the state suits have proceeded to a point, showing that the state will prevail and that the property should be turned over.² Where a street railroad has been sold out under a damage claim, which by statute has priority over a mortgage, and a state receiver is in charge, the mortgagee cannot have a receiver appointed by the federal court in an action to foreclose.³

The court will readily appoint a resident receiver of such of the assets of an insolvent foreign corporation as are within the jurisdiction.⁴ The court appointing an ancillary receiver will pass on claims

of a receiver in foreclosure proceedings in Connecticut as against a trustee in insolvency appointed after the foreclosure was commenced were considered in *Central Trust Co. v. Worcester, etc. Co.*, 86 Fed. Rep. 35 (1898).

1 Where a receiver is already in at the instance of judgment creditors, the same receiver will be appointed in the foreclosure suit. *Loyd v. Chesapeake, etc. R. R.*, 65 Fed. Rep. 351 (1895). An ancillary receivership will be granted *ex parte* subject to the right of the court to consider the appointment on a subsequent motion, where a receivership has been granted in the main action. *Platt v. Philadelphia, etc. Co.*, 54 Fed. Rep. 569 (1893), the court refusing to follow *Mercantile T. Co. v. Kanawha, etc. Ry.*, 39 Fed. Rep. 337 (1890). The receivership may be extended to an additional line of railroad upon the application of one of the parties who claims a lien on such additional part also. *Mercantile T. Co. v. Missouri, etc. Ry.*, 41 Fed. Rep. 8 (1889). If a receiver is in possession, the same court, in a subsequent suit affecting the same property, will extend the first receivership to the second suit. But if the court appoints a new receiver he displaces the old. *State v. Jacksonville, etc. R. R.*, 15 Fla. 201 (1875). The receivership obtained at

the instance of the mortgagee cannot, at his instance, be extended to property not included in the mortgage. *State v. Jacksonville, etc. R. R.*, 15 Fla. 280 (1875). In Florida a receiver appointed in one county has no control over the part of the road which is in other counties. *State v. Jacksonville, etc. R. R.*, 15 Fla. 201 (1875). A receiver of a foreign corporation appointed on a final judgment supersedes a temporary receiver appointed in another suit in another district of the same court. *Glines v. Binghamton Trust Co.*, 68 Hun, 511 (1893). Even though state proceedings have been practically closed, yet, if the receiver has not been discharged, the United States court will not appoint another receiver, especially where no great and imminent danger is involved. *Lancaster v. Asheville St. Ry.*, 90 Fed. Rep. 129 (1898).

2 *Pennsylvania Steel Co. v. N. Y. etc. Ry.*, 160 Fed. Rep. 224 (1903).

3 *Lancaster v. Asheville St. Ry.*, 90 Fed. Rep. 129 (1898). See also § 839, *supra*.

4 A New York creditor of a New York corporation may have a receiver of the latter's property in Illinois appointed in Illinois, and an Illinois creditor cannot attach as against such receiver. *Holbrook v. Ford*, 153 Ill. 633 (1894). A receiver of a foreign corporation may be appointed without

existing within the jurisdiction.¹ The courts of a state wherein an ancillary receivership of an insurance company exists will not order

obtaining service upon the corporation, where jurisdiction is had over the subject-matter, and there is an immediate necessity for the appointment. *Glines v. Order of Iron Hall*, 20 N. Y. Supp. 275 (1892); also 21 N. Y. Supp. 543. A resident creditor of a foreign corporation which has passed into a receiver's hand may file a bill to have a local receiver appointed of the local assets. *Popper v. Supreme Council*, 61 N. Y. App. Div. 405 (1901). The court will not appoint an ancillary receiver unless an independent bill is filed. An appointment *ex parte* on the petition of the chief receiver will be vacated. *Greene v. Star, etc. Co.*, 99 Fed. Rep. 656 (1900). The United States court in New York will not appoint a receiver of a Maine corporation at the instance of stockholders for dissolution and distribution of the property, especially where there are no debts. *Parks v. United States, etc. Corp.*, 140 Fed. Rep. 160 (1905). Where a foreign receiver of a foreign corporation is vested with the title to all its assets in and out of that state, an ancillary receiver cannot be appointed in New York. *Chicago, etc. Co. v. German Ins. Co.*, 119 N. Y. App. Div. 347 (1907). An ancillary receiver was appointed in *Haydock v. Fisheries Co.*, 156 Fed. Rep. 988 (1907). Under the New York statutes even a non-resident stockholder in a Maine corporation may file a bill in equity in New York state for a receiver and a distribution of the assets in New York, where a receiver has already been appointed in Maine and dissolution proceedings commenced and an injunction issued

preventing the officers from administering the property. *MacNabb v. Porter, etc. Co.*, 44 N. Y. App. Div. 102 (1899). The United States court is prohibited by act of congress from enjoining a state court from appointing a receiver or carrying on legal proceedings. *Cœur D'Alene Ry., etc. Co. v. Spalding*, 93 Fed. Rep. 280 (1899). A citizen of Maryland who holds a loss claim against a Pennsylvania mutual insurance company which is insolvent cannot have a receiver appointed in Maryland if it is impracticable for the Maryland courts to levy the necessary assessments to wind up the affairs of the association. *Stockley v. Thomas*, 89 Md. 663 (1899). The United States court may appoint an ancillary receiver of an insolvent corporation, a receiver of which has been appointed by a state court in another jurisdiction. *Scaife v. Scammon, etc. Ass'n*, 80 Pac. Rep. 957 (Kan. 1905). A stockholder in a Florida corporation who joins in a petition to a Florida court to dissolve it, and such dissolution is decreed, and by the statutes of Florida the directors become trustees to wind it up, cannot then have a receiver appointed in Alabama, even though all the company's property is in Alabama. *Black v. Sullivan Timber Co.*, 40 S. Rep. 667 (Ala. 1906). A receivership in one state in a suit between claimants for office does not prevent a receivership in another state in behalf of the bondholders to take charge of the property in such latter state. *Schmidt v. Mitchell*, 98 Ky. 218 (1895). See also *Murray v. Vanderbilt*, 39 Barb. 140 (1863); *Phoenix, etc.*

¹ New York Security Co. v. Equitable Mortgage Co., 71 Fed. Rep. 556 (1896). Creditors outside of the state will not be allowed to intervene in ancillary receivership proceedings in

the state. Their remedy is to file their claims in such proceedings. *Sands v. Greeley & Co.*, 80 Fed. Rep. 195 (1897).

the receiver to turn over the funds to the receiver in another state, where the domestic creditors have legally elected to rescind their insurance and demand a return of their money.¹ Where receivers of a Connecticut corporation have been appointed in Connecticut, and the same receivers are afterward appointed in New York, the New York court may send to Connecticut the whole fund realized in New York, and need not first pay the creditors who have filed their claims in New York.² A New York court, in directing its receiver to remit to a

Co. v. North River, etc. Co., 33 Hun, 156 (1884), where the court also enjoined pending actions against the corporation. *Re Commercial Bank, L. R.* 33 Ch. D. 174 (1886); *N. Y. Code Civ. Proc.*, § 1812. *Cf. Taylor v. Life Assoc.*, 13 Fed. Rep. 493 (1882). A receiver of the property in one state of a foreign insolvent corporation will be appointed at the instance of a resident creditor, even though the corporation has been dissolved, and its affairs are in process of liquidation in the other state. The surplus after paying all the creditors will be distributed among the stockholders. *Redmond v. Hoge*, 3 Hun, 171 (1874). A New York corporation may, by bill filed in the Virginia district of the United States court, have a receiver appointed there of a New Jersey corporation, if the defendant does not object to the jurisdiction. Stockholders and creditors of the defendant company cannot by intervening raise the question of jurisdiction. *Central T. Co. v. McGeorge*, 151 U. S. 129 (1894). A foreign receiver will be allowed to intervene and be heard in an application for a domestic receiver. *Buswell v. Order of Iron Hall*, 161 Mass. 224 (1894). In New York proceedings supplementary to execution suffice to obtain a receiver of a foreign corporation where such corporation has no agent, and does no business in the state, the receiver taking such property as is in the state. *Logan v. McCall Pub. Co.*, 140 N. Y. 447 (1893).

¹ *Fawcett v. Order of Iron Hall*, 64 Conn. 170 (1894).

² *Sands v. Greeley & Co.*, 88 Fed.

Rep. 130 (1898), the court holding also that non-resident creditors who have filed their claims in New York will be allowed to participate. The general rule is that an ancillary receiver, after paying the expenses of his receivership, should be directed to account with and remit to the receivers in the original jurisdiction all funds and assets in his hands. *Central, etc. Co. v. Farmers', etc. Co.*, 113 Fed. Rep. 405 (1902); *aff'd*, 125 Fed. Rep. 1001. Where a receiver of the parent company has been appointed by the federal court at the place where such company was incorporated, the federal courts in other jurisdictions where the subsidiary corporations exist will appoint the same receiver, but will not necessarily turn over the tangible property to such receiver, even though a subsidiary corporation holds it on a terminable lease. *Conklin v. United States, etc. Co.*, 123 Fed. Rep. 913 (1903). Resident creditors of an insolvent foreign corporation are paid before anything is sent to the foreign receiver thereof. *Frowert v. Blank*, 54 Atl. Rep. 1000 (Penn. 1903). A California creditor of a foreign association will be paid out of the resident assets of the foreign association in preference to payment to a foreign receiver. *Lackmann v. Supreme Council, etc.*, 75 Pac. Rep. 583 (Cal. 1904). The court may order funds in the state belonging to a foreign corporation to be paid over to a receiver appointed in the state where the company was organized. *Durward v. Jewett*, 46 La. Ann. 559 (1894). The funds in the state of an insolvent for-

New Hampshire receiver assets in New York of an insolvent New Hampshire corporation, may require the New Hampshire receiver to give a bond that New York creditors shall receive the same proportionate dividend in the distribution of the entire assets as other creditors of the New Hampshire corporation, and that no deduction shall be made on account of a special fund deposited many years prior thereto in New York as special security for New York creditors under the banking law of the state.¹ The court will often appoint as resident receiver the receiver who has already been appointed in another state.² Where a receiver has been appointed in the state where a

eign corporation will not be turned over to a foreign receiver thereof before the local claims are satisfied. *Clark v. Supreme, etc.*, 80 Pac. Rep. 931 (Cal. 1905).

¹ *People v. Granite, etc. Assoc.*, 161 N. Y. 492 (1900). Where a New Hampshire insurance corporation becomes insolvent, and a fund deposited by it in New York is distributed in New York among New York creditors, they will not be allowed to participate in the distribution in New Hampshire until after the other creditors have received an equal *pro rata* dividend. *Bank Com'rs v. Granite, etc. Assoc.*, 49 Atl. Rep. 124 (N. H. 1901). A stockholder in a building and loan association is not a creditor as regards the rule that domestic corporations must be paid before the assets are sent to a foreign receiver. *Weedon v. Granite, etc. Assoc.*, 59 S. W. Rep. 758 (Ky. 1900).

² *Dunlop v. Paterson, etc. Ins. Co.*, 12 Hun, 627 (1878); s. c., 74 N. Y. 145. In the foreclosure of the West Shore Railroad, receivers were first appointed by the New York state court, and then the same receivers were appointed in a suit instituted in the federal court in New Jersey to cover the part of the property in New Jersey. The federal court referred matters of doubt to the New York court for decision. *U. S. Trust Co. v. New York, etc. Ry.*, 25 Fed. Rep. 797 (1885). Although the judges in the different circuits in which a consolidated railroad is being foreclosed

issue different orders to the receiver, who is the receiver in each circuit, as regards payments to be made, yet, if these orders are all legal, the circuit judge will not interfere with them. *Central T. Co. v. Texas, etc. Ry.*, 22 Fed. Rep. 135 (1884). A court of equity has power to appoint a receiver for the assets of a foreign corporation within its jurisdiction and may appoint the same receiver who has been appointed in the state where the corporation exists. Such a suit is not ancillary, but is independent. *Shinney v. North American, etc. Co.*, 97 Fed. Rep. 9 (1899). The court in appointing the same receiver as has been appointed elsewhere may join with him another person as co-receiver. *Coltrane v. Templeton*, 106 Fed. Rep. 370 (1901). Where a foreign receiver is also appointed local receiver he must obey the orders of a local court, so far as the local assets are concerned. *Hammond v. National, etc. Assoc.*, 31 N. Y. Misc. Rep. 182 (1900). Comity as to allowing receivers appointed in one state to sue in another state does not go to the extent of allowing a bill in equity of such a receiver to extend his receivership over property in the state to displace a prior bill filed by a creditor of the corporation to have a receiver appointed, etc. Nor should the two suits be consolidated. *Day v. Postal Tel. Co.*, 66 Md. 354 (1887). A receiver appointed in New Jersey of a New Jersey corporation having its chief plant in Ohio will also be ap-

corporation exists, the same receiver will be appointed in another state where the corporation does business, if the volume and kind of business done in the latter state justifies it, and if the special interests of the citizens of that state may be so protected. In such a case the receiver in the latter state must account to its courts for the business in that state.¹ The orders and decrees of a court in regard to a receivership are binding on the courts of a sister state where an ancillary receiver was appointed.²

Ancillary receivers in Massachusetts of a Kansas corporation are not liable for a tort committed in Kansas by the Kansas receivers.³

If the corporation does not object the federal court may appoint a receiver thereof, although the corporation has its domicile in another district, there being property inside of the district.⁴ Where a receiver has been appointed in the state court and the case is then removed to the federal court, the same receiver continues.⁵ Where a railroad runs through several circuits, the court in one circuit cannot appoint a receiver over the whole.⁶ The courts, however, will appoint the same receivers in the different districts through which the road runs.⁷

pointed receiver in Ohio in an ancillary suit. *Bayne v. Brewer Pottery Co.*, 82 Fed. Rep. 391 (1897). A receiver of the parent company will not necessarily be appointed receiver of the branch companies. *Evans v. Union Pac. Ry.*, 58 Fed. Rep. 497 (1893). On the subject of appointing a non-resident as receiver, see § 864, *supra*.

1 *Irwin v. Granite, etc. Assoc.*, 56 N. J. Eq. 244 (1897).

2 *Coe v. Patterson*, 122 N. Y. App. Div. 76 (1907).

3 *Union Trust Co. v. Atchison, etc. R. R.*, 87 Fed. Rep. 530 (1898).

4 *Lewis v. American, etc. Co.*, 119 Fed. Rep. 391 (1902).

5 *Turner v. Indianapolis, etc. Ry.*, 8 Biss. 527 (1879); s. c., 24 Fed. Cas. 372.

6 *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 69 Fed. Rep. 871 (1895). A federal receiver has no power to take possession of property in another district, and a court in such other district may appoint a receiver to take possession of such property. *Morrill v. American, etc. Co.*, 151 Fed. Rep. 305 (1907). A federal court has

no power to appoint a receiver over property outside of that circuit. *Texas & Pac. Ry. v. Gay*, 86 Tex. 571 (1894), reviewing the authorities at great length. Where most of an interstate road is in another state, the court will appoint the same receiver as has been appointed in such other state. *Port Royal, etc. Ry. v. King*, 93 Ga. 63 (1893). The power of the court to authorize its receiver to take control of real estate situated in another district is very limited. *Baltimore, etc. Assoc. v. Alderson*, 90 Fed. Rep. 142 (1898). See also § 840, *supra*.

7 *Dillon v. Oregon, etc. Ry.*, 66 Fed. Rep. 622 (1895). In *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 72 Fed. Rep. 26 (1896), it appears that a receiver had been appointed in Wisconsin. The same receiver was subsequently appointed in the various districts between Wisconsin and the Pacific coast. Two years later the United States court in Washington vacated the appointment on the ground that the company had no property in Wisconsin. A conflict resulting, four justices of the supreme court passed upon the matter, and held that the court in

Where the same receiver is appointed in several circuits, the claims of parties will be tried in the circuit where they live, but questions relative to the receiver continuing to operate under leases, etc., should be determined only in the circuit where he was first appointed.¹

Where the same receiver has been appointed in several districts, the court of primary jurisdiction is considered the chief court and the others as ancillary, even though the first suit was not where the corporation has its domicile, such domicile being merely nominal, the corporation being organized in New Jersey, but doing all its business elsewhere.² Where the same receiver has been appointed in two jurisdictions, the second court which made the appointment should decide whether the property in that jurisdiction should be sold to pay taxes.³ Even though an insolvent corporation has assigned for the benefit of creditors and afterwards a receiver of the same has been appointed by a court, yet bankruptcy proceedings take precedence over the assignment and receivership.⁴

§ 866. *The receivership takes effect from the date of the entry of the order appointing the receiver — Vesting of title.*—The law favors the diligent creditor, and the diligent creditor is always en-

Wisconsin was the court of primary jurisdiction, and that the proceedings in the other courts were ancillary; overruling 69 Fed. Rep. 871. A bill filed in another circuit court after the main bill has been filed is an auxiliary bill and not an ancillary bill. *Coltrane v. Templeton*, 106 Fed. Rep. 370 (1901).

¹ *Ames v. Union Pac. Ry.*, 60 Fed. Rep. 966 (1894). Although a receiver of an interstate railroad is first appointed in New York over the New York part of the road, and then the same receiver is appointed in Connecticut over the Connecticut part of the road, yet the Connecticut court may order the receiver to pay a certain rate of wages to the employees, and this order binds him in respect to the whole road. *Guarantee T. etc. Co. v. Philadelphia, etc. R. R.*, 69 Conn. 709 (1897). Where a federal receiver of an insolvent corporation is appointed in California, in which district, however, the corporation has no property, and the same receiver is subsequently appointed in the Nevada district, in which the corporation has

property, the application of a lienor to sell the property need not be made in the California district. *Cohen v. Gold Creek, etc. Co.*, 95 Fed. Rep. 580 (1899). Even though the same receiver is appointed in two circuits, yet he has no right to turn over the assets in the one circuit to himself as receiver in the other circuit, without order of the court, and, if he does so, he and his bondsmen are personally liable. *Kirker v. Owings*, 98 Fed. Rep. 499 (1899).

² *Lewis v. American, etc. Co.*, 119 Fed. Rep. 391 (1902). Where a federal court in New Jersey appointed a receiver of a New Jersey corporation, and the federal court in Washington appointed the same receivers there, a claim for services in selling property for the receiver may be adjudicated in the federal court in New Jersey. *Colonial T. Co. v. Pacific, etc. Co.*, 142 Fed. Rep. 298 (1906).

³ *Fletcher v. Harney, etc. Co.*, 84 Fed. Rep. 555 (1897).

⁴ *Lea v. Geo. M. West Co.*, 91 Fed. Rep. 237 (1899).

deavoring to secure a preference over other creditors by obtaining levy of execution before the levy of other creditors, and also before a receivership is ordered. The law, however, favors the priority of the receivership in such cases, especially in railroad cases, where the public is interested in keeping the property together, and in insolvent corporation cases, where rascality is apt to abound. The receivership takes effect from the date of the order of appointment.¹ A receiver's title dates from the time of his appointment without regard to the date of his bond or his actually taking possession.² After the entry of an order that a receivership is granted, a levy of execution, attachment, or garnishment upon the personal property is invalid and a contempt of court, even though the receiver himself has not yet been named or has not yet filed his bond.³ A chancery receiver is a receiver *pendente lite* and does not take title, and hence differs from a statutory receiver, who is practically an assignee.⁴ The appointment of a receiver operates the same as an injunction against the officers taking further action, and hence any conveyance or transfer by them thereafter is invalid.⁵

In regard to real estate, the receiver does not take title by the mere fact of his appointment. Until the insolvent corporation actually makes a deed of its real estate to the receiver, the title of the receiver

¹ Connecticut, etc. Co. v. Rockbridge Co., 73 Fed. Rep. 709 (1895).

² Horn v. Pere Marquette R. R., 151 Fed. Rep. 626 (1907). The title of a receiver to corporate funds on deposit attaches on his appointment and prevents a bank applying it on notes, which by their terms are to become due on insolvency. Eastern, etc. Co. v. Eastern, etc. Co., 146 Fed. Rep. 761 (1906). The title of a receiver, on his appointment, dates back to the time of granting the order. East Tennessee, etc. R. R. v. Atlanta, etc. R. R., 49 Fed. Rep. 608 (1892). See also *Re Schuyler's, etc. Co.*, 136 N. Y. 169 (1892); *rev'd*, 154 U. S. 256. A receiver's title does not date back to the signature of the order so as to affect rights accruing between the signing and the entry of the order. Wilcox v. National, etc. Bank, 67 N. Y. App. Div. 466 (1902). The rents accruing between the time of the notice of motion for a receiver and the entry of the order appointing the re-

ceiver belong to the mortgagee. Preston v. Tumbridge, etc. Ltd., 88 L. T. Rep. 53 (1903).

³ See § 870, *infra*. A receiver's title vests from the date of the original order appointing him and is superior to that of a subsequent execution. Ardmore Nat. Bank v. Briggs, etc. Co., 94 Pac. Rep. 533 (Okla. 1908).

⁴ Hence the fact that a common-law receiver continues to occupy leased premises does not render him liable as assignee of the term upon the covenant to pay rent. He may be liable for the time he actually occupies the premises, but such liability can be enforced only in that suit. Stokes v. Hoffman House, 167 N. Y. 554 (1901).

⁵ Linville v. Hadden, 88 Md. 594 (1898). After a receiver has been appointed the officers have no power to transfer the assets. Brynjolfson v. Osthus, 96 N. W. Rep. 261 (N. Dak. 1903).

thereto is good only in equity.¹ Such also is the rule in regard to patent-rights. An assignment is necessary.² As to personal property the appointment does not in itself convey title to personalty or choses in action located out of the state.³ In appointing a receiver the court may withhold from him certain assets upon which there are mortgages which are about to be enforced under the power of sale.⁴ An attachment has priority over a subsequent receivership.⁵ Where the

1 Unless the statute provides otherwise, as it does in New York, the real estate of the corporation is not vested in the receiver except by an actual conveyance from the corporation to him. *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 111 Ill. 32 (1884). A levy of execution prior to the filing of the bill through which the receiver is appointed takes precedence of course over the receiver. *Chautauque, etc. Bank v. Risley*, 19 N. Y. 369 (1859). Unless a deed of the real estate is made to the receiver, a purchaser from him has no title and cannot maintain a suit for partition. *Scott v. Elmore*, 10 Hun, 68 (1877). A statute may of course provide that title shall vest without a deed. *Re Attorney-General v. Atlantic, etc. Ins. Co.*, 100 N. Y. 279 (1885), where the statute applied to receivers of insurance companies. A receiver to whom the property has been assigned takes precedence over a subsequent judgment and levy all in the same state. *Swift's, etc. Works v. Johnson*, 26 Fed. Rep. 828 (1886). The judgment lien of a party dates from its entry and not from the time when a verdict was rendered. *Jennings v. Philadelphia, etc. R. R.*, 23 Fed. Rep. 569 (1884). Title vests in the receiver under the New York statute upon his appointment. Upon filing his bond the title relates back, although he does not at once take possession. See also, on this subject, *Re Schuyler's, etc. Co.*, 64 Hun, 384 (1892); *aff'd*, 136 N. Y. 169; *rev'd* on another point, 154 U. S. 256. Under the New York statute the title to corporate property does not pass to the temporary re-

ceiver, but does pass to the permanent receiver. *Mutual Brewing Co. v. New York, etc. Ferry Co.*, 16 N. Y. App. Div. 149 (1897). Where the receiver does not take actual possession, but merely collects rental, it is held in Mississippi that the mortgagor company may convey the property and give good title. *Mississippi Valley Co. v. Chicago, etc. R. R.*, 58 Miss. 896 (1881). In Maryland, by statute, a receiver is vested with title only from the time of qualification, hence an execution issued after a judgment creditor's bill was filed, but before the receiver was appointed, has priority over the receivership. *Prentiss, etc. Co. v. Whitman, etc. Co.*, 88 Md. 240 (1898). A judgment obtained after a receiver is appointed is not a lien upon the real estate. *Savings & T. Co. etc. v. Bear Valley, etc. Co.*, 93 Fed. Rep. 339 (1899); *Mercantile Trust Co. v. Southern, etc. Co.*, 86 Fed. Rep. 711 (1898).

2 See § 870, *infra*.

3 *Booth v. Clark*, 17 How. 322 (1854). The appointment by a Connecticut court of a receiver of a Connecticut corporation does not pass title to him of assets in New York as against New York creditors of such corporation. *Hammond v. National, etc. Assoc.*, 58 N. Y. App. Div. 453 (1901).

4 *Weihl v. Atlanta, etc. Co.*, 89 Ga. 297 (1892).

5 *Bennett v. Complete, etc. Co.*, 8 N. Y. App. Div. 301 (1896); *Walling v. Miller*, 108 N. Y. 173 (1888). Where a judgment and execution would have been obtained prior to the receivership but for fraud in interposing a

order appointing the receiver does not contemplate a distribution of the assets, a general creditor may obtain a judgment and a lien upon the property, even though the receiver is in possession.¹ A receiver appointed in behalf of a mortgagee cannot legally take possession of corporate property which is not covered by the mortgage.² The question of a conflict of jurisdiction between the federal and state courts is considered elsewhere.³

B. SUITS AND CLAIMS BY AND AGAINST RECEIVERS.

§ 867. *The receiver should obtain the leave of his court before bringing a suit.*—This is the established rule. It is no defense to his suit that he has not obtained this leave of court, but he will be personally liable for costs if he brings the action without leave of court and is beaten.⁴ Power given to a receiver to demand and receive accounts does not authorize him to sue.⁵

demurrer, a lien prior to the receivership will be given. *Re Lewis, etc. Co.*, 89 Hun, 208 (1895). Even though a judgment is a lien on property at the time the receiver takes possession, yet the court will not allow the sheriff to sell. *Wheeler v. Walton, etc. Co.*, 65 Fed. Rep. 720 (1895). See also § 870, *infra*. A sale by the sheriff on an execution is not good if made after a receiver has been appointed. The sale should be by the receiver. *Ellis v. Vernon, etc. Co.*, 86 Tex. 109 (1893). An attachment precedes a subsequent receiver's rights. *Re West Cumberland, etc. Co.*, [1893] 1 Ch. 713. A receiver cannot take the property from the sheriff, who holds it under an attachment. *State v. Chehalis Superior Court*, 8 Wash. 210 (1894).

¹ *Moore v. Southern, etc. Co.*, 83 Fed. Rep. 399 (1896).

² *Alabama Nat. Bank v. Mary Lee, etc. Co.*, 108 Ala. 288 (1896). Even though the order appointing the receiver in a foreclosure suit directs him to take possession of all the property of the corporation, yet it will be construed as not covering property not covered by the mortgage. *Central*

T. Co. v. Worcester, etc. Co., 114 Fed. Rep. 659 (1902). A receiver appointed in connection with the foreclosure of a mortgage cannot be given power to take property not covered by the mortgage. *Platt v. N. Y., etc. R. R.*, 63 N. Y. App. Div. 401 (1901). A defect in the description of personal property mortgaged is not cured by a receiver taking possession under the mortgage prior to other liens being obtained upon the property. *Central Trust Co. etc. v. Worcester, etc. Co.*, 93 Fed. Rep. 712 (1899).

³ See § 839, *supra*.

⁴ A receiver will be charged personally with costs where he brings a suit as receiver without leave of the court and for his personal advantage and the transaction was not in good faith. *Chapin v. Thompson*, 4 Hun, 779 (1875). A receiver has no power to sue to recover personal property which he has never had in his possession, unless he first obtains an order of the court authorizing such suit. *Bishop v. McKillican*, 124 Cal. 321 (1899). A receiver must obtain special permission from the court before commencing suit against directors for

⁵ *Hubert v. City of New Orleans*, 130 Fed. Rep. 21 (1904).

§ 868. *When may a receiver sue in other courts of the state or of other states, or in the federal courts?*—Although it is customary for the receiver to bring his suits in the court which appointed him, where that court has jurisdiction, yet it is allowable for him to sue in other courts of the state. There is more difficulty, however, in determining whether the receiver may sue in the courts of another state. He can do so only by the comity of states. As receiver he has no absolute right to do so. Generally, however, a foreign receiver is allowed to carry on litigation if the interests of resident creditors are not injured, and if justice will be promoted by sustaining his suit.¹

negligence and against stockholders to hold them liable on stock issued in payment for property at an alleged overvaluation. *Simmons v. Taylor*, 63 S. W. Rep. 1123 (Tenn. 1901). A receiver must allege and prove authority from the court to institute and prosecute the suit. *Darner v. Gatewood*, 89 N. W. Rep. 603 (Neb. 1902). The general statutes of the state sometimes authorize the receiver to bring suits, and in that case it is not necessary for him to obtain leave from the court. *Hayes v. Brotzman*, 46 Md. 519 (1877). In this case, however, the decree had authorized the receiver to bring suits. In Georgia it has been held, where the receiver sued to recover box-cars, that the defendant under the general issue might compel the receiver to prove his authority to sue, and that, where the court had not expressly authorized him to sue, his suit failed. *Screven v. Clark*, 48 Ga. 41 (1872). See also *High, Receivers*, § 208. In New York, by the rules of court (77 and 78), a receiver has power to commence a suit without a special authorization by the court, and, having such general power to sue, he may select his tribunal. *Rockwell v. Merwin*, 45 N. Y. 166 (1871). As to the old rule, see *Merritt v. Lyon*, 16 Wend. 405 (1836); *Foster v. Townshend*, 68 N. Y. 203 (1877). A receiver need not give security under the New York statute, unless his action is palpably heedless or in bad faith. *Hale v. Mason*, 86 Hun, 499 (1895). A suit by a re-

ceiver is demurrable unless he shows that the court authorized the suit. *Rhodes v. Hilligoss*, 16 Ind. App. 478 (1896). A receiver need not allege that he was authorized to commence the suit. *Compton v. Schwabacher, etc. Co.*, 15 Wash. 306 (1896). At common law the time and place of appointment and the filing of the bond must be alleged. *Gillet v. Fairchild*, 4 Denio, 80 (1847). Where a receiver fails to allege that his suit to collect subscriptions was authorized by the court his action will fail. *Gainey v. Gilson*, 149 Ind. 58 (1897). Demurrer lies to a complaint against a receiver which does not allege that the court has allowed the suit to be brought, unless it is alleged that the receiver is a federal receiver. *Pierce v. Jones*, 24 Ind. App. 286 (1900). See also § 870, *infra*.

¹ A foreign receiver will be allowed to sue where he shows that all corporate debts have been paid, and that no domestic creditors can be injured. *Rogers v. Riley*, 80 Fed. Rep. 759 (1896). A foreign receiver of a foreign corporation cannot sue in Iowa to enforce a contract between such corporation and a citizen of Iowa. *Barker v. Lamb*, 68 N. W. Rep. 686 (Iowa, 1896). A receiver appointed in Mexico of a railroad in Mexico owned by a New York corporation may replevy in Missouri a private car which belongs to such railroad. *Robertson v. Staed*, 135 Mo. 135 (1896). A Maryland receiver cannot sue in Delaware a Delaware creditor of the

A receiver of a Massachusetts corporation appointed by the United States court in Massachusetts may bring suit in the New Jersey

corporation. *Stockbridge v. Beckwith*, 6 Del. Ch. 72 (1887). A foreign receiver may sue to collect and protect assets when he alleges that the corporate officers neglect or refuse to do so. *Rogers v. Haines*, 103 Ala. 198 (1894). A foreign receiver cannot bring suit unless he shows that he is authorized so to do by the order of his appointment or by the statutes of the state wherein he is appointed. *Swing v. White River Lumber Co.*, 91 Wis. 517 (1895). A foreign receiver may maintain a suit where there are no domestic creditors whose rights are to be protected. *Comstock v. Frederickson*, 51 Minn. 350 (1892).

Inasmuch as the statutes of the state of Washington authorize a receiver of an insolvent bank to enforce a stockholder's statutory liability, such receiver may maintain such a suit in Massachusetts against a Massachusetts stockholder in such bank. *Howarth v. Lombard*, 175 Mass. 570 (1900). *Cf.* § 218, *supra*. Where by statute upon dissolution the directors are made trustees to wind up the affairs of the company, they may maintain a suit in another state, inasmuch as they are not receivers, but are successors of the corporation. *Root v. Sweeney*, 12 S. Dak. 43 (1899). By comity a foreign receiver can maintain a suit to foreclose a mortgage which was assigned to him. *Hale v. Harris*, 112 Iowa, 372 (1900). Where the trustee becomes insolvent and the court appoints a new trustee, such trustee may bring suit in another state to foreclose the mortgage. *Iowa, etc. Co. v. Hoag*, 132 Cal. 627 (1901). A receiver appointed in one state may sue a stockholder in another state on an unpaid subscription. *Fish v. Smith*, 73 Conn. 377 (1900). A receiver appointed in Washington of an insolvent state bank in that state may bring suit

in the New York courts to enforce the statutory liability of a New York stockholder in such bank, it appearing that no New York creditor of such bank will be prejudiced thereby. *Howarth v. Angle*, 39 N. Y. App. Div. 151 (1899). A foreign receiver will not be allowed to sue in the state where his claim conflicts with the rights of resident creditors. *Ward v. Pacific, etc. Co.*, 135 Cal. 235 (1901). A receiver appointed by a court in Iowa of the assets of an insolvent Iowa corporation cannot maintain a suit in the federal court in Pennsylvania to enforce the liability of a Pennsylvania stockholder in such Iowa corporation, especially where the assessment was fixed by an Iowa court in a suit in which the Pennsylvania stockholder was not a party and did not appear and could not have been made to appear. *Wigton v. Bosler*, 102 Fed. Rep. 70 (1900). A Nebraska receiver of a Nebraska corporation will not be allowed to bring suit in the Iowa courts to enforce the subscription liability of citizens of Iowa to the stock of a Nebraska corporation, where there is no equity in the claim, the fact being that payment for the stock had been made by notes, and afterwards upon a transfer of the stock these notes had been canceled and notes of the transferee taken in exchange therefor. *Wyman v. Eaton*, 107 Iowa, 214 (1899). A receiver may bring suit in his own name, even though he is a resident ancillary receiver of a foreign corporation. *Evans v. Pease*, 21 R. I. 187 (1899). A Maine receiver of a Maine corporation may bring suit in another state to recover land where no rights of resident creditors of such state intervene. *Small v. Smith*, 14 S. D. 621 (1901). While not a matter of right, yet a receiver by comity is generally allowed to

courts to enforce a contract of the corporation, the United States court having authorized the suit, and all the property of the corporation having been delivered to the receiver.¹ A foreign receiver of a

bring suits outside of the jurisdiction in a dictum said that a receiver of the court which appointed him. an Oregon corporation appointed in *Lewis v. American, etc. Co.*, 119 Fed. Rep. 391 (1902). A foreign receiver Oregon would be allowed to bring may maintain a suit to collect a debt suit in Illinois to collect the unpaid due from a resident. *Hallam v. Ashford*, 70 S. W. Rep. 197 (Ky. 1902). subscriptions of stockholders residing in Illinois, where there are no creditors of the corporation residing in Illinois.

On the ground of comity a foreign receiver may bring an action in the corporate name to collect a note due from a citizen of the state. *Winans v. Gibbs, etc. Mfg. Co.*, 48 Kan. 777 (1892). A foreign receiver filing a bill to enjoin resident creditors from enforcing their claims cannot obtain a preliminary injunction on the ground that such claims are fraudulent. *Rogers v. Haines*, 96 Ala. 586 (1892). A foreign receiver may foreclose a mortgage where corporate creditors do not object. *Boulware v. Davis*, 90 Ala. 207 (1890). A receiver appointed in Kentucky of a Kentucky railroad in a foreclosure suit may bring suit in Ohio to recover possession of rolling-stock which was attached in Ohio during the pendency of the application for a receiver, the rolling-stock being subject to the mortgage, and the mortgaged property being insufficient to pay the mortgage debt. *Bank v. McLeod*, 38 Ohio St. 174 (1882). A receiver of a New York savings bank appointed in New York may bring suit at law in New Jersey to recover debts due to the bank. This is allowed on the theory that the receiver has practically an assignment of the bank's claims. No citizens of New Jersey intervened as creditors in this suit. *Hurd v. Elizabeth*, 41 N. J. L. 1 (1879). A receiver appointed in New York was allowed to file and prove a claim in the federal bankruptcy court against the bankrupt, in the case *Ex parte Norwood*, 3 Biss. 504 (1873); s. c., 18 Fed. Cas. 452. In *Patterson v. Lynde*, 112 Ill. 196 (1884), the court

in a dictum said that a receiver of an Oregon corporation appointed in Oregon would be allowed to bring suit in Illinois to collect the unpaid subscriptions of stockholders residing in Illinois, where there are no creditors of the corporation residing in Illinois. Concerning the question whether a receiver appointed in one state may sue in the courts of another state or reach property in other states, see notes to *Cagill v. Woolbridge*, 5 Cent. L. J. 6 (1876). A receiver may sue in other states. *Metzner v. Bauer*, 98 Ind. 425 (1884). In the old case of *Booth v. Clark*, 17 How. 322 (1854), the court said, however, "our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor." A trustee of a corporation appointed by a court cannot sue in the courts of another state. *Ayres v. Siebel*, 82 Iowa, 347 (1891). Mr. Justice Miller said in *Chandler v. Siddle*, 3 Dill. 477 (1874); s. c., 5 Fed. Cas. 459: "It is, perhaps, true that, where duly appointed and authorized, a receiver may, ordinarily, sue in another state. This power, when it exists, arises from comity, in the absence of special statute regulations, and it is, in general, subordinate to the right of local creditors as respects property within the jurisdiction where such a suit is brought." In *Farmers', etc. Ins. Co. v. Needles*, 52 Mo. 17 (1873), the court held that an Illinois receiver of an Illinois corporation could not bring suit in Missouri on a note given by a Missourian to the corporation unless the note has been actually assigned to the receiver; and the fact that he has possession of it is not enough.

¹ *Edwards v. National, etc. Assoc.*, 68 Atl. Rep. 800 (N. J. 1908).

foreign corporation may take an appeal in the name of the receiver when authorized by the court appointing him.¹ A foreign receiver of a foreign corporation cannot file a bill in a New York court for the appointment of a receiver of the property in New York state.²

A Virginia receiver of a Virginia corporation may sue in Maryland in the name of the corporation to collect unpaid subscriptions of Maryland stockholders, it appearing that no harm is thereby done to Maryland creditors.³ But a receiver appointed not under a statutory power, but under the general jurisdiction of the court of equity, cannot maintain a suit in another state to enforce the statutory liability of stockholders, especially where in such other state receivers have no such power.⁴ The right of a receiver to bring suit in a foreign jurisdiction to hold a stockholder liable for stock and bonds illegally issued is limited. The supreme court of the United States has held that unless the title to the property is vested in a receiver, he cannot sue in courts of a foreign jurisdiction, upon the order of the court appointing him, to recover property. Neither can he bring suit in the name of the corporation, where, if he succeeds, the property would be turned over to him as receiver. His right to sue in a foreign jurisdiction is not recognized on the principle of comity, because every court is entitled to appoint its own receiver to distribute the property within the jurisdiction.⁵ A receiver of a national bank has sufficient title to the property to maintain a suit at law in his own

¹ *Eau Claire Canning Co. v. Western Brokerage Co.*, 213 Ill. 561 (1905).

² *Mabon v. Ongley, etc. Co.*, 156 N. Y. 196 (1898), rev'g 24 N. Y. App. Div. 41.

³ *Castleman v. Templeman*, 87 Md. 546 (1898).

⁴ *Hale v. Allison*, 188 U. S. 56 (1903), aff'g 106 Fed. Rep. 258. A receiver cannot bring suit in another court unless title has been vested in him. *Edwards v. National, etc. Assoc.*, 139 Fed. Rep. 795 (1905). A receiver in bankruptcy has no power outside of his district. *In re Benedict*, 140 Fed. Rep. 55 (1905).

⁵ *Great Western, etc. Co. v. Harris*, 198 U. S. 561 (1905). A receiver appointed by a state court cannot maintain a suit in another jurisdiction to collect unpaid subscriptions, even though the court appointing him authorized such suit. Neither can he

maintain such a suit in the name of the corporation. The rule may be otherwise where by statute or otherwise title was vested in the receiver. *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903). An ordinary receiver of an insolvent bank has no power to sue in another jurisdiction to enforce a liability of stockholders. *Covell v. Fowler*, 144 Fed. Rep. 535 (1906). A receiver appointed by the United States court in Iowa cannot bring suit in the United States court in Colorado, even with the consent of the latter court. *Fowler v. Osgood*, 141 Fed. Rep. 20 (1905). An ancillary receiver, if authorized by the court so to do, may bring suit in the name of the corporation to collect assets. *Bay State, etc. Co. v. Rogers*, 147 Fed. Rep. 557 (1906). See also *Person v. Leary*, 126 N. C. 504 (1900).

name in the state courts.¹ Before a receiver commences suit in a foreign court he should ask the permission of that court to institute the suit.² In regard to suits in the federal court, a receiver appointed by a federal court may bring all his suits in that court on the ground of their being ancillary to the suit in which he was appointed, and a federal receiver may sue in the federal court to collect a debt, although the amount is less than two thousand dollars.³

1 *Fish v. Olin*, 56 Atl. Rep. 533 (Vt. 1903).

2 *Castleman v. Templeman*, 87 Md. 546 (1898).

3 *White v. Ewing*, 159 U. S. 36 (1895), holding also that by consent many such claims may be enforced by one suit in equity. Where the property within the jurisdiction is in the hands of a receiver appointed by the federal court he may as ancillary to such suit foreclose a mortgage on property within such jurisdiction irrespective of citizenship or amount. *Gunby v. Armstrong*, 133 Fed. Rep. 417 (1904). The federal court has jurisdiction over subordinate suits affecting the property in its possession, irrespective of the citizenship of the parties. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908). Where the United States court has held that the unsecured bonds of a railroad issued before consolidation with another railroad are not an equitable lien on the railroad of the former, prior in right to mortgage bonds issued by the consolidated road (*Wabash, etc. Ry. v. Ham*, 114 U. S. 587), and a state court has held directly to the contrary (*Compton v. Wabash, etc. Ry.*, 45 Ohio St. 592), one of the holders of such bonds cannot after a foreclosure in the United States court maintain a suit in the state court to obtain such priority. His remedy is in the United States court, where that court reserved jurisdiction over the property for the protection of the purchaser at foreclosure sale. *Wabash R. R. v. Adelbert College*, 208 U. S. 38 (1908), approving *Compton v. Jesup*, 68 Fed. Rep.

263 (1895). A suit by a federal receiver to collect unpaid subscriptions to stock may be in the federal court, irrespective of citizenship or the amount involved. *Brown v. Allebach*, 156 Fed. Rep. 697 (1907). A receiver of an insolvent national bank may sue in the federal court irrespective of his residence or the amount involved. *Myers v. Hettinger*, 94 Fed. Rep. 370 (1899). All claims by or against a federal receiver may be adjudicated by the federal courts. *Bowman v. Harris*, 95 Fed. Rep. 917 (1899). A receiver of a national bank may collect assessments in the federal court even though the amount is less than two thousand dollars. *Brown v. Smith*, 88 Fed. Rep. 565 (1898). A receiver appointed by the federal court cannot bring a suit of foreclosure in another circuit unless the amount involved is over two thousand dollars. *Sullivan v. Swain*, 96 Fed. Rep. 259 (1899). A purchaser of a federal receiver's interest cannot institute suit in the United States court on the ground that the receiver had been interested. *Weaver v. Kelly*, 92 Fed. Rep. 417 (1899). A receiver of a national bank suing in another state may be compelled to give security for costs, unless the suit was expressly directed by the comptroller. *Platt v. Adriance*, 90 Fed. Rep. 772 (1898). A federal court has jurisdiction of a suit by an ancillary receiver appointed by it to enjoin an infringement with a trade-mark, irrespective of citizenship of the parties. *Brookfield v. Hecker*, 118 Fed. Rep. 942 (1902). The federal court has jurisdiction of a suit brought against

Not only may a receiver appointed by a federal court bring suit in the federal court, but where the decree of the circuit court is final in the suit in which the receiver was appointed the decree of the circuit court of appeals is final in suits brought by the receiver.¹ A receiver appointed by a federal court cannot by reason of that fact alone appeal from the supreme court of a state to the supreme court of the United States.² A receiver authorized by the court to institute suit in any court may bring suit in the federal court.³ A federal court has jurisdiction of a suit against its receiver, "inasmuch as the judgments recovered are payable from the property or funds in the course of administration, and the actions may be regarded as ancillary in the sense of subordination to such administration."⁴ The right of a federal receiver to remove suits to the federal court is considered elsewhere.⁵ If the receiver was appointed by a state court, he can sue in the federal court only when the necessary diverse citizenship exists.⁶

a receiver of a national bank to compel him to recognize a depositor's claim, even though both parties are citizens of the same state. *Bartley v. Hayden*, 74 Fed. Rep. 913 (1896). A receiver of an insolvent corporation appointed by a federal court may file a bill in the United States court to collect unpaid subscriptions. *Bausman v. Denny*, 73 Fed. Rep. 69 (1896). A suit involving the acts of a receiver appointed by the federal court may be brought in the federal court. *Keihl v. South Bend*, 76 Fed. Rep. 921 (1896). See also § 871, *infra*.

¹ *Pope v. Louisville, etc. Ry.*, 173 U. S. 573 (1899).

² *Bausman v. Dixon*, 173 U. S. 113 (1899).

³ *James, etc. Co. v. Harris*, 139 Fed. Rep. 105 (1905). A suit by stockholders to set aside an alleged fraudulent modification of a corporate contract, a receiver being in charge and the court having allowed the stockholders to bring such suit, should be in the same court. *Harper v. Printing, etc. Co.*, 128 Fed. Rep. 979 (1904).

⁴ *Gableman v. Peoria, etc. Ry.*, 179 U. S. 335 (1900); *Lanning v. Osborne*, 79 Fed. Rep. 657 (1897). An action against a receiver is, it seems, merely ancillary to the receivership, and the

court appointing the receiver has jurisdiction. *Texas, etc. Ry. v. Cox*, 145 U. S. 593 (1892). A receiver of a national bank may be sued in the federal court. *McDonald v. State of Nebraska*, 101 Fed. Rep. 171 (1900). A receiver of a national bank may be sued in the federal court on a contract made by him in winding up the bank. *Gilbert v. McNulta*, 96 Fed. Rep. 83 (1899). But the federal courts have no jurisdiction of a suit against a national-bank receiver appointed by the comptroller unless the amount involved is over two thousand dollars. *Smithson v. Hubbell*, 81 Fed. Rep. 593 (1897).

⁵ See § 870, *infra*.

⁶ A receiver appointed in one state upon dissolution may bring suit in the federal court in another state. *Avery v. Boston, etc. Trust Co.*, 72 Fed. Rep. 700 (1896). A state receiver may sue in the federal court. *Phenix Ins. Co. v. Schultz*, 80 Fed. Rep. 337 (1897). Where a citizen of New York is appointed receiver of a Texas corporation, he may bring suit in the federal courts against citizens of Texas on the ground of diverse citizenship. *Gray v. Davis*, 1 Woods, 420 (1871); s. c., 10 Fed. Cas. 1006. Where a citizen of Massachusetts is appointed re-

The federal court will not order its receiver to stop his suit in the state court, even though the two courts take a different view of the law on the subject involved.¹

§ 869. *Suits which the receiver may institute—Suits to obtain possession of the property—Other suits—Set-off—Compromises—Proof of appointment of receiver.*—As against the company whose property passes to a receiver, the receiver may obtain possession by a summary order of the court.² So also, as regards any other parties, who are parties to the suit, the court has power to summarily order such parties to turn over to the receiver property in their possession,³ but this rule is so harsh that now the court will compel the

receiver of an Ohio corporation by the federal court sitting in Ohio, he may, on the ground of diverse citizenship and also on the ground of its being an ancillary proceeding, bring suit at law in the federal court to collect moneys due to the corporation. *Farlow v. Lea*, 8 Fed. Cas. 1017 (1877), citing *Davis v. Gray*, 16 Wall. 203 (1872). A receiver in a state court, after obtaining judgment upon a claim, may sue therein in a federal court. This suit is then as a judgment creditor, and not as receiver. *Wilkinson v. Culver*, 25 Fed. Rep. 639 (1885). If the receiver is a citizen of another state he may remove the case to the federal courts. *Brisenden v. Chamberlain*, 53 Fed. Rep. 307 (1892). A Minnesota receiver may sue in the federal court in Massachusetts to enforce a stockholder's statutory liability in a Minnesota corporation. *Hale v. Tyler*, 104 Fed. Rep. 757 (1900). A suit instituted in the federal court by a state receiver cannot be continued by his successor, the original receiver having no authority to institute the suit and the successor being a citizen of the same state as the defendant. *Hubert v. City of New Orleans*, 130 Fed. Rep. 21 (1904). See also §§ 218, 223, *supra*.

¹ *Frees v. Shields, etc. Co.*, 145 Fed. Rep. 1020 (1906).

² If the treasurer of a manufacturing company refuses to turn over to the receiver the funds in his hands,

he is guilty of contempt of court. *Edrington v. Pridham*, 65 Tex. 612 (1886). The court may commit the president for contempt for not turning over the property to the receiver. *Tolleson v. People's Sav. Bank*, 85 Ga. 171 (1890). In order to put a party in contempt for not delivering property to a receiver, a personal demand by the receiver must be shown. *McComb v. Weaver*, 11 Hun, 271 (1877). A tenant may be ordered to pay the rents to the receiver. *Sea Ins. Co. v. Stebbins*, 8 Paige, 565 (1841). But if he has defenses the court will not summarily order him to pay.

³ *Parker v. Browning*, 8 Paige, 388 (1840). Where the receiver obtains an order to show cause why the possession of real estate should not be surrendered up to him, and the parties do not object to the form of the proceeding, and the party and the land are within the jurisdiction, and the party sets up a right to the premises and submits to an adjudication, he waives any objection to the form of proceedings. *Ex parte Davidson*, 57 Fed. Rep. 883 (1893). In the case of *Miles v. New, etc. Assoc.*, 95 Fed. Rep. 919 (1899), the court held that a receiver of an insolvent corporation may, by a summary order, compel a party holding assets of such insolvent corporation as trustee for its creditors to turn over to the receiver such assets. A receiver of all the property of an insolvent corporation is en-

receiver to sue for possession, if the party claiming the property shows that there are questions of fact and law involved which should not be disposed of by affidavits and motion.

Where the receiver claims property which is in the hands of persons who are not parties to the suit in which the receiver is appointed, then the receiver's remedy is by suit.¹ His remedy in such

titled to the proceeds from the real estate, even though it is not specifically mentioned in the order of appointment. *Cheney v. Maumee, etc. Co.*, 64 Ohio St. 205 (1901). Even though a person holding assets of an insolvent corporation is enjoined by a state court from disposing of them, yet if by order of the federal court he turns them over to a receiver appointed by the federal court, he is protected. *Carter v. Dime Sav. Bank*, 61 Neb. 587 (1901). A receiver may obtain from the court a peremptory order to a party to pay over money belonging to the receiver, which was received by the party after the receiver was appointed, but a suit is necessary when the party received the money before the receiver was appointed. *Horn v. Pere Marquette R. R.*, 151 Fed. Rep. 626 (1907).

¹ A court which has appointed a receiver has no power to order a bank to pay over a deposit of the insolvent corporation where the bank claims an offset and was not a party to the proceedings in which the receiver was appointed. The bank is entitled to its day in court. *Wheaton v. Daily Tel. Co.*, 124 Fed. Rep. 61 (1903). Where a corporation has never been in possession of the property and the party having possession is not a party to the proceedings, the receiver has no greater right to take possession than an individual, claiming an interest in the property, would have. *Kidder v. Beavers*, 74 Pac. Rep. 819 (Wash. 1903). To get possession of property from the insolvent party the receiver proceeds by order, but to obtain it from third parties, not parties to the suit, he must bring an

action. *Yeager v. Wallace*, 44 Pa. St. 294 (1863). A receiver cannot have a writ of assistance against a person who is not a party to the suit. *Comer v. Felton*, 61 Fed. Rep. 731 (1894). Where a railroad is leased and then the company makes a mortgage, a receiver thereafter appointed cannot take possession of the road as against the lessee, the latter's rights being prior to the mortgage, even though the lease gives the net earnings of the road to the lessor. *Louisville, etc. R. R. v. Eakin*, 100 Ky. 745 (1897). The court should not peremptorily order a person to turn over to the receiver property the title to which may be in the former. *Wilt v. Reed, etc. Co.*, 187 Pa. St. 424 (1898). A receiver cannot by a summary application to the court obtain possession of property which is held by a person upon a claim of title in hostility to the receiver, where such person is not a party to the proceedings in which the receiver was appointed. *Matter of Muehlfeld*, 16 N. Y. App. Div. 401 (1897). A receiver cannot obtain possession of property by order of the court as against parties who have possession of the property and claim title thereto, and are not parties to the suit in which the receiver was appointed. *Musgrove v. Gray*, 123 Ala. 376 (1899). Where receivers are appointed by the federal court in one state, the holder of bonds guaranteed by the insolvent corporation cannot, by a bill filed in the federal court in another state, compel the receivers to bring suit to collect certain assets which it is alleged the receivers should collect. *French v. Union Pac. Ry.*, 92 Fed. Rep. 26

cases is the same as the company's would have been if no receiver had been appointed. He cannot file a bill in equity to obtain possession of real estate and to remove a cloud from the title, where it is clear that his remedy is at law.¹ The receiver cannot by petition stop a competing road from discriminating against him.²

A receiver may institute almost any suit which the corporation itself might institute. He may file a bill to ascertain which of the bonds secured by a mortgage are valid and were legally issued, and which of the bonds were invalid and illegally issued.³ He may sue the directors for fraud, *ultra vires* acts, or negligence.⁴ He may

(1899). Where a mortgage covers bonds to be thereafter delivered, and instead of such delivery the mortgagor deposits the bonds as security with the United States government and then makes another mortgage covering such bonds, the first mortgagee is entitled to the bonds upon their being released by the United States government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second mortgage have passed into *bona fide* hands. *Central T. Co. v. West India, etc. Co.*, 169 N. Y. 314 (1901). A person who is not a party to the suit is not guilty of contempt for failure to turn over to the receiver property which the receiver claims, even though the court has made an order to that effect. *State v. Denham*, 71 Pac. Rep. 196 (Wash. 1903).

¹ *Harland v. Bankers', etc. Tel. Co.*, 32 Fed. Rep. 305 (1887); s. c., 33 Fed. Rep. 199. The court has no power, in an action by the receiver against a debtor, to order the debtor to pay the money into court. *Balestier v. Metropolitan Nat. Bank*, 43 Hun, 564 (1887).

² *Wood v. New York & N. E. R. R.*, 61 Fed. Rep. 236 (1894).

³ See § 848 (*h*), *supra*; *Hubbell v. Syracuse, etc. Works*, 42 Hun, 182 (1886). In this case the receiver was appointed, not in a foreclosure suit, but in sequestration proceedings. The receiver of an insolvent corporation is the representative of its creditors, and

as such may, by suit or defense, avoid any instrument which is void as against them. *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120 (1892). A receiver may contest the validity of a mortgage. *Fidelity, etc. Co. v. Staten Island, etc. Co.*, 67 Atl. Rep. 1078 (N. J. 1905). A receiver appointed in a foreclosure suit should contest the validity of the mortgage itself if it is void by reason of having been given when the corporation was insolvent. *Thompson v. Huron Lumber Co.*, 4 Wash. St. 600 (1892). A receiver maintained in part a bill to declare void a mortgage in *Baker v. Guarantee, etc. Co.*, 31 Atl. Rep. 174 (N. J. 1895). *Cf.* 162 Fed. Rep. 170.

⁴ See ch. XLII, § 701, *supra*. *Cf.* § 735, *supra*, as to a creditor's right, generally, to complain. In an action by a receiver against directors for misconduct the stockholders have no right to become parties. *Kimball v. Ives*, 30 Hun, 568 (1883). A stockholder or creditor may often hold a director liable for negligence where a receiver cannot. *Briggs v. Spaulding*, 141 U. S. 132, 150 (1891). Corporate creditors cannot hold directors liable for mere non-feasance, but a receiver may hold them liable. *Stone v. Rottman*, 82 S. W. Rep. 76 (Mo. 1904). A receiver may cause to be set aside a purchase of land by the corporation from the wife of the president, which cost her \$450 and which she sold to the corporation for \$3,000 by means of the influence of her husband. *Voorhees v. Nixon*, 66 Atl. Rep.

sue to set aside illegal transfers of the corporate property,¹ and to

192 (N. J. 1907). A receiver may hold directors liable for excessive salaries, even though paid when the corporation was solvent, and may also hold them liable for collusion by which another corporation, which they control, obtained judgment and absorbed the assets of the former corporation. The receiver represents the stockholders as well as creditors, and may also maintain the suit to pay the costs of the receivership. *Hays v. Pierson*, 58 Atl. Rep. 728 (N. J. 1904). Where in order to increase its apparent reserve directors of an insurance company borrow money and purchase worthless stock of another corporation, they are personally liable therefor to a receiver of the former, even though the stockholders ratified the transaction, it appearing that the directors controlled the stockholders' meeting. *Bowers v. Male*, 111 N. Y.

App. Div. 209 (1906). A receiver may bring a suit in equity to hold a director liable for misconduct where particular property or the proceeds thereof are involved; otherwise his remedy is at law. *Mabon v. Miller*, 81 N. Y. App. Div. 10 (1903). A receiver may bring suit to collect back money misappropriated by an officer. *Richardson v. Agnew*, 89 Pac. Rep. 404 (Wash. 1907). A receiver will not be directed to hold promoters liable until after the visible assets have been exhausted. *Land, etc. Co. v. Asphalt Co.*, 121 Fed. Rep. 587 (1902). A receiver of an insolvent bank may, in behalf of creditors, hold the directors personally liable for negligence leading to a defalcation by the cashier. *Campbell v. Watson*, 62 N. J. Eq. 396 (1901). A receiver of an insolvent bank may sue the directors for damages for their negligence, and

¹ A temporary receiver may bring suit to recover back money illegally paid out by the corporation by way of preference. *Nealis v. American Tube, etc. Co.*, 150 N. Y. 42 (1896). The corporation should be a party defendant, but this objection can be raised only by demurrer. *The fact that the company is unable to meet its obligations, and that judgments are being entered against it, show insolvency. *Nealis v. American Tube, etc. Co.*, 76 Hun, 220 (1894). In an action by a receiver to set aside a transfer of property made in violation of the statute, it seems that it is no defense that an execution sale by a third party had taken all the equity of the company in the property. *Stonebridge v. Perkins*, 141 N. Y. 1 (1894). It seems that a temporary receiver may file a bill to set aside an illegal preference given by the insolvent corporation to one of its creditors. *Stiefel v. New York Novelty Co.*, 14 N. Y. App. Div. 371 (1897). Where a company has given its note

irregularly executed, and has illegally pledged its property as security, the judgment on the note is conclusive except for fraud, but a receiver may contest the pledge. *Nevitt v. First Nat. Bank*, 91 Hun, 43 (1895). A receiver may sue to set aside illegal or fraudulent transfers of the property, or to recover its funds or securities invested or misapplied. *Attorney-General v. Guardian, etc. Ins. Co.*, 77 N. Y. 272 (1879). A receiver may set aside preferences in violation of the Kentucky statute. *Industrial, etc. v. Taylor*, 82 S. W. Rep. 574 (Ky. 1904). A receiver may bring suit to set aside a preference given by an insolvent corporation to the directors. *Taylor v. Mitchell*, 80 Minn. 492 (1900). Where an insolvent corporation has illegally transferred its property, a permanent receiver may bring a suit at law for conversion instead of suing in a court of equity. *McQueen v. New*, 45 N. Y. App. Div. 579 (1899). *Cf.* § 735, *supra*.

quiet title to land, and enjoin sales under adverse titles,¹ and to recover back illegal dividends which were paid out of the capital stock.² A receiver may sue for a conversion of personal property be-

it is not necessary to join as defendants all the directors. *Coddington v. Canaday*, 61 N. E. Rep. 567 (Ind. 1901). Even though valid claims exist against directors for misconduct, and even though in proceedings to wind up the corporation they have filed claims as creditors, yet it is not the proper procedure to allow the receiver to file an answer and set-off in that suit, especially where no process is issued against the directors requiring them to answer. An order might have been entered withholding any distribution of assets to them until the claim against them had been litigated. *Youtsey v. Hoffman*, 108 Fed. Rep. 693 (1901). Promoters who obtain an option and then sell the property to a corporation at a secret profit in payment for stock may be held liable by the receiver upon the insolvency of the corporation for the difference between what they paid and what they received, without regard to the actual value. *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902). "The receiver stands in the place of the stockholders, as their representative, and all the rights of the company reside in him." *Hood v. McNaughton*, 54 N. J. L. 425 (1892); *Farwell v. Great Western Tel. Co.*, 161 Ill. 522 (1896). A receiver may hold directors liable for corporate funds used by them to purchase state bonds—an *ultra vires* act. *Austin v. Daniels*, 4 Denio, 299 (1847). A receiver may be directed by the court to sue directors to make them pay moneys loaned by the corporation in violation of law. *Thompson v. Greeley*, 107 Mo. 577 (1891), citing cases. As to the right of corporate creditors to sue for negligence, and an action by a receiver or assignee in behalf of them, see *Warner v. Hopkins*, 111 Pa. St. 328 (1886). The receiver of an

insolvent railroad corporation may file a bill in equity to compel the directors and their attorney to disgorge corporate funds which they divided among themselves. *Gindrat v. Dane*, 4 Cliff. 260 (1874); s. c., 10 Fed. Cas. 434. A receiver may bring an action against directors to hold them liable for negligence. *Robinson v. Hall*, 59 Fed. Rep. 648 (1894). A receiver's action against the directors for negligence is at law. *Higgins v. Tefft*, 4 N. Y. App. Div. 62 (1896). See § 701, *supra*. A receiver has power, irrespective of the statutes, to sue for all moneys due to the company and for all property improperly disposed of in violation of the rights of either creditors or stockholders. *Osgood v. Laytin*, 48 Barb. 463 (1867); *aff'd*, 3 Keyes, 521 (1867).

1 A receiver may file a bill against state officials to quiet title and enjoin sales in hostility to his title. In such a receiver's suit to quiet title the creditors of the company are not necessary or proper parties. *Gray v. Davis*, 1 Woods, 420 (1871); s. c., 10 Fed. Cas. 1006; *Davis v. Gray*, 16 Wall. 203 (1872). "A receiver takes the property subject to all the equities which exist against the bank." *Putnam, etc. Bank v. Beal*, 54 Fed. Rep. 577 (1893).

2 A receiver may file a bill in equity to compel stockholders to refund dividends illegally paid to them. *Hayden v. Thompson*, 71 Fed. Rep. 60 (1895). A receiver of a national bank may recover back dividends paid at a time when the bank was insolvent, even though the stockholders did not know of such insolvency, and it seems that a suit in equity lies for that purpose. *Hayden v. Williams*, 96 Fed. Rep. 279 (1899). A receiver may recover back a dividend paid to a director when the corporation was insolvent. *Daven-*

longing to the corporation, even though such conversion was before he was appointed.¹ The receiver represents the corporation, stockholders, and creditors. He may sue to collect subscriptions to stock,² but not to enforce a statutory liability, unless a statute has given him that power.³ At common law a receiver could not hold stockholders liable on stock, which was issued as paid up, but was not actually paid for at par.⁴ The court has power to authorize a receiver of a railroad to condemn real estate for railroad purposes.⁵

port v. Lines, 72 Conn. 118 (1899). An order of the court directing a receiver to recover dividends illegally paid is not an adjudication binding on the stockholders to the effect that such dividends were illegally paid. *Stewart v. Marion, etc. Co.*, 57 N. E. Rep. 911 (Ind. 1900). A court may authorize a receiver to bring suit against a stockholder for dividends paid while the corporation was insolvent. *Kretschmar v. Stone*, 43 S. Rep. 177 (Miss. 1907). A receiver of the corporation is the proper party to sue to recover back any dividends which were paid from the capital stock. Corporate creditors cannot sue for these after the receiver goes in. It is doubtful whether the corporation itself could complain of such dividends. A sale of the assets by the receiver does not carry this cause of action. *Minnesota, etc. Co. v. Langdon*, 44 Minn. 37 (1890). See also § 549, *supra*.

¹ *Smith v. Texas, etc. Co.*, 108 S. W. Rep. 819 (Tex. 1908).

² See § 208, *supra*. In a hearing on an application by a receiver to levy assessments on unpaid subscriptions and for the collection of the same, the special defenses of the subscribers will not be considered. The court will only ascertain the amount of the debts, the names of the stockholders who have not paid, and the amount

of the assessment necessary. A receiver will not be required first to try to collect a claim which he has, he having no funds to prosecute the same, and the stockholders not offering to indemnify him. *Cumberland, etc. Co. v. Clinton Hill, etc. Co.*, 54 Atl. Rep. 450 (N. J. 1903).

³ See § 218, *supra*. But a receiver appointed not under a statutory power, but under the general jurisdiction of the court of equity, cannot maintain a suit in another state to enforce the statutory liability of stockholders, especially where in such other state receivers have no such power. *Hale v. Allison*, 188 U. S. 56 (1903), *aff'd* 106 Fed. Rep. 258.

⁴ Neither the corporation itself nor a receiver of the corporation can hold a stockholder liable for stock issued to the stockholder at less than par by agreement. *Great Western, etc. Co. v. Harris*, 128 Fed. Rep. 321 (1903); *aff'd*, 198 U. S. 561, the court saying (p. 329): "A contract between a corporation and its stockholders that they should not be called on to pay therefor in full is good between the corporation and its stockholders." A railroad construction contract by which the work is paid for by stock and bonds is not a stock subscription nor a sale of the stock, but is merely a contract, and the receiver of the railroad cannot hold a contractor liable

⁵ *Morrison v. Forman*, 177 Ill. 427 (1898). As to condemnation of property held by a receiver, see also § 870, *infra*. It seems that the receiver may be authorized to condemn lands for

the use of the railroad. *Lehigh, etc. Co. v. Central R. R.*, 35 N. J. Eq. 379 (1882). See also *Minn. Western Ry. v. Minn. etc. Ry.*, 61 Minn. 502 (1895) and 162 Fed. Rep. 452.

The federal receiver of a water company may file a bill in equity to establish his right to fix water rates.¹ After a receiver has been appointed for a corporation its creditors cannot sue to set aside mortgages by the corporation.² A creditor cannot sue to reach subscriptions for stock unless the receiver refuses to sue.³ Where the receiver refuses to collect the subscriptions, the remedy of the creditor is to apply for the removal of the receiver.⁴ After a receiver has been appointed, a stockholder's suit against officers to compel them to account for fraudulent misappropriations of corporate property must join the receiver as a party defendant.⁵ It is to be borne in mind that corporate creditors, or a receiver representing them, have not the same right to object to the fraudulent or *ultra vires* acts of directors that stockholders have.⁶ A receiver may replevy corporate personalty,

for the alleged value of the stock and bonds, he being estopped the same as the corporation itself, and there being no promise to pay the par value of the stock. *Bostwick v. Young*, 118 N. Y. App. Div. 490 (1907). Even though in a foreclosure suit judgment creditors petition the court to direct the receiver to bring suit to hold stockholders liable on stock issued as a bonus, yet the court need not order such suit absolutely and may leave it in the discretion of the receiver to do so, if there is any reasonable prospect of collecting a judgment if obtained. *Sterling, etc. Co. v. Augusta, etc. Co.*, 124 Ga. 371 (1905). Cf. ch. III, *supra*.

¹ *Lanning v. Osborne*, 79 Fed. Rep. 657 (1897). After such suit is started a consumer cannot start suit in the state court to test the same question. *Ward v. San Diego, etc. Co.*, 79 Fed. Rep. 665 (1897).

² *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352 (1895). In New Jersey by statute a receiver is invested with all the rights of creditors. After his appointment a creditor cannot sue to set aside illegal conveyances to the officers, not even in the federal court. *Werner v. Murphy*, 60 Fed. Rep. 769 (1894). Where a receiver has been appointed he alone can bring an action to compel stockholders to refund corporate

moneys which they have taken after paying in the same on their subscriptions. *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. Dak. 173 (1893).

³ *First Nat. Bank v. Dovetail, etc. Co.*, 143 Ind. 534 (1896). The failure of a receiver to notify a subscriber to pay his unpaid subscription is immaterial, even though ordered by the court, inasmuch as that defense may be set up in the answer and payment made and the defendant relieved from costs. *Berry v. Rood*, 67 S. W. Rep. 644 (Mo. 1902). A receiver in a foreclosure suit cannot collect unpaid subscriptions. *Lea v. Iron, etc. Co.*, 119 Ala. 271 (1898).

⁴ *Links v. Connecticut, etc. Co.*, 66 Conn. 277 (1895).

⁵ *Porter v. Sabin*, 149 U. S. 473 (1893). See also § 738, *supra*.

⁶ See § 735, *supra*. Where all the stockholders and directors assent to a lease of corporate property to a director, a receiver appointed at the instance of a foreclosing mortgagee cannot have the lease declared void, it not being shown that he represents creditors or is vested with equities to maintain the suit. Leases to a director "will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation." *Tyler v. Hamilton*, 62 Fed. Rep. 187

fraudulently sold to a director.¹ A receiver of an insolvent corporation represents the creditors as well as the corporation itself, and may set up that a conditional sale of property by the corporation has not been recorded as required by statute.²

The receiver does not succeed to the right to sue for damages for personal injuries to the corporation, such as libel.³ If he sues on a note of the corporation, he sues subject to all the defenses that existed when he was appointed.⁴ A receiver appointed at the instance of a general creditor represents the stockholders as well as creditors. He cannot claim more than the corporation could, except as to the acts which bind the corporation but are a fraud on the creditors. A creditor will not be allowed to intervene and sue stockholders on their subscriptions or to collect assets fraudulently disposed of.⁵ Where a re-

(1894). A receiver cannot maintain a suit against directors to reach profits made by them in a construction contract, and in issuing stock to themselves in exchange for stock in other corporations, unless he shows the nature of his receivership, and that there are creditors, or the company is insolvent, or that the acts complained of were repudiated by the stockholders or corporation. He must also show that he succeeded to the right of the corporation to the cause of action. In New York, by statute, where the receiver is appointed in dissolution proceedings, he succeeds to such cause of action by force of the statute. *Forker v. Brown*, 30 N. Y. Supp. 827 (1894). For many decisions on suits by or against receivers, see 1 Abb. New Forms, 576 *et seq.* As to the right of a receiver to appeal, see *Bosworth v. Terminal R. R. Assoc.*, 80 Fed. Rep. 969 (1897).

1 *Mish v. Main*, 81 Md. 36 (1895).

2 *Re Wilcox, etc. Co.*, 70 Conn. 220 (1898). A receiver appointed at the instance of general creditors may attack a chattel mortgage on the ground that it had not been properly recorded. *Bayne v. Brewer Pottery Co.*, 90 Fed. Rep. 754 (1898).

3 *Milwaukee, etc. Ins. Co. v. Sentinel Co.*, 81 Wis. 207 (1892). In Pennsylvania, although the statute authorizes a sale of all the property, real,

personal and mixed, and also the franchises and rights of corporations by execution sale, yet such a sale does not pass title to a claim of a mining corporation for damages in tort. *International, etc. Co. v. Pennsylvania R. R.*, 152 Fed. Rep. 551 (1907); s. c., 152 Fed. Rep. 554.

4 *Bell v. Shibley*, 33 Barb. 610 (1861). A receiver of an insolvent creditor of an insolvent corporation cannot assert a claim which the insolvent creditor could not assert by reason of fraud. *Gottlieb v. Miller*, 154 Ill. 44 (1895).

5 *Voorhees v. Indianapolis, etc. Co.*, 140 Ind. 220 (1895). A receiver in a foreclosure suit represents both the creditors and the stockholders. *Atkins v. Judson*, 33 N. Y. App. Div. 42 (1898). As against a receiver notes given as a contribution to the corporation may be shown to have been given upon conditions. *Catt v. Oliver*, 98 Va. 580 (1900). A receiver of an insolvent corporation appointed by a court of equity can maintain only such suits as the corporation can maintain, and cannot maintain a suit which a dissenting stockholder might maintain to compel another stockholder in a building association to return to the corporation a note which had been canceled for stock. *Young v. Stevenson*, 130 Ill. 608 (1899). The receiver of a building

ceiver intervenes in a foreclosure suit and claims the funds involved in that suit and is defeated, all parties to the suit in which he was appointed are bound thereby.¹ A receiver may sue to set aside a mortgage fraudulent as to creditors although it is not fraudulent as to the corporation.² A person owing rent to a receiver cannot legally be imprisoned for non-payment on the ground of contempt.³ Any set-off or counter-claim that existed at the time that the receiver was appointed is a good defense to an action by him.⁴ A receiver cannot appeal from

association has no greater rights as against the stockholders than the association has. *Clarke v. Olson*, 83 N. W. Rep. 519 (N. Dak. 1900). A receiver of a corporation cannot defeat a mortgage on the ground that the directors have not expressly authorized it, where the corporation itself could not defeat it. *Auten v. City, etc. Ry.*, 104 Fed. Rep. 395 (1900). Where a bank illegally holds its own stock and induces a person to take it and give his own note therefor, on the understanding that such note is merely for the accommodation of the bank and is not to be collected, a receiver of the bank cannot enforce the note, unless it is shown that the bank is insolvent or that debts exist. *Shuey v. Holmes*, 20 Wash. 13 (1898). See also § 882.

¹ *Atlantic T. Co. v. Dana*, 128 Fed. Rep. 209 (1903).

² *Curtis v. Lewis*, 50 Atl. Rep. 878 (Conn. 1902).

³ *Knutte v. Superior Court, etc.*, 134 Cal. 660 (1901). In a suit by a creditor to set aside fraudulent transfers of property by an insolvent corporation, a decree that the grantees pay to the receiver the value of the property cannot be enforced by contempt proceedings. *General Electric Co. v. Sire*, 88 N. Y. App. Div. 498 (1903).

⁴ As against the receiver of a national bank, a rule of equity prevails that a depositor who has borrowed money of the bank and has given his note therefor, and deposits the money to be drawn upon, has an equitable, although not legal, right to a set-off, the court saying, however, that the rule would be otherwise where the

party acquired the claim against the corporation after it became insolvent. *Scott v. Armstrong*, 146 U. S. 499 (1892). In *Barbour v. National Exch. Bank*, 50 Ohio St. 90 (1893), the court held that a judgment by the creditor, obtained after the receivership on notes maturing after the receivership, was a good set-off to the judgment obtained by the receiver against the creditor for taking excessive interest under the national banking act. As against a claim by the receiver on an account, the defendant may set up a failure of the insolvent company to deliver goods according to contract, even though no demand for the goods had been made before the receiver was appointed. *Laybourn v. Seymour*, 53 Minn. 105 (1893). See also *Osgood v. Ogden*, 4 Keyes, 70 (1868); *Clark v. Brockway*, 3 Keyes, 13 (1866). A receiver of an insolvent corporation appointed at the instance of creditors takes a right of action in behalf of the corporation subject to any equitable set-offs which were good against the corporation. *Central, etc. Co. v. Buchanan*, 90 Fed. Rep. 454 (1898). A set-off is not allowable as against a receiver of an insolvent bank where the debtor acquired the set-off or the set-off accrued after the receiver was appointed. *Van Dyck v. McQuade*, 85 N. Y. 616 (1881); *Re Middle District Bank*, 1 Paige, 585 (1829); *Re Van Allen*, 37 Barb. 231 (1861); *Murray v. Deyo*, 10 Hun, 3 (1877). A lessee sued by the receiver for rent may set up any defenses, counter-claims, or set-offs he might have pleaded in a suit by the lessors. *Cox v. Volkert*, 86 Mo. 505 (1885). A receiver of a bank

an order which does not affect him personally, nor the corporate estate.¹

A receiver need not prosecute a doubtful claim, and he may be authorized to compromise or settle a doubtful claim.² A receiver may compromise a claim without an order of the court, but if he does so, he does so at the risk of being personally held liable.³

who sues a surety company on a bond given in behalf of an employee of the bank is bound by representations of the assistant cashier of the surety company made in connection with the bond. *Willoughby v. Fidelity, etc. Co.*, 85 Pac. Rep. 713 (Okl. 1906). The maker of a note to a corporation may offset against the corporation to the same extent that he might have offset against the corporation, even though the note was not due when it passed into the receiver's hands. The set-off in this case accrued before the appointment of the receiver. *Berry v. Brett*, 6 Bosw. 627 (1860). *Cf. U. S. Trust Co. v. Harris*, 2 Bosw. 75 (1857); *People v. St. Nicholas Bank*, 76 Hun, 522 (1894); *Salladin v. Mitchell*, 42 Neb. 859 (1894). A creditor cannot purchase claims after the winding-up order and offset them, but may bring in a matter of surety which was not then complete. *Re Moseley, etc. Co.*, 4 De G., J. & S. 756 (1864). The indorser of a note which becomes due after a receiver is appointed may set off his deposits in the bank when the receiver went in. *Yardley v. Clothier*, 51 Fed. Rep. 506 (1892). Under the Michigan statute a debtor of an insolvent bank cannot offset a certificate of deposit purchased by him after the bank closed its doors, although before a receiver was appointed. *Stone v. Dodge*, 96 Mich. 514 (1893). A corporate debtor sued before the receiver was appointed cannot set off corporate coupons maturing after the receiver was appointed. *Wheeling, etc. Ry. v. Cochran*, 68 Fed. Rep. 141 (1895). Where an insolvent bank in the hands of a receiver is indebted to a stockholder, and the stockholder is also insolvent, the court will not allow such stockholder

to participate in the distribution of the assets, but will offset his interest in the assets against his statutory liability on the stock, even though the stockholder has assigned to another his interest in the assets. *King v. Armstrong*, 50 Ohio St. 222 (1893). A receiver cannot set off a stockholder's statutory liability or debts against a claim by a party whose money was deposited in the stockholder's name. *Fisher v. Knight*, 61 Fed. Rep. 491 (1894).

¹ *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 151 (1905). See also *Metropolitan T. Co. v. North Carolina, etc. Co.*, 162 Fed. Rep. 170 (1908).

² *Wooster v. Trowbridge*, 115 Fed. Rep. 722 (1902). A creditor of a bank which is in a receiver's hands may apply to the court to authorize a settlement of his claim, even though the receiver is opposed to such settlement. *McGregor v. Third Nat. Bank of Atlanta*, 124 Ga. 557 (1905). A court may authorize a receiver to settle a claim by taking stock in payment. *Alexander v. Maryland T. Co.*, 66 Atl. Rep. 836 (Md. 1907). In the case of *Woerz v. Schumacher*, 37 N. Y. App. Div. 374 (1899), a suit by a receiver of an insolvent bank against the directors was compromised by the directors paying thirty-five per cent. of the liabilities of the bank and taking all the assets and agreeing to pay to the receiver anything realized by them over and above such thirty-five per cent. The court refused to compromise a judgment against a stockholder under the national bank act in the case *In re Earle*, 96 Fed. Rep. 678 (1899).

³ *Cyclemaker's, etc. Co. Ltd.*, 88 L. T. Rep. 360 (1903).

The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders, where such contract is a fair one, even though some of the stockholders dissent.¹

The receiver, in discontinuing a suit, need not show that the court which appointed him authorized such discontinuance.² Costs against a receiver in suits authorized by the court are payable from the estate.³ A receiver may in a proper case, be ordered by the court to give security for costs in a suit brought by him against the directors for misfeasance, under the English statute, such security to be given by him personally and not as receiver.⁴

If the receivership is denied by the defendant in any suit brought by the receiver, the pleadings and the order of court and the receiver's bond, in the suit in which he was appointed, are sufficient

¹ *People v. Anglo-American, etc. Assoc.*, 66 N. Y. App. Div. 9 (1901). A receiver, with the authority of the court, may accept an offer of a number of stockholders to compromise all the claims against them for unpaid subscriptions for a specified sum, even though some of such subscriptions can be collected in full and others not at all, the compromise being a fair one. *Morrison v. Lincoln, etc. Co.*, 89 N. W. Rep. 996 (Neb. 1902). Where a compromise is passed upon and authorized by the court, a receiver has no power to make any promises in addition thereto. *Una v. Newark, etc. Inst.*, 46 Atl. Rep. 660 (N. J. 1900). After the receiver, in accordance with an order of the court, settles with the directors claims against them for breaches of trust, a stockholder cannot maintain a suit for such breaches of trust. *Craig v. James*, 71 N. Y. App. Div. 238 (1902). This order under which the receiver compromised claims against the directors was subsequently modified on the ground of misrepresentations. *Craig v. James*, 41 N. Y. Misc. Rep. 148 (1903). An order authorizing the receiver to sell the assets to another corporation, in which the directors are interested, at a certain price, a condition of the sale being that the di-

rectors should be released by the receiver from personal liability on their part for past acts, cannot be set aside as to such release by a suit by a stockholder for that purpose, where the effect would be to deprive the directors of the benefit to them without canceling the benefit they confer. *Craig v. James*, 89 N. Y. App. Div. 541 (1904). Where the court has ordered the receiver to sue the directors for negligence, the court has no power to authorize a settlement with one director under seal, especially where the effect would be to discharge the others. *Murphy v. Penniman*, 66 Atl. Rep. 282 (Md. 1907). A receiver has no power to release the president from liability to the company for diversion of its funds. A president sued in Rhode Island for diversion of corporate assets cannot set up a release by a receiver of the corporation in Pennsylvania, although the company was incorporated in the latter state. See *Griswold v. Hazard*, 141 U. S. 260 (1891).

² *Youtsey v. Hoffman*, 108 Fed. Rep. 699 (1901).

³ *Cumberland, etc. Co. v. Clinton Hill, etc. Co.*, 54 Atl. Rep. 452 (N. J. 1903).

⁴ *Re Strand Wood Co., Ltd.*, 90 L. T. Rep. 800 (1904).

proof.¹ The company itself may institute suits notwithstanding the receivership, unless the court has forbidden it.² A receiver may bring suit in his own name as receiver. The court of equity which appoints him may give him that power, and he then need not bring the suit in the name of the company.³ But where a receiver has not

1 A certified copy of the order appointing the receiver is not sufficient to prove his right to bring suit for assessments. The pleadings should be introduced to show that the court acquired jurisdiction, etc. *Taft v. Pullen*, 90 N. W. Rep. 329 (Mich. 1902). Entries of the court record showing the appointment of a receiver are competent evidence of such appointment. *Coddington v. Canaday*, 157 Ind. 243 (1901). Receivership may be proved by a certified copy of the order appointing the receiver. *Ocean, etc. Co. v. Wilder*, 107 Ga. 220 (1899). In a suit by a receiver it may be necessary for him to show that the court acquired jurisdiction, and introduce the pleadings to show the character of the suit in which he was appointed. *Taft v. Pullen*, 90 N. W. Rep. 329 (Mich. 1902). The receiver's capacity to sue is proven by producing the petition for the appointment, also the order of appointment, also the bond. *Palmer v. Clark*, 4 Abb. N. Cas. 25 (1877). The order of appointment proves the receivership without showing that the court had jurisdiction. *Hayes v. Brotzman*, 46 Md. 519 (1877). If the existence of a receivership is denied, it may be proved by the order of appointment. *Allen v. Central R. R.*, 42 Iowa, 683 (1876). The order appointing a receiver is not sufficient proof of receivership in an action where the receivership is denied. *Spring v. Bowery Nat. Bank*, 63 Hun, 505 (1892). A receiver in bringing suit need not attach a copy of the order of his appointment. *Wheatley v. Glover*, 125 Ga. 710 (1906). A plaintiff in bringing suit and alleging his receivership should show that he was appointed by a court of competent jurisdiction and

had qualified and entered upon his duties. *Hagerman v. Thomas*, 96 N. W. Rep. 631 (Neb. 1901). A pledgee of property from a corporation cannot defend against a suit by the receiver thereof to recover the property by denying the corporate capacity of the company. *Blanc v. Germania Nat. Bank*, 114 La. 739 (1905). A foreign receiver may bring suit, but should first obtain leave of court, and, if his receivership is denied, he should prove the same by an exemplified copy of the decree appointing him. *Perrison v. Leary*, 126 N. C. 504 (1900).

2 See § 871, *infra*.

3 *Harland v. Banker's, etc. Tel. Co.*, 33 Fed. Rep. 199 (1887), reversing, to that extent, s. c., 32 Fed. Rep. 305. Under a statute authorizing receivers to sue "in the name of the corporation or otherwise," a receiver may sue in his own name. *Manlove v. Burger*, 38 Ind. 211 (1871). But where the statute merely authorizes the court to allow him to sue in his own name, he must obtain that permission and allege it. *Garver v. Kent*, 70 Ind. 428 (1880). Under a code which prescribes that the party in interest shall sue in his own name, a receiver may sue in his own name. *Gray v. Lewis*, 94 N. C. 392 (1886). In regard to patents and real estate, however, he must obtain title before he can sue. So held in *Dick v. Struthers*, 25 Fed. Rep. 103 (1885), a patent case. The receiver bringing suit for conversion occurring prior to his receivership must sue in the name of the partnership of which he has been appointed receiver. *Yeager v. Wallace*, 44 Pa. St. 294 (1863). A receiver may sue in his own name as receiver on a note given to the corporation. *Hardin v. Sweeney*, 14 Wash. 129 (1896).

been authorized to sue for or recover property of a corporation, and such property has not been in his possession nor assigned to him, he cannot sue in his own name for it, but may sue for it in the name of the company.¹ In Pennsylvania the receiver of a corporation has no such title to patents as gives him power to institute a suit thereon. He is custodian merely.² Costs in a suit instituted during a receivership should be paid as a preferred claim.³ Where the receiver is authorized to commence suit for the benefit of such corporations as come in and give security for the cost and expenses of such suit, the suit being against stockholders, the defendants cannot defend on the ground that some of the creditors purchased their claims for the sole purpose of coming in under such order of the court.⁴ Questions relative to the right of a receiver to sue in other jurisdictions are considered elsewhere.⁵

§ 870. *Suits against receiver—Suits pending at the time of appointment—Leave of court to bring suit—Taxes—"Strikes" against a receiver—Levy of execution, attachment, and garnishee process in the state after the order of receivership is made—Interference with possession of receiver.*—The fact that a receiver is

¹ *Wilson v. Welch*, 157 Mass. 77 (1892). A Maryland receiver of a Maryland corporation cannot bring suit in his own name in Massachusetts, on a contract running to his corporation, unless he shows that he is actually or virtually an assignee of the corporation's property. *Homer v. Barr, etc. Co.*, 180 Mass. 163 (1901). A foreign receiver of a foreign corporation may sue in the courts of a state, and he may sue in his own name or in the name of the corporation he represents. *Swing v. Bentley, etc. Co.*, 45 W. Va. 283 (1898). Where promoters pay out less than \$30,000 to secure options on land, and then sell the options to a corporation for \$700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability

is not for unpaid stock, but for fraud as promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. *Hayward v. Leeson*, 176 Mass. 310 (1900).

² *Dick v. Struthers*, 25 Fed. Rep. 103 (1885). An insolvent corporation's patent-rights may, under a statute, be sold by the sheriff and a good title be thus given. *Erie, etc. Co. v. National Wringer Co.*, 63 Fed. Rep. 248 (1894).

³ *Ephraim v. Pacific Bank*, 136 Cal. 646 (1902). See also §§ 878, 879, 881.

⁴ *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902).

⁵ See § 868, *supra*.

appointed does not stop or affect a suit that is pending against the corporation at the time of the appointment. The suit may continue without him, or he may apply to come in as a party.¹ A court will not stay a pending suit against the company in order to force the fil-

1 *Sigua Iron Co. v. Brown*, 171 N. Y. 488 (1902). The receiver may come into an action pending when he is appointed, the corporation being plaintiff. No substitution is necessary. *U. S. Vinegar Co. v. Spamer*, 143 N. Y. 676 (1894). A receiver may appeal in a suit pending when he was appointed, and his appeal may be in the name of the corporation. *People v. Troy, etc. Co.*, 82 Hun, 303 (1894). A suit pending when a receiver is appointed may proceed without him. *Kittredge v. Osgood*, 161 Mass. 384 (1894). The court may authorize a foreign receiver to come into a pending suit. *Rust v. United Waterworks Co.*, 70 Fed. Rep. 129 (1895). A receiver who comes into a suit that is pending when he is appointed is bound by the default of the corporation, but he may contest the sufficiency of the evidence. *Perry v. Godbe*, 82 Fed. Rep. 141 (1897). The appointment of a receiver does not abate a suit pending in the corporate name. *Rooney v. Southern, etc. Ass'n*, 119 Ga. 941 (1904). Suits pending against a corporation at the time it passes into the hands of a receiver may be prosecuted to judgment, without making the receiver a party defendant. *Cooper v. Philadelphia, etc. Co.*, 57 Atl. Rep. 733 (N. J. 1904). A judgment against a corporation cannot be attacked collaterally on the ground that it was obtained after the corporation had transferred all its property for the benefit of creditors and ceased doing business. *Temple v. Branch Saw Co.*, 88 S. W. Rep. 442 (Tex. 1905).

The appointment of a receiver does not cause a pending action to abate. It may be continued by the receiver. *Phoenix Warehousing Co. v. Badger*, 6 Hun, 293 (1875); affirmed, 67 N. Y.

294. See also § 871, *infra*. A receiver cannot be substituted as defendant in an action for tort against the company commenced before his appointment. *Decker v. Gardner*, 124 N. Y. 334 (1891). The appointment of a receiver does not prevent a sale under foreclosure where judgment therefor was obtained before the appointment. *Preston v. Loughran*, 58 Hun, 210 (1890). It is in the discretion of the court whether it will allow the receiver to come into a suit which is pending when he is appointed. *Dunlop v. Patterson, etc. Ins. Co.*, 74 N. Y. 145 (1878). The fact that a receiver is appointed during the pendency of an application by the corporation for a *mandamus* to compel a town to deliver bonds does not abate the proceeding or affect it in any way, so long as the receiver does not object. The corporation remains in existence and capable of suing and being sued. *People v. Barnett*, 91 Ill. 422 (1879). A receiver and the funds in his hands are not affected by a judgment obtained against the company in a federal court, even though the receiver had intervened in the suit to the extent of preserving some assets. The judgment is not allowed to participate. *People v. Knickerbocker, etc. Ins. Co.*, 106 N. Y. 619 (1887). A receiver may intervene in a suit pending against the corporation when he is appointed. *Andrews v. Steele City Bank*, 57 Neb. 173 (1898). A pending suit in a federal court is not affected by insolvency proceedings instituted after such suit was commenced. *Straine v. Bradford, etc. Co.*, 88 Fed. Rep. 571 (1898). A receiver need not be brought into an appeal pending when he was appointed. *Steinhauer v. Colmar*, 11 Colo. App. 494 (1898). A court which has ap-

ing of the claim in the receivership.¹ After the appointment of a receiver of an insolvent corporation to wind up its affairs and distribute its assets, a creditor cannot obtain a judgment and claim a lien prior to other creditors.² A receiver must observe any injunction that exists against the company at the time of his appointment. The receiver of a corporation may cause to be reopened a judgment obtained against the corporation by default by fraud and collusion and to interpose a defense.³ Where a receiver continues a suit which was pending when he was appointed, the estate is liable for costs before as well as after he entered the suit.⁴

pointed a receiver may enjoin the prosecution of a pending case against the corporation by a creditor. *Morton v. Stone, etc. Co.*, 44 Atl. Rep. 875 (N. J. 1899). A receiver of a national bank is a proper but not a necessary party to a suit pending against the bank at the time of his appointment. *Speckert v. German Nat. Bank*, 98 Fed. Rep. 151 (1899). Newly-appointed receivers are proper parties defendant in a pending action against the company to try the title to land. *San Antonio, etc. Ry. v. Ruby*, 80 Tex. 172 (1891). A receiver must obey an injunction in existence at the time he takes possession of a railroad. If he does not he will be punished for contempt, even though he was appointed by a federal court and the injunction was in a state court. *Safford v. People*, 85 Ill. 558 (1877). As to a federal receiver disobeying a state court injunction, see *State v. Miller*, 54 Kan. 244 (1894). The court, upon the appointment of a receiver of an insolvent corporation, may restrain the prosecution of suits against it. *Phoenix, etc. Co. v. North River, etc. Co.*, 33 Hun, 156 (1884). A foreclosure of a lien in a state court may go on though a receiver is appointed in the meantime by the federal court in foreclosing the mortgage. The latter court, however, will not aid a judgment in the former case. *Blair v. St. Louis, etc. R. R.*, 25 Fed. Rep. 2 (1885). Cf. § 839, *supra*. A receiver appointed during the pendency of a suit against a corporation

need not be brought in as a party. If he applies to come in and set up a defense the court will generally allow him to do so. *Willink v. Morris, etc. Co.*, 4 N. J. Eq. 377 (1843). The appointment of a receiver does not abate, continue, or bar a suit pending against the corporation. The suit may continue. *Toledo, etc. Ry. v. Beggs*, 85 Ill. 80 (1877). Where at the time of the appointment of a receiver a suit is pending on a claim, and the plaintiff files his claim against the receiver and continues his suit, the amount found due in the suit will be the amount allowed as against the receiver. *Pine, etc. Co. v. Lafayette, etc. Works*, 53 Fed. Rep. 853 (1893). Cf. § 881, *infra*. In England, where judgment is obtained against a company after the stockholders have resolved to wind it up, the action will be stayed as against the receiver. *Westbury v. Twigg*, [1892] 1 Q. B. 77.

1 *Currie v. Consolidated, etc. Corp. Ltd.*, 94 L. T. Rep. 148 (1905).

2 *Clark v. Bacorn*, 116 Fed. Rep. 617 (1902).

3 *Peabody v. New England, etc. Co.*, 184 Ill. 625 (1900). A receiver cannot have a judgment at law set aside on the ground that it was obtained by collusion. His remedy is in equity. *Woodward v. Arlington, etc. Co.*, 44 Atl. Rep. 620 (Del. 1899).

4 *Re London, etc. Stores*, [1898] 2 Ch. 684. Where the liquidator defends against a suit pending when he was appointed and is defeated, the

In regard to new suits instituted after the receiver is appointed, the permission of the court which appointed the receiver must be obtained before a suit is brought against the receiver or against the property in his possession. If this permission is not obtained, the party commencing the suit is guilty of contempt of court.¹ A suit,

entire costs are payable out of the estate in preference to ordinary debts. *Re Wenborn & Co.*, 92 L. T. Rep. 228 (1905). Where a receiver voluntarily intervenes in a pending litigation without any reasonable prospect of success, and is without funds to pay the costs, he may be deemed guilty of bad faith and charged personally with the costs. *Bourdon v. Martin*, 74 Hun, 246 (1893); *aff'd*, 142 N. Y. 669. See § 881, *infra*.

1 "The jurisdiction of the court appointing a receiver is necessarily exclusive, and actions at law cannot be prosecuted against him except by leave of that court." *Texas, etc. Ry. v. Cox*, 145 U. S. 593 (1892); *Werner v. Murphy*, 60 Fed. Rep. 769 (1894). The state cannot file a *quo warranto* proceeding to forfeit a charter, where a receiver is already in charge, unless the consent of the court is first obtained. *Wayne Pike Co. v. State*, 134 Ind. 672 (1893). When property is in the hands of a receiver a suit therefor cannot be brought against the receiver, except by leave of court. *Chalmers v. Littlefield*, 69 Atl. Rep. 100 (Me. 1907). In *Thompson v. Scott*, 4 Dill. 508 (1876); *s. c.*, 23 Fed. Cas. 1088, the court ordered that a party who had brought suit in another court for damages against the receiver appointed by the former court without obtaining leave should be committed for contempt unless he discontinued the suit. The court refused to follow *Allen v. Central R. R.*, 42 Iowa, 683 (1876), and *Kinney v. Crocker*, 18 Wis. 74 (1864). Demurrer lies to a suit brought against a receiver without leave, even though a state statute authorizes suit without such leave, the receiver being appointed by a federal court. *Hale v. Duncan*, 11 Fed.

Cas. 184 (1877). In *Henderson v. Walker*, 55 Ga. 481 (1875), where permission to sue at law had been obtained, the court at law, in dismissing the complaint on the evidence, withdrew at the same time the permission to sue.

A receiver of a bank is a necessary party to a suit by a stockholder to cancel his subscription for fraud, and a suit against him for that purpose without leave of court will be dismissed. *Earle v. Humphrey*, 121 Mich. 518 (1899). The receiver cannot be sued without the consent of the court, even for a cause of action arising before the receivership. *Smith v. St. Louis, etc. Ry.*, 151 Mo. 391 (1899). A suit against a receiver for taking possession of property, which it is alleged he was not entitled to take, may be enjoined by the court which appointed the receiver, its consent not having been obtained. *Montgomery v. Enslin*, 126 Ala. 654 (1900). A complaint against a receiver which does not contain an allegation that the court has authorized the suit is demurrable. *Peirce v. Chism*, 23 Ind. App. 505 (1899). A party must apply to the court before suing at law for damages. *Melendy v. Barbour*, 78 Va. 544 (1884). Where the receiver rejects the claim, the court should permit an issue to be framed and tried, instead of leaving the creditor to sue the insolvent company. *Citizens' Sav. Bank v. Ingham Circuit Judge*, 93 Mich. 173 (1893). A receiver may be sued for trover without first obtaining the consent of the court. *Kenney v. Ranney*, 96 Mich. 617 (1893). In suits relative to the infringement of patents the federal court will treat a state receiver the same as other individuals. *Hupfeld v. Automaton*

however, instituted against a receiver without leave of the court does not necessarily fail. If the receiver is willing so to do, he may waive the objection, and his waiver need not be formal, but will be implied if he fails to object at once.¹

Piano Co., 66 Fed. Rep. 788 (1895). A stockholder may be permitted to bring suit against the receiver of the corporation to set aside a fraudulent assignment by him of stock, and a request need not be made to the receiver to bring the suit, he being guilty of the fraud. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522 (1896). Demurrer lies to an application for a *mandamus* against a receiver without consent of the court. *Malott v. State*, 64 N. E. Rep. 458 (Ind. 1902). Where the receiver is a railroad company, and in addition to being receiver of one road is lessee of another road, it is liable to be sued for an injury on the latter without leave of the court to bring such suit being granted. *Lyman v. Central Vt. R. R.*, 59 Vt. 167 (1886). In Vermont it is held that a receiver may be sued for negligence in constructing a crossing, and that the permission of the court to bring the suit need not be obtained. *Roxbury v. Central Vt. R. R.*, 60 Vt. 121 (1887). The receiver, when sued at law without leave, may plead his receivership. It is a good defense. *Barton v. Barbour*, 104 U. S. 126 (1881). In this case, however, there is a vigorous dissenting opinion by Mr. Justice Miller, who said of the receiver: "He generally takes the property out of the hands of its owner, operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debts of the corporation, but quite as often adds to them, and injures prior creditors by creating a new and superior lien on the property pledged to them." Punishment for contempt can be inflicted only on those who were personally served.

American Con. Co. v. Jacksonville, etc. Ry., 52 Fed. Rep. 937 (1892). Where the receiver is a party defendant, other parties defendant may file a cross-bill against him without obtaining the consent of the court. *Venner v. Denver, etc. Co.*, 90 Pac. Rep. 623 (Col. 1907). An appeal lies from an order of the court refusing to allow a receiver to be sued. *State v. Superior Court*, 80 Pac. Rep. 195 (Wash. 1905).

¹ If the receiver objects he must do so promptly. *Jerome v. McCarter*, 94 U. S. 734 (1876). The court has jurisdiction of a suit against a receiver, even though consent to sue him was not obtained. He may waive it. *Mulcahey v. Strauss*, 151 Ill. 70 (1894). The plaintiff must allege that the court has authorized the suit against the receiver. *Burk v. Muskegon, etc. Co.*, 98 Mich. 614 (1894); although perhaps it is waived if raised only at the final hearing. *Steel, etc. Co. v. Muskegon, etc. Co.*, 98 Mich. 616 (1894). If the receiver submits to be sued at law without leave being first obtained, and if counsel do not raise the question, the court on appeal will not raise it, the case itself being dismissed. *Smith v. Flint, etc. Ry.*, 46 Mich. 258 (1881). Although a receiver has been sued without leave of the court, yet the court will not always enjoin the suit, but may allow it to proceed. The injunction if granted is against the person and not against the other court. The receiver cannot set this up as a matter of defense. His remedy is to apply to the court which appointed him for an injunction. *Lyman v. Central Vt. R. R.*, 59 Vt. 167 (1886); *Blumenthal v. Brainerd*, 38 Vt. 402 (1866); *Kinney v. Crocker*, 18 Wis. 74 (1864), but criticised in *Thompson v. Scott*, 4 Dill.

Where an application is made for leave to sue the receiver, the court, if it allows the suit, will generally require that it be brought in that court and not in a foreign court.¹ In a foreclosure suit against a

508 (1876); s. c., 23 Fed. Cas. 1088. Where the receiver appears and defends he cannot after judgment raise the objection that the consent of the court was not first obtained. *Manker v. Phoenix, etc. Ass'n*, 100 N. W. Rep. 38 (Iowa, 1904). A citizen of New York may bring suit against a foreign receiver of a foreign corporation without first obtaining permission from the court. The general rule is that a suit brought against a receiver without previous permission is not a defense to the suit, but is merely a contempt of court. The court may set aside or stay the suit, but until it does so the suit may proceed. *Pruyn v. McCreary*, 105 N. Y. App. Div. 302 (1905). It is presumed that leave was obtained to sue a receiver. Failure to obtain it does not affect a suit except that the receiver may obtain a stay of proceedings or institute proceedings for contempt. *Payson v. Jacobs*, 80 Pac. Rep. 429 (Wash. 1905). Where a receiver is sued without leave, but does not object and goes to trial, he cannot, after a verdict is given, arrest judgment on that ground. *Elkhart, etc. Co. v. Ellis*, 113 Ind. 215 (1887); *Camp v. Barney*, 4 Hun, 373 (1875). Permission to sue the receiver in an action of trespass on land need not be obtained where there is nothing to show that the receiver is in possession. The receiver was made a party defendant as a joint wrong-doer with the corporation, which was also made a party defendant. The receiver, it seems, might have applied to his court to enjoin the action. *Fort Wayne, etc. R. R. v. Mellett*, 92 Ind. 535 (1883). A resident of New York may sue in the New York courts a receiver appointed in Ohio where such suit is based upon a contract made in New York with such receiver. The

consent of the Ohio court to such suit need not be obtained, especially where by the statutes of Ohio such consent is unnecessary. *Le Fevre v. Matthews*, 39 N. Y. App. Div. 232 (1899). Where a creditor has obtained judgment against the receiver in a state other than that in which the receiver was appointed, the creditor may bring suit against the receiver in the latter state on such judgment. *Thomas v. Hale*, 82 Minn. 423 (1901). Where an insolvent corporation passes into a receiver's hands and the receiver acquires all the interests of the parties to the suit, an outside creditor may file a new bill to reach certain equitable assets of the corporation. *Harp v. Abbeville, etc. Co.*, 108 Ga. 168 (1899).

¹ *Central T. Co. v. Wabash, etc. R. R.*, 23 Fed. Rep. 858 (1885), where application was made to allow suit to have declared void certain bonds held by the receiver. Under a statutory power to enjoin creditors' actions after a receiver is appointed, a state court cannot enjoin a subsequent proceeding in the federal court. *Re Schuyler, etc. Co.*, 154 U. S. 256 (1894), rev'g 136 N. Y. 169. In the case of *Peale v. Phipps*, 14 How. 368 (1852), the court held that a receiver appointed by a state court could not be sued in the federal court. By permission of the court an attachment may be levied by a creditor of a non-resident person on a debt due from a resident receiver to such non-resident. *Green v. Wallis Iron Works*, 49 N. J. Eq. 48 (1892). An order refusing to allow a party to sue a receiver is appealable. *Meeker v. Sprague*, 5 Wash. St. 242 (1892). In an application to the court for leave to sue its receiver, the court may authorize an independent suit or may compel the applicant to intervene

warehousing company where a receiver has been appointed, a claim against the company for injury to goods may be passed upon by the court and the mortgagor is not entitled to a jury.¹ A suit against a receiver in another court for the wrongful acts of his predecessors may be enjoined.² A suit by or against a federal receiver may be brought in the federal court.³ Service may be made upon the agent of a receiver of a railroad where the statute requires that any one operating a road shall appoint an agent in each county upon whom service may be made.⁴

A federal receiver is not entitled, by reason of that fact alone, to remove a case from the state court into the federal court.⁵ But

in the original cause. *Stephens v. Augusta, etc. Co.*, 120 Ga. 1082 (1904).

¹ *Shedd v. Seefeld*, 82 N. E. Rep. 580 (Ill. 1907).

² *Jones v. Schlapback*, 81 Fed. Rep. 274 (1896).

³ See § 868, *supra*.

⁴ *Stewart v. Harmon*, 98 Fed. Rep. 190 (1899). Under the United States statute, that a federal receiver shall manage property according to the laws of the state where the property is, service in a suit against a receiver may be made upon a local agent where by the statutes of the state such service could be so made as against the corporation itself. *Wolfe v. Pierce*, 23 Ind. App. 591 (1900).

⁵ *Gableman v. Peoria, etc. Ry.*, 179 U. S. 335 (1900). A suit against a federal receiver may be removed to the federal court, irrespective of citizenship, if over \$2,000 is involved. *Tompkins v. MacLeod*, 96 Fed. Rep. 927 (1899). A federal receiver cannot remove a suit against him in the state court unless the amount involved is \$2,000 or more. *Gilmore v. Herrick*, 93 Fed. Rep. 525 (1899). A suit in a state court against a receiver for acts of the receiver himself and not for acts of the insolvent corporation cannot be removed by the receiver into the federal court unless the amount involved is \$2,000. *Pitkin v. Cowen*, 91 Fed. Rep. 599 (1899). A suit brought in a state court against a federal receiver may be

removed to the federal court as arising under the laws of the United States. *Board of Com'rs, etc. v. Peirce*, 90 Fed. Rep. 764 (1898). Where a receiver has been appointed by the federal court at the instance of bondholders, and a party that is carrying on suit against the corporation in the state court interpleads in the federal suit, the federal court may cause such suit to be removed from the state court to the federal court, even though such party objects thereto, and even though a federal court would not originally have had jurisdiction of such a case. *Rice v. Durham Co.*, 91 Fed. Rep. 433 (1899). A federal receiver has no right to remove a case to the federal court where he is sued jointly with another party who has no right to remove. *Marrs v. Felton*, 102 Fed. Rep. 775 (1900). Even though in a suit in a state court against a federal receiver there is no allegation that the receiver was appointed by the United States court, yet the receiver may remove the case to the United States court. *Winters v. Drake*, 102 Fed. Rep. 545 (1900). Where a citizen of Pennsylvania, who is appointed receiver by the United States court in Massachusetts, brings suit in that state in the state court against a citizen of New York, the latter may remove the case to the United States court, the amount being sufficient. *Pepper v. Rogers*, 128 Fed. Rep. 987

where a federal receiver removes a case from the state court into the federal court he cannot afterwards object that the removal was illegal.¹ The federal court will not allow its receiver to be interfered with, in

(1904). Where the property of a corporation is in the hands of state receivers and any judgment against it in the federal court would have to be referred to the state court for payment, a case which has been removed to the federal court should be remanded. *Goldberg, etc. Co. v. German, etc. Co.*, 152 Fed. Rep. 831 (1907). Where a suit against a federal receiver has been removed to the federal court and subsequently another similar suit is instituted in the state court, the trial of the latter will be deferred until the decision in the federal court. *City of Ashland v. Wisconsin, etc. Ry.*, 98 N. W. Rep. 532 (Wis. 1904). An attachment suit in a state court against a corporation, pending when a receiver is appointed by the federal court, cannot be removed by the receiver to the federal court, the amount involved being less than \$2,000. *Pendleton v. Lutz*, 78 Miss. 322 (1900). A suit in a state court against a federal receiver for damages is not removable merely because the receiver is a federal receiver. *Gableman v. Peoria, etc. Ry.*, 101 Fed. Rep. 1 (1900). A suit against a federal receiver to determine his rights as to certain assets may be removed by him to the federal court irrespective of the amount involved. *Shinney v. North American etc. Co.*, 97 Fed. Rep. 9 (1899). A suit in a state court against the officers of a national bank on the ground that they had violated the national bank act is removable to the United States court. *Bailey v. Mosher*, 95 Fed. Rep. 223 (1899). A suit brought in a state court against a receiver appointed by the federal court may be removed into the federal court. *Evans v. Dillingham*, 43 Fed. Rep. 177 (1890). A receiver appointed by the federal court cannot, by reason of that fact alone, remove cases to the United States court. *Echols v. Smith*, 42 S. W. Rep. 538 (Ky. 1897). *Cf. Sullivan v. Barnard*, 81 Fed. Rep. 886 (1897); *Central Trust Co. v. East Tennessee, etc. Ry.*, 59 Fed. Rep. 523 (1894); *Carpenter v. Northern Pac. R. R.*, 75 Fed. Rep. 850 (1896). An action in a state court against a federal receiver on a cause arising out of his acts may always be removed into the federal court. *Jewett v. Whitcomb*, 69 Fed. Rep. 417 (1895). A suit against a federal receiver may be removed to the federal court. *Lund v. Chicago, etc. Ry.*, 78 Fed. Rep. 385 (1897). *Mandamus* proceedings in a state court against a federal receiver may be removed to the federal court. *State v. Northern Pac. R. R.*, 75 Fed. Rep. 333 (1896). The fact that a federal temporary receiver is in possession of the company's property on foreclosure does not enable him to remove to the United States court a suit brought against him in the state court. *Lincoln v. Lincoln Street Ry.*, 77 Fed. Rep. 658 (1896). The fact that a receiver of a bank is appointed by the comptroller does not authorize him to remove pending suits to the federal court. *Wichita Nat. Bank v. Smith*, 72 Fed. Rep. 568 (1896). A receiver of a national bank appointed by the comptroller could not remove a case to the federal court where the amount was less than \$500. *Hallam v. Tillinghast*, 75 Fed. Rep. 849 (1896). Where a federal receiver is sued in the state court, and removes the case to the federal court, he cannot have the case taken away from a jury trial. *Vany v. Toledo, etc. Ry.*, 67 Fed. Rep. 379 (1895).
¹ *Baggs v. Martin*, 179 U. S. 206 (1900).

the conduct of litigation, by a state receiver subsequently appointed.¹ A receiver of an insolvent corporation which is subject to the bankruptcy act must turn the property over to a trustee in bankruptcy upon the appointment of the latter.²

As a general rule receivers appointed in one state cannot be sued in another state on causes of action arising from acts or contracts of the receiver.³ Where a state receiver is in charge of a mine, a citizen of another state cannot file a bill in equity in the federal court for an injunction against such receiver in his mining operations, unless the state court consents to his being so sued.⁴ By act of congress receivers appointed by the federal courts may be sued without leave of court being first obtained.⁵

1 *Johnson v. Southern, etc. Assoc.*, 99 Fed. Rep. 646 (1900). This subject of a conflict between the federal and state courts as to the appointment of receivers and the exercise of exclusive jurisdiction based on priority of jurisdiction is fully considered elsewhere. See § 839, *supra*.

2 *Hooks v. Aldridge*, 145 Fed. Rep. 865 (1906).

3 A citizen of Indiana, injured by a railroad in the hands of a receiver appointed by a Virginia court, has no constitutional right to bring her suit for damages in the federal court. *Reed v. Axtell*, 84 Va. 231 (1887). An attachment on property being administered in New York by a New Jersey receiver will not lie on a cause of action against the receiver for excessive charges on freight. The court will not allow an interference with the custody of the law in another state. *Killmer v. Hobart*, 58 How. Pr. 452 (1880). The courts of one state will not order a receiver appointed in another state to pay over money owing by him to a judgment creditor of the person to whom the receiver owes it. *Smith v. McNamara*, 15 Hun, 446 (1878). Where a receiver appointed in one state is operating a road in another state, service of papers upon him in the latter state is made in the same way as by statute may be made upon corporations. Such receiver may be garnished in the latter state without

first obtaining the consent of the court in the former state. *Phelan v. Ganebin*, 5 Colo. 14 (1879). A receiver appointed by a Vermont court over a Vermont and Massachusetts railroad may be sued in Massachusetts in an action at law for damages to freight, the courts of Vermont sustaining such actions when brought in Vermont. *Paige v. Smith*, 99 Mass. 395 (1868).

A receiver appointed in one county cannot be enjoined by the court of another county from paying out funds until sufficient funds are set aside to pay certain damages. Leave of the former court must first be obtained. *De Graffenried v. Brunswick, etc. R. R.*, 57 Ga. 22 (1876). Where a statute regulates the service of papers a receiver may be so served. *Lewis v. Seifert*, 116 Pa. St. 628 (1887), where the court refused to set the service aside. A Vermont receiver operating a New York railroad may be sued in New York for negligence. *Kain v. Smith*, 80 N. Y. 458 (1880).

4 *Ross v. Heckman*, 84 Fed. Rep. 6 (1897).

5 A federal receiver cannot be sued without permission of the court where the suit attacks the title of the receiver to property already in his custody. *Case Plow Works v. Finks*, 81 Fed. Rep. 529 (1897). The act of congress allowing suit to be brought against a federal receiver without consent of the court does not apply to

But even though a federal receiver may be sued in the state court without the permission of the federal court, yet "it devolves on the

suits on claims arising before the receivership. *Farmers' Loan & T. Co. v. Chicago, etc. R. R.*, 118 Fed. Rep. 204 (1902), holding also that after foreclosure and distribution of assets a claimant cannot bring suit against the receiver in the state court without the consent of the court. Under the act of congress authorizing suits against federal receivers without leave of the court, the suit may be brought in any state court or in the federal court. Garnishment proceedings are not such suits, however, and the federal court will enjoin them. *Central Trust Co. v. East Tennessee, etc. Ry.*, 59 Fed. Rep. 523 (1894). A receiver appointed by a federal court cannot be garnished in a state court so as to bind him. Even under the act of congress authorizing suit against him without permission of the court, the judgment in the state court would not bind the receiver. *Re Barnard*, 61 Fed. Rep. 531 (1894). It is not contempt of the federal court to institute a suit in the state court to enjoin the federal receiver from tearing up a railroad track, provided there is no actual physical interference with the possession of the federal court. *Royal T. Co. v. Washburn, etc. R. R.*, 139 Fed. Rep. 865 (1905). A stockholder may maintain a suit in the state court to enjoin directors from extending a lease at a reduced rental and from releasing security for such rental, where he charges fraud, even though both the lessor and lessee are in the hands of receivers appointed by the federal court. Moreover the federal court has no authority in such suits to compel the lessor to execute such lease. *Guaranty Trust Co. v. North Chicago St. R. Co.*, 130 Fed. Rep. 801 (1904). Money due from federal receivers may be garnished in a state court, but collection cannot be made

except by an order of the federal court. *Irwin v. McKechnie*, 58 Minn. 145 (1894). Where a federal receiver is sued in a state court and judgment obtained, and the federal court rejects it, and the property is returned to the company, the state court may then enforce the judgment. *Garrison v. Texas, etc. Ry.*, 10 Tex. Civ. App. 136 (1895). The second section of the act of March 3, 1887, chapter 373, was intended to place receivers of railroads on the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of service, and the service, in the present case, on an agent of the receivers was sufficient to bring them into court in a suit arising within the Indian Territory. *Eddy v. Lafayette*, 163 U. S. 456 (1896). Where a receiver of a federal court is in possession, a claimant of land occupied by the company and the receiver cannot start suit in the state court to try the title. Prior to the act of congress he had to apply to the federal court. *Fort Wayne, etc. R. R. v. Mellett*, 92 Ind. 535 (1883). Although a federal court has appointed receivers of a corporation, yet a suit may be brought in a state court to cancel a mortgage given to the corporation. *Calhoun v. Lanaux*, 127 U. S. 634 (1888). A federal receiver cannot be sued in the state court for the purpose of determining the receiver's title to the property. *Hollifield v. Wrightsville & T. R. R.*, 99 Ga. 365 (1896). Under the federal statutes a federal receiver may be sued without first applying to the court for permission. *The St. Nicholas*, 49 Fed. Rep. 671 (1892). By the act of congress a receiver appointed by any federal court may be sued without the previous consent thereto of the court. If a receiver is out of the state, ser-

court in possession of the property or funds out of which judgments against its receiver must be paid to adjust the equities between all parties, and to determine the time and the manner of payment of judgment creditors necessarily applying for satisfaction from assets so held to the court that holds them.”¹

Where, under decree of the federal court, the property has been sold, and the court has ordered claims against the receiver to be filed, the court will enjoin the prosecution of claims against the receiver in a state court.² The federal court will not allow its receiver to be made a party to a proceeding in the state courts to condemn the property.³ A petition for an order that the receiver deliver up cer-

vice may be made on local agents, as is provided by the state laws. *Central Trust Co. v. St. Louis, etc. Ry.*, 40 Fed. Rep. 426 (1889). Concerning the federal statute that a receiver of a federal court may be sued without leave of court, see *Texas, etc. Ry. v. Cox*, 145 U. S. 593 (1892). A receiver appointed by a federal court may be served by serving an agent of the railroad company in accordance with the state statutes providing for service upon corporations. *Eddy v. Lafayette*, 49 Fed. Rep. 807 (1892). In *St. Joseph, etc. R. R. v. Smith*, 19 Kan. 225 (1877), where a receiver appointed by the federal court was sued in the state court for taxes, the latter court held that it was no defense that leave to sue had not been obtained from the federal court. The remedy of the receiver was not by way of defense, but by injunction or contempt proceedings instituted in the federal court. Although a federal receiver is in charge of an Indiana railroad, yet the Indiana courts hold that the receiver may be sued in the state court for an accident under the state statute rendering all receivers liable, and he may be served by serving process on a conductor, as provided in the statutes. *Louisville, etc. R. R. v. Cauble*, 46 Ind. 277 (1874); *Indianapolis, etc. R. R. v. Ray*, 51 Ind. 269 (1875); *Ohio, etc. R. R. v. Fitch*, 20 Ind. 498 (1863); *McKinney v. Ohio, etc. R. R.*,

22 Ind. 99 (1864). A receiver appointed by a federal court may be sued in the state court without the permission of the federal court, the acts of congress so providing. *For-dyce v. Withers*, 1 Tex. Civ. App. 540 (1892). A federal receiver cannot be garnished in a state court unless the federal court consents to the same. *Glover v. Thayer*, 101 Ga. 824 (1897).

¹ *Gableman v. Peoria, etc. Ry.*, 179 U. S. 335 (1900); *Re Tyler*, 149 U. S. 164 (1893). The enforcement of the judgment is controlled by the federal court appointing the receiver. *Dillingham v. Hawk*, 60 Fed. Rep. 494 (1894). A judgment in the state court against a federal receiver for negligence should be certified to the federal court to be there disposed of. *Reardon v. White*, 87 S. W. Rep. 365 (Tex. 1905).

² *Central T. Co. v. St. Louis, etc. Ry.*, 59 Fed. Rep. 385 (1893).

³ *Hayes v. Columbus, etc. Ry.*, 67 Fed. Rep. 630 (1895). A federal court in allowing its receiver to be made a defendant in condemnation proceedings, may make it a condition that the proceedings be in the federal court. *Buckhannon, etc. Co. v. Davis*, 135 Fed. Rep. 707 (1905). A crossing over a railroad in the hands of a federal receiver cannot be condemned except in the federal court, which appointed the receiver. *Coster et al. v. Parkersburg Branch R. Co. et al.*, 131 Fed. Rep. 115 (1904). Where a

tain stock will be denied without prejudice where the validity of such issue is being tested in another court.¹

Money deposited in a bank on a day when it closes its doors, it being hopelessly insolvent, may be recovered back from the receiver on the ground of fraud.² Where a vendor has obtained a judgment in the state court establishing his vendor's lien on personal property, and he intervenes in a foreclosure suit in the federal court, the latter court will accept the judgment in the state court establishing the lien as conclusive.³ A receiver may defend the estate, by trial and by appeal, against all claims which are antagonistic to both parties to the suit in which he was appointed, but he cannot appeal from a decree of the court adjudicating the rights of all parties as between themselves.⁴ Although a receiver is in charge of a railroad system at the instance of a judgment creditor, the court will not enjoin a mortgagee from instituting a foreclosure suit based on a default in the payment of interest which occurred after the receivership.⁵

receiver is in possession of a railroad, a telegraph company cannot acquire a right of way over it by condemnation proceedings unless the court permits the proceedings. *Western Union Tel. Co. v. Atlantic, etc. Tel. Co.*, 7 Biss. 367 (1877); s. c., 29 Fed. Cas. 791. In the case of *Malott v. Collinsville, etc. R. R.*, 108 Fed. Rep. 313 (1901), where a receiver was in charge of a steam railroad, an electric street railway wishing to condemn the right to cross the steam railroad applied to the equity court which had appointed the receiver for such right upon compensation being paid. See also §§ 868, 869, *supra*.

¹ *Kirkpatrick v. Eastern, etc. Co.*, 135 Fed. Rep. 144 (1904). Even though a suit is pending in the state court to cancel a lease and the property is in the hands of a receiver a similar suit may be instituted in the federal court, but the receiver will not be directed to turn over the property on a defaulted judgment in the federal court. *Isom v. Rex, etc. Co.*, 82 Pac. Rep. 319 (Cal. 1905).

² *Richardson v. New Orleans, etc. Co.*, 102 Fed. Rep. 780 (1900); *Richardson v. New Orleans, etc. Co.*, 102 Fed. Rep. 785 (1900). A re-

ceiver of a bank is not liable to refund a deposit illegally received by the bank after its insolvency, unless the deposit can be identified in the hands of the receiver or it is shown that the funds coming into his hands were increased by that amount. It must also be shown that the officers knew the bank was insolvent when the deposit was received. *Quin v. Earle*, 95 Fed. Rep. 728 (1899).

³ *State, etc. Co. v. De La Vergne, etc. Co.*, 105 Fed. Rep. 468 (1900).

⁴ *Bosworth v. St. Louis, etc. Assoc.*, 174 U. S. 182 (1899).

⁵ *Mercantile Trust Co. v. Baltimore & O. R. R.*, 89 Fed. Rep. 606 (1898).

A first mortgagee may file a bill to foreclose, and, with the court's consent, join as a party defendant a receiver already appointed by the court in another foreclosure suit. *American Surety Co. v. Worcester, etc. Co.*, 90 Fed. Rep. 773 (1898). The act of congress permitting suits against federal receivers, without the consent of a court, in certain cases, does not authorize the filing of an independent bill of foreclosure against the receiver on the property in the receiver's custody, even though the foreclosure suit is brought in the federal

Where a firm has pledged stock and afterwards passes into the hands of a receiver, an action subsequently commenced by the pledgee to foreclose his lien must make the receiver a party defendant.¹ A trust company as pledgee of second-mortgage bonds may sell them on notice, even though it is the trustee of the first mortgage, and even though a receiver is in charge.² The interest a corporate creditor has in the assets, after a receiver has been appointed and before a decree of distribution, cannot be reached by one of his creditors by petition of intervention.³

A person holding an underlying lien on real estate cannot sell such real estate where it is in the hands of a receiver, unless the court authorizes such sale.⁴ Where an ice company purchases, without power so to do, beer from a brewing company, and even though it passes into a receiver's hands, the latter may file a petition asking in the alternative to be allowed the price, or, if the contract is disaffirmed, the value thereof.⁵ Interference with assets belonging to the receiver may be remedied by petition instead of by an independent bill, even though such assets have never been in the possession of the receiver.⁶ Where the possession of the receiver is interfered with, he need not file a bill in equity, but may obtain an injunction by a petition in the suit already pending.⁷ A receiver of a railroad may, by petition in the suit in which he was appointed, enjoin another railroad from using without authority the tracks in his possession, even though such other railroad is not a party to the suit.⁸ The city

court. *Minot v. Mastin*, 95 Fed. Rep. 734 (1899). Where a federal receiver is in charge of property, a mortgagee cannot file a bill for foreclosure even in the federal court, but must intervene. *American L. & T. Co. v. Central V. R. R.*, 84 Fed. Rep. 917 (1898). See also §§ 839, 845, *supra*.

¹ *Denny v. Cole*, 22 Wash. 372 (1900).

² *Guaranty Trust Co. v. Galveston City R. R.*, 87 Fed. Rep. 813 (1898). Even though bankruptcy proceedings are instituted against the pledgor, yet the bankruptcy court has no power to enjoin the pledgee from selling the pledge in accordance with the terms of the pledge itself. *In re Browne*, 104 Fed. Rep. 762 (1900).

³ *Williston Seminary v. Easthampton, etc. Co.*, 186 Mass. 484 (1904).

⁴ *Pelletier v. Greenville, etc. Co.*, 123

N. C. 596 (1898). A person claiming the right under a verbal agreement of the president, to gather turpentine from pine trees on land which has passed into the hands of a receiver, cannot exercise such right unless the court allows it. *McKinnon-Young Co. v. Stockton*, 44 S. Rep. 237 (Fla. 1907). A stockholder has no standing for interfering in the settlement of the affairs of an insolvent corporation after a receiver has been appointed. *Wenar v. Schwartz, Ltd.*, 44 S. Rep. 902 (La. 1907).

⁵ *Tennessee Ice Co. v. Raine*, 64 S. W. Rep. 29 (Tenn. 1901).

⁶ *Bibber-White Co. v. White River, etc. Co.*, 107 Fed. Rep. 176 (1901).

⁷ *Virginia, etc. Co. v. Bristol Land Co.*, 88 Fed. Rep. 134 (1898).

⁸ *Lake Shore, etc. Ry. v. Felton*, 103 Fed. Rep. 227 (1900).

council of Kansas City may regulate the speed in that city of trains running from that city into Kansas, even though a federal receiver is in charge of the railroad.¹ A state court cannot enjoin a federal receiver of a telephone company from charging higher rates than is permitted by a city ordinance.²

It is contempt of court for a creditor of the receiver to levy an attachment, execution, or garnishment on property of the receiver after he has been appointed.³ Where, however, a receiver refuses to

1 Erb v. Morasch, 177 U. S. 584 (1900).

2 Rogers v. Chippewa, etc., 97 N. W. Rep. 154 (Mich. 1903). See § 839, *supra*.

3 A receiver cannot be garnished except by consent of the court. Citizens', etc. Bank v. Bay Circuit Judge, 110 Mich. 633 (1896). Cf. note 5, p. 3087, *supra*. An execution on a judgment obtained after receivers are appointed cannot legally be levied on property in the receiver's possession. Chalmers v. Littlefield, 69 Atl. Rep. 100 (Me. 1907). As to an attachment or garnishment by a non-resident to reach moneys due from a receiver to third persons, debtors of the attaching party, see Central Trust Co. v. Chattanooga, etc. R. R., 68 Fed. Rep. 685 (1895). A judgment creditor cannot obtain a preference by levying on the property after the court by insolvency proceedings has restrained the corporation from doing further business, even though no receiver has been appointed. Squier v. Princeton, etc. Co., 64 Atl. Rep. 474 (N. J. 1906). Garnishee proceedings instituted after the receiver is appointed are a contempt of court, even though the receiver has not taken possession of the money garnisheed or demanded or sued for it. Richards v. People, 81 Ill. 551 (1876). Although a judgment creditor has levied on property in the receiver's hands, yet the court, upon his purging himself of contempt, will allow him to intervene in the foreclosure suit and attack the bonds. Farmers' L. & T. Co. v. Toledo, etc. R. R., 43 Fed. Rep. 223 (1890). A

receiver's right to property cannot be interfered with by attachments, etc., after he has qualified. *Re Christian, etc. Co.*, 128 N. Y. 550 (1891). Judgment creditors will not be allowed to sell property in the hands of receivers. Mercantile Trust Co. v. Baltimore, etc. R. R., 79 Fed. Rep. 389 (1897); Gardner v. Caldwell, 16 Mont. 221 (1895). A vessel being used by a receiver may be libeled *in rem*. The Willamette Valley, 66 Fed. Rep. 565 (1895). The court will not in all cases enjoin a libel on boats in the possession of receivers. Paxson v. Cunningham, 63 Fed. Rep. 132 (1894). Where it has been decided that a street railway's use of the streets is unauthorized, the mortgagee, being a party to such suit, cannot, by having a receiver appointed, prevent the city from insisting on the removal of the tracks. Louisville Trust Co. v. Cincinnati, etc. Ry., 78 Fed. Rep. 307 (1897). An attachment after the appointment of a receiver, but before the receiver takes possession, has no preference. Mosher v. Order of Iron Hall, 88 Hun, 394 (1895). Where a receiver of an insolvent corporation has been appointed at the instance of an unsecured creditor, a creditor secured by certain mortgages as a pledge may, upon application to the court, compel the receiver to deliver up such mortgages. Risk v. Kansas Trust, etc. Co., 58 Fed. Rep. 45 (1893). Where a creditor obtains judgment against the corporation on December 9th, and at once issues execution, and on December 31st, in another action, a receiver is appointed, and at once takes pos-

accept merchandise which the insolvent company ordered, the vendor session, and the first creditor garnishees a debtor of the company on January 18th, the receiver takes title in preference to the garnishee process, even though he did not file his bond until some forty days later. *Maynard v. Bond*, 67 Mo. 315 (1878). After a judge has signed an order to show cause why a receiver should not be appointed, an attachment cannot be levied so as to have precedence over the receivership. *Worden v. Pruter*, 88 S. W. Rep. 434 (Tex. 1905).

A receiver takes the property subject to the payment of all valid prior liens, including attachments. *Smith v. Sioux, etc. Co.*, 109 Iowa, 51 (1899). Even though an application for a receiver is pending, the corporation may transfer its property or its creditors may attach the same, and even though this is done in violation of an injunction, yet if by agreement between the parties applying for the receiver and the attaching creditors such attachments are given priority and the court approves the same, such preferences are legal. *Smith v. Sioux, etc. Co.*, 109 Iowa, 51 (1899). Where a receiver is in charge, and without consent of the court a suit is brought against the company, and a creditor of the corporation is garnished, a judgment cannot be enforced against the garnishee, inasmuch as it is an illegal interference with the assets belonging to the receiver, and a question of whether the receiver was appointed by collusion will not be considered in such a proceeding. *Missouri, etc. Ry. v. Love*, 61 Kan. 433 (1900). In *Phelan v. Ganabin*, 5 Colo. 14 (1879), the court sustained a garnishee process served upon a receiver appointed by the courts of another state over a railway partly within the state. After causing a receiver to be appointed a judgment creditor cannot issue execution. *Fox v. Union, etc. Co.*, 37 N. Y. Misc. Rep. 308 (1902). An execution sale made after a receiver has been

appointed is in contempt of court and will be set aside. *Campau v. Detroit, etc. Club*, 90 N. W. Rep. 49 (Mich. 1902). An attachment of partnership property is not good as against a receiver's title where the attachment was levied after the appointment of the receiver, but before he filed his bond. *Steele v. Sturges*, 5 Abb. Pr. 442 (1857). So also where process of execution is levied after the order to ascertain a fit receiver, but before his appointment. *Rutter v. Tallis*, 5 Sandf. 610 (1852). The right of the receiver to take possession accrues when he files his bond. *Noyes v. Rich*, 52 Me. 115 (1862). The decision in the old case of *Farmers' Bank v. Beaton*, 7 Gill & J. (Md.) 421 (1836), to the effect that a garnishee process subsequent to the appointment and giving of bonds of a receiver is good as against the receivership, where the receiver has not actually taken in charge the funds so garnisheered, is not the law. It has been held in England that the receiver of the assets of an individual does not take title until he gives the required security, and an execution levied after his appointment, but before he gives security, is not a contempt of court. *Edwards v. Edwards*, L. R. 2 Ch. D. 291 (1876). After the receiver takes possession, a judgment creditor who levied on the real estate before the receiver was appointed can foreclose his lien only through the court that appointed the receiver. *Wiswall v. Sampson*, 14 How. 52 (1852). Even though the receiver declines to accept the position, an execution cannot legally be levied on the property. *Skinner v. Maxwell*, 68 N. C. 400 (1873). In *Russell v. East Anglian, etc. Ry.*, 3 Macn. & G. 104 (1850), on a motion to commit the sheriff for levying a *fi. fa.* on property in the hands of the court's receiver, the court, upon the sheriff submitting, ordered him to give up his possession of the property

may sell it for the receiver's account without the consent of the court, and may recover from the receiver any deficiency.¹

Where a receiver appointed by a federal court is in possession of the property, even a tax collector cannot levy upon the property under state process. The tax collector must apply to the federal court.² A receiver of an insolvent bank is not liable for taxes assessed on its capital stock before insolvency.³

Aside from the rules given above, a suit or proceeding against a receiver is carried on very much the same as any other suit.⁴

and pay the costs. Although the court does not order the sheriff to withdraw a levy, and answer for contempt for levying on property in the hands of a receiver, yet this does not validate the levy and enable it to come in ahead of the mortgages. The possession of the receiver is the possession of the mortgagee. *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372, 403 (1859). The court will set aside a levy of execution on property in the hands of a receiver. If the judgment creditor believes that the property levied on was not subject to the mortgage, he must apply to the court to discharge the property from the receivership before he makes his levy. *Robinson v. Atlantic, etc. R. R.*, 66 Pa. St. 160 (1870). If a person claims personally as mortgagee, but a receiver is in possession, the former's remedy is a suit for possession and not in trover. The receiver is not a trespasser in such a case. *Morrill v. Noyes*, 56 Me. 458 (1863). If a judgment creditor levies process on the profits of docks which are in the hands of a receiver without first obtaining leave from the court, the court will enjoin him. *Ames v. Birkenhead Docks*, 20 Beav. 332 (1885). An execution levied after the receiver takes possession gives no prior lien. *Coe v. Knox, etc. Bank*, 10 Ohio St. 412 (1859). The owner of an engine which a company was using, and which the receiver of the company has taken possession of, may replevy the same without asking the permission of the court. The receiver is a mere trespasser. He was entitled

to possession of the company's property only. *Hills v. Parker*, 111 Mass. 508 (1873). Even though a creditor acquires a lien before the appointment of a receiver, yet the court may refuse to allow him to sell. See § 866, *supra*. As to a sale by a pledgee from the corporation, see § 763, *supra*.

¹ *Moore v. Potter*, 155 N. Y. 481 (1898), rev'g 87 Hun, 334. See also *Fidelity, etc. Co. v. Roanoke, etc. Co.*, 81 Fed. Rep. 439 (1896); *Dudley v. Gould*, 6 Hun, 97 (1875).

² See § 860, *supra*.

³ See § 860, *supra*.

⁴ The court does not favor an order that the receiver pay over money to claimants, the decision being based on affidavits. A common-law trial is safer and better to preserve the interests of all parties. *Re North River Bank*, 60 Hun, 91 (1891). A receiver, when sued at law for damages, may set up the statute of limitations as a bar. *Bartlett v. Keim*, 50 N. J. L. 260 (1888). Money collected by an insolvent bank for another bank cannot be recovered as a trust fund from the receiver, unless its identity is traced into his hands. *Frank v. Bingham*, 58 Hun, 580 (1890). The receiver will be ordered to pay out of the fund costs awarded against him in a suit. *People v. John, etc. Co.*, 42 Hun, 484 (1886); *People v. Remington*, 45 Hun, 347 (1887). Costs to an unsuccessful claimant will not be allowed out of the funds in the receiver's hands. *People v. Security, etc. Co.*, 23 Hun, 597 (1881). Where rental is claimed from a receiver, the court may order the

The court will punish for contempt of court all "strikers" who by force prevent other men from working for the receiver.¹

§ 871. *Levy of execution, attachment, and garnishee process in another state after a receivership has been ordered in one state—Status of a corporation during a receivership.*—It is a settled rule that each state will favor its own litigants who are creditors of a corporation as against a receiver of that corporation appointed in another state. Hence an attachment, execution, or garnishee process levied in the state on assets in the state belonging to a foreign corporation will take precedence over the title of a receiver appointed prior thereto in another state.²

question to be determined by action rather than by motion. *Woodruff v. Erie Ry.*, 93 N. Y. 609 (1883). A state statute to the effect that, in an action by an employee against a railroad for damages, the railroad shall not set up the defense of negligence of a co-employee, applies to receivers appointed by the federal court. *Peirce v. Van Dusen*, 78 Fed. Rep. 693 (1897). A statute raising a presumption of negligence where a person is injured by a railroad does not apply to a railroad in the hands of a receiver. *Robinson v. Huidekoper*, 98 Ga. 306 (1896). A suit against a railroad receiver to recover a simple-contract debt owing by the receiver is not sustainable in equity. *Nash v. Ingalls*, 79 Fed. Rep. 510 (1897).

¹ See § 904, *infra*.

² A non-resident may attach real estate in a state other than that in which a receiver has been appointed. *Schindelholz v. Cullum*, 55 Fed. Rep. 885 (1893). On this subject, see *Barnett v. Kinney*, 147 U. S. 476 (1893), which holds that *Green v. Van Buskirk*, 7 Wall. 139 (1868); s. c., 5 Wall. 307, is to be confined to the facts involved therein. A citizen of Wisconsin may attach in New York property of a Wisconsin corporation, where the property has passed into the hands of an assignee for the benefit of creditors, and where such assignment was under a statute. A different rule, it seems, will apply where

the assignment is the ordinary assignment for the benefit of creditors, the distinction being between a voluntary assignment and an involuntary assignment, the latter being statutory and the former a common-law proceeding. *Barth v. Backus*, 140 N. Y. 230 (1893). Even though a New York court appoints a receiver of a corporation and enjoins persons within the State of New York from bringing suits against it, this does not prevent a Pennsylvania bank from instituting suit against the corporation in any other state and levying upon the property in such other state. *Union National Bank v. Leary*, 95 N. Y. App. Div. 381 (1904). A debt due from a Massachusetts limited partnership to a Massachusetts corporation cannot be attached in New York after a receiver of the corporation has been appointed in Massachusetts. *National, etc. Bank v. Sampson*, 85 N. Y. App. Div. 320 (1903). Attachment or garnishment by a resident creditor of a foreign corporation on its property in the state takes precedence over a foreign receiver who does not obtain possession of the property before process is issued. *Choctaw, etc. Co. v. Williams, etc. Co.*, 87 S. W. Rep. 632 (Ark. 1905). In *Commercial Nat Bank v. Motherwell, etc. Co.*, 95 Tenn. 172 (1895), it was held that, although an Ohio receiver of an Ohio corporation had been appointed, yet that a resident of Ohio might thereafter attach

The supreme court of the United States has held that a statutory assignment by a Minnesota corporation to another Minnesota corpora-

porate property in Tennessee (reviewing the cases). The appointment of a receiver of a foreign corporation by the United States court in Pennsylvania does not prevent an attachment being levied on the corporate assets in New York, and such attachment takes precedence over the rights of a receiver appointed subsequently in the New York circuit. *Cole v. Oil Well Supply Co.*, 57 Fed. Rep. 534 (1893). A debt due from a citizen of Massachusetts to a New York corporation on overdue promissory notes may be attached in Massachusetts by a Massachusetts creditor of the corporation, and this attachment comes in ahead of the rights of a New York receiver of the corporation, even though the receiver was appointed before the attachment was made. If the corporation had been dissolved, the attachment suit would of course have failed. *Taylor v. Columbian Ins. Co.*, 96 Mass. 353 (1867). The priority of a suit in New York by the receiver on these notes does not change the above rule. *Taylor v. Columbian Ins. Co.*, 96 Mass. 353 (1867). The sequel of this decision is found in *Osgood v. Maguire*, 61 N. Y. 524 (1875), where the unfortunate payor of the above-mentioned notes was obliged to pay them over again, because the New York courts declared the Massachusetts decision to be contrary to law. In Connecticut it is held that a Massachusetts assignee appointed by the court has no rights as against attachments of the assignor's property in Connecticut. *Upton v. Hubbard*, 28 Conn. 274 (1859). An Ohio receiver of an Ohio bank has no precedence over attachments levied in New York on funds of the bank in New York, although the attachments were subsequent in time to the appointment of the receiver. *Willits v. Waite*, 25 N. Y. 577 (1862). An attachment in New

York of property of a New Jersey corporation after a receiver had been appointed in New Jersey, but before a receiver was appointed in New York, is good as regards property attached, but no further. *Woerishoffer v. North River Const. Co.*, 99 N. Y. 398 (1885); *Dunlop v. Patterson, etc. Ins. Co.*, 12 Hun, 627 (1878); affirmed, 74 N. Y. 145.

A citizen of New York who is a creditor of a Connecticut corporation may attach property of such corporation in Maryland, even though a receiver of the corporation was appointed in Connecticut several months prior to the attachment, and such attachment is not affected by the fact that such creditor filed his claim in the receivership proceedings in Connecticut. *Linville v. Hadden*, 88 Md. 594 (1898). Bondholders of an English corporation having a lien on a debt due from a French firm cannot object because general creditors, after the appointment of a receiver in England, obtain a lien in France on such claim. *Re Maudslay, etc. Limited*, [1900] 1 Ch. 602. An assignment for the benefit of creditors of a non-resident corporation is good as against non-residents when made in accordance with the law where the corporation exists. *Parks Bros. & Co. v. Branch & Co.*, 55 S. W. Rep. 305 (Tenn. 1900). Attachment does not lie against a foreign corporation after a receiver of it has been appointed in the state where it exists. *Thomas v. Merchants' Bank*, 9 Paige, 216 (1841). A citizen of the Republic of Mexico may bring suit in Texas against an Illinois corporation for breach of contract, even though the corporate property is in the hands of a receiver appointed in Mexico. *American, etc. Works v. De Aguayo*, 53 S. W. Rep. 350 (Tex. 1899). Where a foreign receiver does not take possession of

tion does not prevent a subsequent attachment in Massachusetts by a citizen of New York, who is a creditor of the insolvent Minnesota

property in the state until after a resident creditor has levied attachment thereon, the attachment has precedence. *Gray v. Covert*, 58 N. E. Rep. 731 (Ind. 1900). Even after a New York receiver has been appointed of a New York corporation, a citizen of North Carolina who is a creditor of such corporation may attach land owned by the corporation in North Carolina. *Kruger v. Bank of Commerce*, 123 N. C. 16 (1898). Citizens of South Carolina will not be allowed to take all the assets in South Carolina of a North Carolina insolvent corporation, where a receiver in North Carolina will distribute the funds ratably among the creditors. *Wilson v. Keels*, 54 S. C. 545 (1899). Even though an Idaho corporation, which has pledged securities in New York, passes into the hands of a receiver appointed by a court in Idaho, yet, after such receivership, a citizen of that state may assign his claim against the insolvent corporation to a citizen of New York, and the latter may attach the equity of redemption in such pledge. *Thum v. Pingree*, 21 Utah, 348 (1900).

In Louisiana it is held that where a receiver of a Tennessee bank is appointed in Tennessee, and a part of the assets are illegally taken from Tennessee into Louisiana, the courts of the latter will, on an intervention by the Tennessee receiver, restore the property to him, even as against an attachment in Louisiana. *Paradise v. Farmers', etc. Bank*, 5 La. Ann. 710 (1850). An attachment in Maine against the property of a New York corporation is not displaced by the subsequent appointment in New York of a receiver of the corporation. *Hunt v. Columbian Ins. Co.*, 55 Me. 290 (1867). Where a receiver took possession of a barge in Missouri, wherein he was appointed, and caused the

barge to continue business, and the barge goes into the state of Illinois, it cannot there be attached, even for a corporate debt due to a citizen of Illinois. The court said that the receiver was rightfully in possession, and such a case does not come under the rule that "a foreign receiver should not be permitted, as against the claims of creditors resident in another state, to remove from such state the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied." *Chicago, etc. Ry. v. Keokuk, etc. Co.*, 108 Ill. 317 (1884). A receiver appointed in New Jersey over a New Jersey corporation may send property into Connecticut to build a bridge, and that property cannot be attached for a debt of the company. *Pond v. Cooke*, 45 Conn. 126 (1877). A debenture issued in Australia by a company organized in Australia, creating a lien on the unpaid subscriptions, including subscriptions in Scotland, does not have priority over an attachment levied in Scotland by Scotch creditors of the company before a receiver has been appointed at the instance of the debenture-holders. *Re Queensland, etc. Co.*, [1891] 1 Ch. 536 (1891); affirmed, [1892] 1 Ch. 219. Where a receiver is appointed in England over property belonging to a French corporation, and four days afterwards a receiver is appointed in France in liquidation proceedings, the parties obtaining the appointment of the receiver in England are entitled to have the property held by such receiver applied to their debt, even though they had subsequently applied for payment of their debt in the French receivership proceedings also. *Levasseur v. Mason*, 63 L. T. Rep. 700 (1890); aff'd, [1891] 2 Q. B. 73. For an able

corporation, to reach assets of the latter in Massachusetts, even though the New York creditor had notice of the assignment, but had not proven his claim nor filed a release therein.¹

But there is a certain danger connected with such a proceeding. If the court that appointed a receiver can reach the creditor who has obtained such a precedence over the receiver, it may compel such creditor to release his advantage and may commit him for contempt of court, or may enjoin him from obtaining such preference.² More-

article (by H. R. Bailey) and comparison of the decisions in the various states on the subject of attachment of property in a state other than that in which an assignment in solvency has been made, see 7 Harvard L. Rev. 281.

1 *Security T. Co. v. Dodd, Mead & Co.*, 173 U. S. 624 (1899). In this case the court stated that common-law assignments were different and would be respected, except so far as they conflicted with the rights of local creditors or with the laws and policy of a state.

2 Where the courts of Illinois appoint a receiver of a copartnership, and a Connecticut corporation, having an office and agent in Chicago, causes through such agent an attachment to be levied in the District of Columbia on goods belonging to such insolvent copartnership, it is a contempt of the Illinois courts, and the agent of the corporation will be committed for contempt. *Sercomb v. Catlin*, 128 Ill. 556 (1889). Where a partnership in Massachusetts is about to go into insolvency, its creditors, citizens of Massachusetts, will not be allowed to levy an attachment in Pennsylvania on property there belonging to the firm. After the assignee in insolvency is appointed, the Massachusetts court will enjoin the citizens of that state from continuing the Pennsylvania action. *Dehon v. Foster*, 86 Mass. 545 (1862). In *Chafee v. Quidnick Co.*, 13 R. I. 442 (1881), an attorney of New York, who had appeared in this case in Rhode Island and taken part therein and knew that a receiver had

been appointed of the defendant, his client, and had then attached lands in New York for his fees, was ordered to discontinue his suit in New York. He did so. The court appointing a receiver will enjoin residents of that state from instituting legal proceedings in other states to reach funds which belong to the receiver. It is contempt of court for residents so to do, even though there is no injunction. The moneys involved in this case were earnings made after the receiver took possession. The receiver was appointed in Vermont. A Vermont corporation, a creditor of the insolvent corporation, attached funds in Massachusetts. The court granted the petition of the receiver to enjoin the parties from proceeding with the attachment suit. *Vermont, etc. R. R. v. Vermont Cent. R. R.*, 46 Vt. 792 (1873). After a winding up has been commenced, an English creditor will not be allowed to reach corporate assets in a foreign country. *Re Central Sugar Factories*, [1894] 1 Ch. 369.

Where a citizen of Virginia obtains in the New Jersey courts the appointment of a receiver of a New Jersey corporation and afterwards attaches property of the corporation in Virginia, he may be enjoined from proceeding with such attachment. *Chesapeake, etc. Ry. v. Swayze*, 60 N. J. Eq. 417 (1900). A Pennsylvania creditor of a Connecticut corporation may attach property of the latter in New York, and, after realizing what he can therefrom, may file his claim as a general creditor in dissolution proceedings of the corporation in Con-

over, the courts of one state do not favor attachments in that state by a resident of another state as against a receiver appointed in the latter state.¹ Where an Illinois receiver has been appointed of an

necticut; but if such an attachment was taken out after the Pennsylvania creditor knew that a receiver had been appointed in Connecticut and had taken title, the Pennsylvania creditor will be compelled to pay to the receiver the actual value of the property so taken before being allowed to participate in the distribution in Connecticut. *Ward v. Connecticut, etc. Co.*, 71 Conn. 345 (1899). Under the Vermont statutes, which prohibit preferences acquired within a specified time before an adjudication of insolvency, a bank in Vermont, which on November first attaches stock in New Mexico which was owned by an insolvent person in Vermont, is not entitled to the preference obtained thereby, where a creditor's petition against the insolvent was filed in Vermont October 28th, even though the bank sold its claim and the attachment to a third person. The bank and its officers may be held liable to the assignees in insolvency for the amount paid for the stock at the sale in New Mexico, the stock itself having been bought in for the benefit of the assignees. *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543 (1898). See also *Thum v. Pyke*, 66 Pac. Rep. 157 (Idaho, 1901).

¹ *Cole v. Cunningham*, 133 U. S. 107 (1890), holds that where a Massachusetts firm is insolvent, a resident creditor will be enjoined from obtaining a preference by levying an attachment in New York. Where a bill in equity is filed in Virginia on March 13 for foreclosure and a receiver of a Virginia corporation, and on June 6 an order of appointment is made, and the receiver files his bond on June 12, and a citizen of Virginia on June 12 attaches all the defendant's property in Pennsylvania, the courts of the latter state will not sustain the attach-

ment or garnishee process. The receiver takes title. *Bagby v. Atlantic, etc. R. R.*, 86 Pa. St. 291 (1878). Where a receiver in New York is appointed over a New York corporation, and the creditors are enjoined from prosecuting the suits against the company, a resident of New York cannot, by starting a suit in Wisconsin against the corporation and garnishing a resident of Wisconsin, obtain a preference in the assets. *Gilman v. Ketcham*, 84 Wis. 60 (1893). In New York, by statute, a non-resident's right to bring an action against a foreign corporation is very limited. See Code Civ. Pro., § 1780. Where a Pennsylvania corporation has passed into a Pennsylvania receiver's hands, and he has sold certain articles to parties in New Jersey, a Massachusetts creditor of the company cannot attach the proceeds in New Jersey. *Merchants' Nat. Bank v. Penn. Steel Co.*, 57 N. J. L. 336 (1894).

Even though a Connecticut court has appointed a receiver of a Connecticut corporation under the Connecticut statute, yet where the title does not pass to such receiver a creditor may attach in Kentucky property of the corporation in that state and obtain priority over the receiver's rights, notwithstanding an assignment of the property had been made by the corporation in Connecticut to the receiver. *Zacher v. Fidelity, etc. Co.*, 106 Fed. Rep. 593 (1901). A statutory receiver appointed in Connecticut of the assets of a Connecticut corporation does not take title to property in Kentucky as against a subsequent attaching creditor in Kentucky. *Zacher v. Fidelity Trust, etc. Co.*, 59 S. W. Rep. 493 (Ky. 1900). Even though a Connecticut corporation which owns a railroad in Kentucky is being wound up, in accordance with the statutes of

insolvent Illinois corporation, and a Vermont creditor of such corporation afterwards attaches property belonging to the latter in Massachusetts, the Massachusetts court will turn such property over to such receiver.¹ This same question of interstate comity arises in regard to the right of a receiver in one state to bring suits in the courts of another state.² As regards rolling-stock the rule is strict in preserving it from attachment, the object here being to enable the receiver to continue the operation of the road.³

The courts of a state will, at the instance of creditors of a foreign corporation, appoint a receiver of the assets of such corporation so far as such assets are within the state.⁴

Although a stockholder's bill for a receiver to preserve and administer the assets of an insolvent corporation is pending, yet the corporation may return to a vendor of rails such part of the rails as have not yet been used. The principle of law that the filing of a bill gives the court the exclusive right to control the property does not apply to such a case.⁵ Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration.⁶ Where a receiver has been appointed with the usual injunction, the officers cannot appeal a case in another state.⁷ A corporation may at its own expense appear by counsel in litigation in which it is a party, even though a receiver is in charge and is conducting the litigation.⁸ A stockholder may bring a suit in behalf of the corporation, where the directors are guilty of a fraud, even though a receiver of a corporation has been appointed in another state.⁹ Suit may be brought

Connecticut, and even though the company has assigned to the statutory receiver in Connecticut all its property, yet such an assignment is not an assignment for the benefit of creditors, and hence a creditor of the railroad may attach in Kentucky assets in that state. *Huntington v. Chesapeake, etc. Ry.*, 98 Fed. Rep. 459 (1899).

¹ *Witters v. Globe Sav. Bank*, 171 Mass. 425 (1898).

² See § 868, *infra*.

³ See §§ 854, 855, *supra*, and § 899, *infra*.

⁴ See § 865, *supra*.

⁵ *Illinois Steel Co. v. Putnam*, 68

Fed. Rep. 515 (1895). See also § 852, *supra*.

⁶ *Grant v. Lowe*, 89 Fed. Rep. 881 (1898).

⁷ *American W. W. Co. v. Farmers' L. & T. Co.*, 20 Colo. 203 (1894). Where a receiver is appointed and the officers enjoined, they cannot lawfully cause the corporation to appear in a suit in another state. *Rust v. United Water-works Co.*, 70 Fed. Rep. 129 (1895).

⁸ *Johnson v. Southern, etc. Assoc.*, 99 Fed. Rep. 646 (1899).

⁹ *Fitzgerald v. Fitzgerald, etc. Co.*, 41 Neb. 374 (1894). A stockholder

may maintain a suit in the state court

against a national bank although it has passed into the hands of a receiver. The receiver will be bound by the adjudication and may be sued at law on the first judgment so recovered.¹ The appointment of a receiver does not prevent the statute of limitations running in favor of the corporation.² Although a corporation is in a receiver's hands it may incur expense with a view to reorganization.³ A corporation may continue business even after a creditor has filed a bill for the appointment of a receiver and distribution of its assets, it being insolvent, but debts incurred by it after the filing of such bill are second to debts existing at the time such bill is filed.⁴ The appointment of a receiver does not prevent the directors adopting resolutions to bring about an equitable distribution of the assets of the company.⁵ A corporation that has passed into a receiver's hands and then been taken out of the receiver's hands is liable on a claim existing before the receivership.⁶ A receiver's admission relative to a fact existing prior to his appointment and of which he has no personal knowledge is not admissible as against the corporation.⁷ A suit may be brought against the corporation, although a receiver has been appointed.⁸ Even though a federal receiver has been appointed, yet the

to enjoin directors from extending a lease at a reduced rental and from releasing security for such rental, where he charges fraud, even though both the lessor and lessee are in the hands of receivers appointed by the federal court. Moreover the federal court has no authority in such suits to compel the lessor to execute such lease. *Guaranty Trust Co. v. North Chicago St. R. Co.*, 130 Fed. Rep. 801 (1904). See also §§ 735, 740, *supra*.

1 *Denton v. Baker*, 79 Fed. Rep. 189 (1897).

2 *Jackson v. Fidelity, etc. Co.*, 75 Fed. Rep. 359 (1896). As to the statute of limitations while a receiver is in charge, see *International, etc. R. R. v. McCulloch*, 24 S. W. Rep. 1101 (Tex. 1894).

3 *Linn v. Joseph, etc. Co.*, 59 N. J. L. 28 (1896). See 112 S. W. Rep. 447.

4 *Atlas Ry., etc. Co. v. Lake, etc. Ry.*, 134 Fed. Rep. 503 (1905).

5 *In re C. Moench & Sons Co.*, 123 Fed. Rep. 965 (1903).

6 *Diamond, etc. Co. v. San Antonio, etc. Ry.*, 11 Tex. Civ. App. 587 (1895). On this subject see also § 875, *infra*.

7 *First Nat. Bank v. Linn, etc. Bank*, 30 Oreg. 296 (1897).

8 A suit for damages against the corporation itself may be brought without obtaining permission of the court which appointed a receiver of the company. The damage was done after the receiver was appointed, but before he filed his bond. *Allen v. Central R. R.*, 42 Iowa, 683 (1876). A foreign corporation may be sued, although it is in the hands of a receiver in another state, and such receiver need not be made a party defendant. *Venner v. Denver, etc. Co.*, 90 Pac. Rep. 623 (Col. 1907). In Maine, after a receiver of a bank has been appointed, and he has taken possession, a creditor will not be allowed to sue the bank. *Leathers v. Shipbuilders' Bank*, 40 Me. 387 (1855). The appointment of a receiver of a national bank does not dissolve the corporation. A creditor may sue on a claim and join both the bank and the receiver. *Green v. Walkill Nat. Bank*, 7 Hun, 63 (1876). But as to ordering such a receiver to pay over money, see *Ocean Nat. Bank v. Carll*, 7 Hun,

corporation itself may sue for unpaid subscriptions, especially where such suit is brought outside of the jurisdiction wherein the receiver was appointed.¹ A railroad may institute condemnation proceedings although it is in the hands of a receiver, and it may authorize a contractor to do so in its name.²

Even though a receiver has been appointed, the corporation may, by leave of the court, bring actions in its own name against any one, except the receiver, to try the legal title to property.³ The appointment of a receiver does not stay a pending action which had been commenced by the corporation.⁴

C. DUTIES AND POWERS OF RECEIVERS.

§ 872. *What a receiver may do without order of the court, and what he may do under order of the court—Books of the company.*—A receiver has no power, unless expressly authorized by the

237 (1876). The receiver need not be made a party to a suit brought for injury done by the corporation before the receivership. *Northern Pac. R. R. v. Heflin*, 83 Fed. Rep. 93 (1897). The appointment of a receiver does not prevent suit against the corporation unless there is an injunction. *Warner v. Imbeau*, 63 Kan. 415 (1901). Where a suit is commenced against a national bank after a receiver is appointed and judgment is obtained without making the receiver a party, the receiver cannot have the judgment set aside for fraud where he waits two years before commencing suit for that purpose. *Denton v. Baker*, 93 Fed. Rep. 46 (1899). Receivership proceedings to obtain an accounting do not prevent a suit being prosecuted against the company. *Pad-dack v. Staley*, 13 Colo. App. 363 (1899). An agreement of a bank on a sale of bonds by it that it will buy them back at the same price at a certain time, if the vendee wishes, is binding upon the receiver of the bank, and, upon judgment being obtained against the bank thereon, the receiver should pay the claim. *Wolf v. Nat. Bank of Illinois*, 178 Ill. 85 (1899).

¹ *Sigua, etc. Co. v. Brown*, 171 N. Y. 488 (1902). While the appointment of a receiver does not affect a suit against a corporation, yet, as to suits brought by the corporation, they are suspended until the receiver continues or dismisses them. *Kokomo, etc. Ry. v. Pittsburg, etc. Ry.*, 58 N. E. Rep. 211 (Ind. 1900). Where at the instance of the attorney-general a bank has been declared insolvent and the transaction of further business enjoined, an assessment on the stock levied before the decree, but payable after the decree, cannot be enforced by the bank. *Bank of National City v. Johnston*, 133 Cal. 185 (1901).

² *Detroit, etc. R. R. v. Campbell*, 103 N. W. Rep. 856 (Mich. 1905).

³ *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 111 Ill. 32 (1884). Where a receiver has been appointed in Maryland of a Maryland corporation, and the corporation is unable to bring suit in Maryland, it cannot maintain a suit in the courts in Delaware. *E. F. Kirwan, etc. Co. v. Truxton*, 44 Atl. Rep. 427 (Del. 1899).

⁴ *Sigua, etc. Co. v. Brown*, 171 N. Y. 488 (1902). See also § 870, *supra*.

court, to incur any expense on account of the property in his hands except such as is absolutely necessary for its preservation.¹ He has

¹ *Cowdrey v. Galveston, etc. R. R.*, 93 U. S. 352 (1876), where the court disallowed a disbursement of the receiver made in preventing any aid to a proposed parallel line of road. A receiver has no right to incur expense, without order of the court, for exhibition purposes. *Re British Power, etc. Co.*, 97 L. T. Rep. 198 (1907). A mortgagee in possession will, upon a filed bill by the mortgagor for redemption, be allowed expense for necessary repairs and for protection of the title, but not for improvements, unless the mortgagor consented thereto or was notified in advance and did not object. *Sandon v. Hooper*, 6 Beav. 246 (1843). The receiver of a railroad has inherent power to purchase a delivery wagon, etc., and scales, and to rent an office and pay interest on money borrowed by him. "All outlays made by the receiver in good faith in the ordinary course with a view to advance and promote the business of the road and to render it profitable and successful are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of the railroad in his hands." This includes not only "the keeping of the road, buildings, and rolling-stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require"; but he should apply to the court or master as to any considerable outlay, and always to the court in advance if the outlay is great. Hence a receiver will not be allowed a disbursement for advertising for a business where a firm which used his name as the firm name was benefited thereby. *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660. In *Raht v. Attrill*, 106 N. Y. 423 (1887), the court said in regard to receivers' expenses: "The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses which are called expenses of reservation, may be incurred under the order of the court on the credit of the property; and it follows from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or when necessary out of the corpus of the property before distribution, or before the court passes over the property to those adjudged to be entitled. . . . It would be difficult to define by a rule applicable in every case what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by James, L. J., in *Re Regents' Canal, etc. Co.*, L. R. 3 Ch. D. 411, 427 (1875), that 'the only costs for the preservation of the property would be such things as . . . the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.'" A claimant cannot enforce as against the property a contract with the receiver for the furnishing of ties, where that contract was improvident and known so to be by the contractor. The rule is different if the contractor did not know that it was improvident. The fact that a new receiver has been appointed does not change the rule. The succeeding receiver is bound. *Vanderbilt v. Central R. R.*, 43 N. J. Eq. 669 (1887), rev'g *Lehigh, etc. Co. v. Central R. R.*, 41 N. J. Eq. 167 (1886), and passing upon the same case as reported in 35 N. J. Eq. 426,

no power to grant illegal rebates;¹ or allow another company to cross his tracks;² or to lease the railroad;³ or to loan the money in his hands;⁴ or release the president from liability to the company for diversion of its funds;⁵ or modify important contracts.⁶ A receiver has no power to sell real estate without an order of the court.⁷ A receiver who sells property without express authority, and loses the

and 38 N. J. Eq. 175. As to a receiver's expenditures, see also § 875, *infra*, and 162 Fed. Rep. 542.

¹ *Handy v. Cleveland, etc. R. R.*, 31 Fed. Rep. 689 (1887). In *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660, Mr. Justice Bradley sustained the receiver in giving a rebate in order to get business, it being shown that other roads did the same. This was prior to the Interstate Commerce Act. *Of. Cutting v. Florida, etc. Co.*, 43 Fed. Rep. 747 (1890). A receiver is not bound to continue a contract to pay rebates, even though it be legal and he has paid those past accruing. He may, however, agree to pay rebates, there being no agreement against others receiving the same rebate. *Kansas Pac. Ry. v. Bayles*, 19 Colo. 348 (1894). Receivers are not subject to penalties imposed for discrimination in freight rates. *Bonner v. Franklin Co-op. Assoc.*, 4 Tex. Civ. App. 166 (1893).

² The receiver has no power to allow another railroad to cross his own road, and a stockholder may enjoin it. *Howlett v. New York, etc. Ry.*, 14 Abb. N. Cas. 328 (1882).

³ A receiver has no inherent power to lease the property. *McMinnville, etc. R. R. v. Huggins*, 62 Tenn. 177 (1873). In this case the court had not authorized the receiver to make a lease.

⁴ In *Attorney-General v. North America, etc. Ins. Co.*, 26 Hun, 294 (1882) (modified, 89 N. Y. 94), the court said: "The strict duty of the receiver holding these funds for distribution, and not for investment, was to keep them separate from all other moneys so that they could at all times

be traced and identified. He ought not, in any way, to use the funds unless by direction of the court. It is true that under some circumstances it may be his duty to see that the fund shall not remain unproductive, but when it becomes necessary to invest it he should apply to the court for instructions, and should make no loans or investments without having first obtained such instructions. If he invests the money he should, we think, in the absence of other directions from the court, invest it in government or real-estate securities, as is the duty of other trustees, for investment, or in the manner prescribed for insurance companies by statute. And he should keep clear, accurate, and precise accounts, otherwise all presumptions are against him and all obscurities are resolved adversely to him. These rules are adopted for the protection of the fund and cannot be too strictly enforced." For breach of these rules the receiver is personally liable and will be charged interest. It is a breach of duty for the receiver to deposit the funds in the bank to his individual credit. *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283 (1893).

⁵ A president sued in Rhode Island for diversion of corporate assets cannot set up a release by a receiver of the corporation in Pennsylvania, although the company was incorporated in the latter state. See *Griswold v. Hazard*, 141 U. S. 260 (1891). See also § 869, *supra*.

⁶ *Day v. Postal Tel. Co.*, 66 Md. 354 (1886).

⁷ *Mason v. Hubner*, 65 Atl. Rep. 367 (Md. 1906).

money in the business, may be held liable for the fair value of the property so sold. He has no inherent power to undertake new work nor to expend more than the court authorizes in completing unfinished work. If he continues operations when he was ordered merely to preserve the property, he is personally liable for the loss.¹ A receiver has no implied power to rent a suite of offices for a term of years. Express authority from the court is necessary.² A receiver cannot condemn land unless the court authorizes him.³ A receiver's agreement to give a perpetual free pass for a right of way is not enforceable.⁴ A receiver should not, on Sunday and by surprise, lay tracks and cross-overs over another company's tracks.⁵ A receiver *pendente lite* has no powers except those expressly conferred.⁶ A receiver has no inherent power to borrow money, but if he does so and becomes insolvent and the debts incurred by him as receiver are proved against his personal estate, because he incurred the debts without order of the court, the court will see that such debts as were properly incurred by him are either paid by him or paid from the corporate assets.⁷ A receiver has inherent power to fix railroad freight rates.⁸ The employees of a receiver may apply to the court to

¹ Hence a receiver of a manufacturing corporation who continues its operation without express authority is personally liable for any loss, and where the property is being consumed by expenses he should apply to the court for permission to sell it. *State, etc. Bank v. Fanning, etc. Co.*, 92 N. W. Rep. 712 (Iowa, 1902). A receiver has no power to carry on the business of a mining corporation unless authorized so to do by the court and the court cannot make his expenses a lien prior to an existing recorded mortgage. *Dalliba v. Riggs*, 82 Pac. Rep. 107 (Idaho, 1905). Where a grain-dealing corporation becomes insolvent and a trustee is appointed and thereafter the president continues to do business on his own account, but uses the name of the corporation, moneys received by him are not subject to the debts of the corporation. *Boyle v. Northwestern, etc. Bank*, 103 N. W. Rep. 1123 (Wis. 1905).

² *Chicago Dep. Vault Co. v. McNulta*, 153 U. S. 554 (1894).

³ *Minneapolis Western Ry. v. Min-* (195)

neapolis, etc. Ry., 61 Minn. 502 (1895). See also § 869, *supra*.

⁴ *Martin v. New York, etc. R. R.*, 36 N. J. Eq. 109 (1882).

⁵ *Chattanooga Terminal Ry. v. Felton*, 69 Fed. Rep. 273 (1895). The court will order its receiver to cease obstructing a highway in violation of a statute. *Felton v. Ackerman*, 61 Fed. Rep. 225 (1894).

⁶ *Decker v. Gardner*, 124 N. Y. 334 (1891). A temporary receiver has no power to employ a truckman, and, it seems, he is personally liable therefor. *Meyer v. Lexow*, 1 N. Y. App. Div. 116 (1896). As to the powers and duties of temporary and permanent receivers respectively, see *Herring v. N. Y., L. E. etc. R. R.*, 105 N. Y. 340 (1887); *Nealis v. American Tube, etc. Co.*, 150 N. Y. 42 (1896). The temporary receiver is more at liberty and under greater obligations to ask the instructions of the court. *People v. St. Nicholas Bank*, 76 Hun, 522 (1894).

⁷ *Re London, etc. Breweries, Ltd.*, 97 L. T. Rep. 541 (1907).

⁸ *Kansas Pac. Ry. v. Bayles*, 19 Colo. 348 (1894).

remedy grievances which they have against the receiver as to their wages. The court will not determine the rate of wages, but if the court is satisfied that the receiver is wrong, a new receiver will be appointed.¹ A receiver has no inherent power to employ counsel, without consent of the court, to oppose a discharge of bankruptcy in another state.² A receiver has no implied power to give a claim to an attorney to enforce on shares.³ A receiver of a corporation owning a mill cannot turn over the mill to another party to operate.⁴

The court will decline to direct and make orders concerning the details of administration of the receiver. "The very object in having a receiver experienced in the management of railroads to represent the court and operate the road and preserve the property preparatory to a sale is to relieve the court from the responsibility of its maintenance and management."⁵ A receiver need not apply to the court for power in regard to the ordinary administration of

1 *Continental Trust Co. v. Toledo*, etc. R. R., 59 Fed. Rep. 514 (1894). Receivers should not reduce wages without giving the employees an opportunity to be heard. *Ames v. Union Pacific Ry.*, 60 Fed. Rep. 674 (1894). As to when the court will allow the receiver to reduce wages, see *U. S. Trust Co. v. Omaha, etc. Ry.*, 63 Fed. Rep. 737 (1894). Where, for years, a schedule of wages has existed, and the company had agreed to maintain the same except on notice of change being given, the court will not have the receiver adopt a new schedule. *Ames v. Union Pac. Ry.*, 62 Fed. Rep. 7 (1894). But in *Thomas v. Cincinnati, etc. Ry.*, 62 Fed. Rep. 17 (1894), the court sustained the receiver in making a ten per cent. reduction, where it was reasonable and other companies were doing the same.

2 *Schwartz v. Rosetta, etc. Co.*, 110 La. 619 (1903).

3 *Henrietta Nat. Bank v. Barrett*, 25 S. W. Rep. 456 (Tex. 1894).

4 *Shadewald v. White*, 74 Minn. 208 (1898).

5 "The receiver is chosen on account of his experience and sound judgment to operate the road for the benefit of the creditors and all concerned. While he is the officer of the court, and subject to the orders and

directions of the latter, yet his instructions are always general in their character. He is expected to look after the details of the business, and to apply to the court from time to time when special instructions seem necessary. The very nature of his relations to the court, and his duties to the creditors, entitle him to the largest decree of discretion possible in the discharge of his duties. . . . His discretion in such management will not be interfered with, except where some abuse and wrong is manifest." If the court is satisfied that the receiver is not managing properly, "it will then interfere, not by assuming to reverse his administration and settle the details of such complaints, but by selecting a new receiver, to whom such matters can more satisfactorily be intrusted." *Continental Trust Co. v. Toledo, etc. R. R.*, 59 Fed. Rep. 514 (1894). A receiver of a street railway may compel the conductors to carry boxes into which the fares shall be deposited by the passengers. *Morley v. Saginaw Circuit Judge*, 117 Mich. 246 (1898). A receiver is expected to act on his own responsibility in mere details. *Harriگان v. Gilchrist*, 99 N. W. Rep. 909 (Wis. 1904).

the business, not even in regard to entering into a lease to obtain terminal facilities. The court will sustain his acts unless they involve bad faith or such extravagance as to be unconscionable.¹ A receiver may contract for transportation beyond the line of his road and may assume liability over connecting lines.² A receiver may personally preserve an equity belonging to the estate, if the court with full knowledge directs that the estate shall not preserve it, and will have a lien thereon for his expenditures, the profit to go to the trust fund.³

The order appointing the receiver may compel the company to turn over to him all the books of the company and also the seal.⁴ Where a corporation makes an assignment for the benefit of creditors, the assignee is entitled to all its books, including minute books.⁵

After dissolution proceedings have been commenced it is in the discretion of the court whether to allow a transfer on the books of the company, the court saying that such transfers should not be allowed except for strong reasons.⁶ The books of the company in his hands should be open to all parties.⁷ The court may direct a receiver to permit an examination of the corporate books, even though the company objects thereto.⁸ The court will order the receiver to allow a stockholder and bondholder to examine the property.⁹ A receiver of an insolvent bank must allow the district attorney to examine the

1 *State, etc. v. Port Royal, etc. Ry.*, 89 Fed. Rep. 565 (1898).

2 *Farmers', etc. Co. v. Northern Pac. R. R.*, 120 Fed. Rep. 873 (1903).

3 *Harrigan v. Gilchrist*, 99 N. W. Rep. 909 (Wis. 1904).

4 *American Const. Co. v. Jacksonville, etc. Ry.*, 52 Fed. Rep. 937 (1892). The receiver is entitled to the books, documents, and papers of the company. *Engel v. South Metropolitan, etc. Co.*, L. R. [1892] 1 Ch. 442.

5 *Lothrop, etc. Co. v. Williams*, 191 Mass. 353 (1906).

6 *Re Onward Bldg. Soc.*, [1891] 2 Q. B. 463. See also cases in note 2, p. 730, *supra*.

7 *Fowler's Petition*, 9 Abb. N. Cas. 268 (1878). He is entitled to the books. A receiver will be ordered to open the books to a stockholder, even though the stockholder wishes to obtain facts to induce other stockholders not to enter a reorganization which has been agreed to by a majority of the stockholders. The receiver may

properly refuse such request until ordered to open the books by the court. The receiver, however, should remain neutral as between the opposing parties. Where, however, the stockholder became such six months after the appointment of a receiver, his application to examine the books will be denied. *Chable v. Nicaragua Canal Co.*, 59 Fed. Rep. 846 (1894). See also *Lindley on Companies*, pp. 704, etc. A stockholder in Pennsylvania may have a *mandamus* to compel the company to allow him to inspect and take a copy of the list of stockholders, his purpose being to consult them and obtain proxies from other stockholders. It is immaterial that a receiver is in charge of the property under a foreclosure. Such a receiver has nothing to do with the stock-book. *Commonwealth v. Philadelphia, etc. R. R.*, 3 Pa. Dist. 115 (1893).

8 *State v. Talty*, 139 Mo. 379 (1897).

9 *Henszey v. Langdon-Henszey, etc. Co.*, 80 Fed. Rep. 178 (1897).

books and papers to ascertain the condition of the bank and whether the officers had criminally received deposits after the bank became insolvent.¹

The court may authorize its receiver to complete a line of railroad which is in his possession;² to enter into and carry out traffic contracts with other companies;³ at the instance of second-mortgage bondholders, to pay the interest on the first mortgage and to borrow money for that purpose;⁴ to borrow money to pay certain claims;⁵

¹ *McElree v. Darlington*, 187 Pa. St. 593 (1898).

² Where two out of twenty miles of road are uncompleted, the receiver may be authorized to complete them in order to prevent a forfeiture of a land grant. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. A receiver may complete a railroad partially built as well as operate one completed. *Moran v. Lydecker*, 27 Hun, 582 (1882). In *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 586 (1880), the court authorized its receiver to expend \$10,000 to aid in building a short branch road, it subsequently turning out to be profitable. In *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660, the court authorized the purchase of more rolling-stock, but refused to order the construction of a connecting link of road and the purchase of a bridge. A receiver may be authorized to complete uncompleted contracts. *Harriگان v. Gilchrist*, 99 N. W. Rep. 909 (Wis. 1904).

³ A receiver will be ordered to turn over to another railroad such part of the income from a pooling contract as has come into the receiver's hands from the corporation of which he is receiver, so far as the same was to go to the other railroad by the terms of the pooling contract. *Central Trust Co. v. Ohio Cent. R. R.*, 23 Fed. Rep. 306 (1885). A receiver may pay the proper amount of freight to a connecting road, he having collected freight for the whole distance. *Meyer v.*

Johnston, 64 Ala. 603 (1879). Where two railroads are in the hands of receivers appointed by the same court, the court has power to modify an existing contract relative to the use of the terminal of one by the other, and to reduce the rent called for by the contract. *Re New Jersey, etc. Ry.*, 29 N. J. Eq. 67 (1878). Funds coming into the hands of a receiver by reason of a traffic contract with another line, such funds belonging to the other line, may be attached for a debt of the latter. *First Nat. Bank v. Portland, etc. R. R.*, 2 Fed. Rep. 831 (1880). A receiver's traffic contracts are terminable at will where no time is specified in the contract. No notice is necessary. *Investment Co. etc. v. Ohio, etc. Ry.*, 41 Fed. Rep. 378 (1889).

⁴ *Lloyd v. Chesapeake, etc. R. R.*, 65 Fed. Rep. 351 (1895), a case where the trustees of the first mortgage opposed the payment of their interest. The court will order the receivers to pay coupons of the second mortgage where not to do so will result in destroying the system and sacrificing property, especially where there is doubt as to the priority of the mortgages. *Park v. New York, etc. R. R.*, 64 Fed. Rep. 190 (1894). The receiver will not be ordered to pay the interest on an underlying mortgage where the application does not allege a possible dismemberment of the system, and the receiver was appointed at the instance of the railroad, and the money is needed to pay receiver's debts. *Cleveland, etc. R. R. v. Knick-*

to cease diverting traffic from its proper channel;¹ to take a lease of a connecting line;² to lease the property for a reasonable time;³

erbocker Trust Co., 64 Fed. Rep. 623 (1894). The income during the receivership will be apportioned for the payment of taxes and interest on underlying mortgages, but the court may vary the amount to be paid to a particular division. Debts for labor, etc., have a preference, and are a lien on the whole system, though incurred by one division. *Central Trust Co. v. Wabash, etc. Ry.*, 30 Fed. Rep. 332 (1887). Before authorizing the receiver to pay interest on bonds the court will have a master take testimony as to the assets and liabilities. *Pennsylvania Steel Co. v. New York City Ry.*, 158 Fed. Rep. 460 (1908). Where in a foreclosure suit the interest is paid by the receiver on the first mortgage, and the first mortgagee purchases the property at the sale, such interest is not a diversion of the earnings from the general creditors. *Farmers' L. & T. Co. v. Fidelity, etc. Co.*, 41 S. W. Rep. 113 (Tex. 1897). Where the funds in the hands of the receiver are sufficient for that purpose after paying operating expenses, the court may direct the payment of the interest on the first mortgage bonds, the suit being for the foreclosure of a second mortgage. *Peoria, etc. Ry. v. Central T. Co.*, 83 Fed. Rep. 910 (1897). The court will not order accrued earnings to be applied to the payment of coupons before the foreclosure sale where the funds are insufficient to pay all of such coupons. *Louisville, etc. R. R. v. Schmidt*, 52 S. W. Rep. 835 (Ky. 1899). Where a junior mortgagee causes the receiver to pay interest on underlying mortgages, he cannot afterwards claim that such underlying mortgages, which are finally foreclosed on the same proceeding, should bear a part of such expense. *New York, etc. T. Co. v. Louisville, etc. R. R.*, 102 Fed. Rep. 382 (1900). The court will not direct

the receiver to pay the interest on the fourth-mortgage bonds in order to prevent the principal becoming due, there being default on prior mortgages. *Brown v. New York, etc. R. R.*, 22 How. Pr. 451 (1859).

¹ The court may order its receiver not to divert freight from the road of a petitioner. *Grand, etc. Ry. v. Central, etc. R. R.*, 84 Fed. Rep. 66 (1897).

² A receiver may be authorized to acquire a connecting line by lease for the purpose of reaching a commercial center. Authority to him to do so may be given without notice to the parties to the suit. For illustrations of the remarkable extent to which courts have gone in allowing receivers to expend money, see this case, *Mercantile Trust Co. v. Missouri, etc. Ry.*, 41 Fed. Rep. 8 (1889). The court authorized the receiver to take leases of two other roads, in *Gibert v. Washington, etc. R. R.*, 33 Gratt. (Va.) 536 (1880). In *Re La Crosse R. R. Bridge*, 2 Dill. 465 (1873); s. c., 14 Fed. Cas. 919, the court authorized the receiver to make a contract binding him, the company, purchasers, assignees, etc., for ten years to pay certain tolls for the use of a bridge to be constructed at the terminus of the road under foreclosure in that case. At the end of ten years the rates were to be readjusted every five years by the court, if necessary, with a right to purchase at the end of twenty years.

³ A receiver *pendente lite* may be authorized to make a lease of real estate for three years, that being the customary period of leases, even though the receivership does not continue for that length of time. *Weeks v. Weeks*, 106 N. Y. 626 (1887). See also *Daniell's Eq. Pl. & Pr.* (5th ed.), p. 1749. A court has no power as against the dissent of minority stockholders and bondholders, however small their hold-

to condemn land;¹ to compromise claims;² to aid a corporation whose stock the receiver holds;³ to enjoin the company he represents from constructing a parallel line;⁴ to buy rolling stock⁵ and steel rails;⁶ to sell and assign the choses in action which come into his

ings, to reorganize the company by authorizing the receivers to lease the property for a long period of time and allow the lessee to place a large mortgage on the property, even though the proceeds of the mortgage are to be used for rebuilding the property, especially where the rebuilding is not subject to the orders of the court or the wishes of the security holders. The court has no such power, even though the system is made up of a great many different street railways with different franchises, some of which have lapsed and there is danger that the entire property will be lost if the offer of the city to grant a new franchise on certain terms is not excepted. *Merchants', etc. Co. v. Chicago Rys.*, 158 Fed. Rep. 923 (1907), *rev'g Guaranty T. Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 913 (1907). Thereupon the trustees in their foreclosure suit applied for decrees of foreclosure and petitioned the court in the meantime to have the company operated by the reorganized company, and the court so ordered. *Guaranty Trust Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 1015 (1908). The court may authorize its receiver to lease a railroad for one year with an option to the lessee to renew the lease for another year. If before the expiration of the term the foreclosure sale takes place and the purchaser is put in possession, damages should be allowed to the lessee for losing possession. Usually a provision for cancellation should be inserted in such leases. *Farmers', etc. Co. v. Eaton*, 114 Fed. Rep. 14 (1902). Where the receiver is authorized to make a lease of all the property and does so, the lessee is entitled to rents and the mortgagee is not entitled

thereto. *Western Union Tel. Co. v. Boston Safe D. & T. Co.*, 87 Fed. Rep. 788 (1898). A lease made by the receiver with the consent of the court is binding on the mortgagee at whose instance the receiver was appointed, and hence if the receiver collects from others compensation for the use of the wires it belongs to the lessee. *Western Union Tel. Co. v. Boston, etc. Co.*, 112 Fed. Rep. 37 (1901). Where the court in a suit for the foreclosure of a mortgage authorizes the receiver to lease a part of the railroad of the company, whose mortgage is being foreclosed, and no appeal is taken from the order, the purchaser at the foreclosure sale cannot, by a summary proceeding, claim such property free from the lease. *Farmers' Trust Co. v. Staten Island, etc. R. R.*, 6 N. Y. App. Div. 148 (1896).

1 See § 869, *supra*.

2 See § 869, *supra*.

3 The court may authorize the receiver to loan money to a corporation whose stock he holds. *Kalbfleisch v. Kalbfleisch*, 13 N. Y. Supp. 397 (1891).

4 In *Pullan v. Cincinnati, etc. R. R.*, 4 Biss. 35 (1865); s. c., 20 Fed. Cas. 32, the court enjoined the company from proceeding to construct a new line parallel to the one under foreclosure.

5 *Wabash, etc. Ry. v. Central Trust Co.*, 22 Fed. Rep. 269 (1884). In *Re Eastern, etc. Ry.*, 66 L. T. Rep. 153 (1891), the court authorized the receiver to make a contract for additional rolling-stock.

6 The receivers may be authorized to receive and pay for steel rails that were ready for delivery when they were appointed. *Wabash, etc. Ry. v. Central Trust Co.*, 22 Fed. Rep. 269 (1884).

hands;¹ and to purchase supplies.² A receiver of a street railway may be ordered to discontinue transfers.³ A court will not order the receiver to take part in an investigation by a state commission, inasmuch as that is the province of the owners of the property.⁴

The court may authorize a receiver of a mining company to purchase machinery, and his application to do so may be *ex parte*.⁵

Where a road is being operated by a receiver at a loss, the court may authorize him to turn over such road for operation to a connecting company without any rental being paid, such operation to continue during the receivership and the receiver to be alone liable for damages arising during the operation. Such a contract is not a lease, but makes the operating company merely the agent of the receiver, and is legal where the statutes authorize leases of railroads. Even though the receiver makes such a contract without special authority from the court so to do, yet, where for many months all the parties and the court with full knowledge of the same do not object the contract is legal.⁶ It is not legal for a receiver, even under an order of the court, to sell nearly all the property of the company to another corporation in exchange for stock of the latter to be given to stockholders of the former with a provision that dissenting stockholders should be paid on a certain basis, which is different from stock of the former corporation acquired by the latter corporation.⁷ The court will not order a sale by the receiver where the purpose of the receivership was to complete a railroad and save certain subsidies and that purpose has not yet been accomplished.⁸

A receiver of a bank may be authorized by the court to sell at public or private sale a judgment held by the receiver.⁹ The court may order a receiver to sell shares of stock held by the receiver in one block instead of in parcels, if the court deems best.¹⁰ A stockholder will be allowed to intervene and object to a reckless sale of the property of an insolvent corporation by the receiver thereof, where the corporation itself is not protecting the interests of the stockholder.¹¹ A private

¹ Hoyt v. Thompson, 5 N. Y. 320 (1851).

² A receiver may be authorized to purchase supplies for a hotel of which he is receiver. Highland, etc. R. R. v. Thornton, 105 Ala. 225 (1894).

³ Re Receiverships of Street Rys., 161 Fed. Rep. 879 (1908).

⁴ Pennsylvania Steel Co. v. New York City Ry., 157 Fed. Rep. 440 (1907).

⁵ Free, etc. Co. v. Splers, 135 Cal. 130 (1902).

⁶ South Carolina, etc. R. R. v. Car. etc. Ry., 93 Fed. Rep. 543 (1899).

⁷ People v. Anglo-American, etc. Assoc., 60 N. Y. App. Div. 389 (1901).

⁸ Bibber-White Co. v. White River, etc. R. R., 110 Fed. Rep. 472 (1901).

⁹ Matter of Denison, 114 N. Y. 621 (1889).

¹⁰ First Nat. Bank v. C. Bunting & Co., 63 Pac. Rep. 694 (Idaho, 1900). See also § 478, *supra*.

¹¹ State v. Holmes, 60 Neb. 39 (1900).

sale of the property by a receiver at a small price, made without authority from the court, will be set aside at the instance of the corporation or of the majority stockholders.¹ A sale by a commissioner to a bank in which he is a stockholder and director is invalid, irrespective of whether the sale and price were fair.² Even though a receiver's sale of property is a private sale, and before it is confirmed another party makes a higher bid, nevertheless, if there was no fraud or mistake chargeable against the purchaser, the court will confirm the sale, notwithstanding the objection of a stockholder and of the competing bidder.³ The validity of a judicial sale of the assets of an insolvent corporation by a receiver cannot be impeached in a collateral action.⁴ The title obtained at a receiver's sale is only such title as the corporation had and is subject to all valid liens thereon.⁵ Where the court has expressly authorized the receiver of a bank to make a sale of a judgment owned by the receiver, and such sale is made, the court may compel the purchaser to complete the contract.⁶ A receiver in a mortgage foreclosure suit may be authorized to sell the property subject to the mortgage and without redemption.⁷ A court may authorize a receiver in a railroad foreclosure suit to stop the operation of unprofitable parts of a railroad and to tear up the tracks and sell the same.⁸ Although a receiver is authorized to purchase material,

¹ So. Baltimore, etc. Co. v. Kirby, 89 Md. 52 (1899).

² McCullough, etc. Co. v. National Bank, etc., 111 Ga. 132 (1900). The pledgee of stock cannot claim title to it on the ground that the pledgor was a receiver and purchased the stock at a receiver's sale. Groetz v. Cole, 103 N. W. Rep. 977 (Iowa, 1905). See also § 850, *supra*.

³ Rogers v. Rogers, etc. Co., 62 N. J. Eq. 111 (1901).

⁴ Anderson v. Chicago, etc. T. Co., 101 Wis. 385 (1898). A purchaser at a receiver's sale cannot object that the receiver himself did not make the sale and that a statute as to notice of sale by execution is applicable to receivers' sales. Threadgill v. Colcord, 85 Pac. Rep. 703 (Okla. 1906).

⁵ Matter of Coleman, 174 N. Y. 373 (1903).

⁶ Matter of Denison, 114 N. Y. 621 (1889).

⁷ Mercantile Realty Co. v. Stetson, 94 N. W. Rep. 859 (Iowa, 1903).

⁸ Where a worthless railroad has been dismantled by the receiver and the rails and rolling stock sold, a purchaser at foreclosure sale cannot be required by the state to reconstruct and operate the road. State v. Jack, 145 Fed. Rep. 281 (1906). The attorney-general of a state may file a bill in the state court to enjoin a federal receiver from tearing up a railroad, in accordance with an order of the federal court. *In re Attorney-General*, 88 N. W. Rep. 912 (Wis. 1902). The court may authorize its receiver to dismantle a railroad and sell the materials where it has been and would have to be operated at a loss, there being no statute requiring such operation. Jack v. Williams, 113 Fed. Rep. 823 (1902). It is not contempt of the federal court to institute a suit in the state court to enjoin the federal receiver from tearing up a railroad track, provided there is no actual physical interference with the possession of the federal

yet he is not authorized to issue notes therefor, and hence is personally liable on such notes.¹ The powers of a receiver may be enlarged on his application or on the court's own motion.² Advisory orders in a receivership are properly entered *ex parte*.³

In regard to the powers which the court will not give him, the court will not authorize him to continue the insurance business,⁴ or reduce rates when the state statute directing it is of doubtful constitutionality,⁵ or pay the expenses of a reorganization,⁶ or sell rolling-stock on credit to raise money to pay interest.⁷ A gas company may refuse to supply gas to the receiver of a corporation where the corporation itself has not paid back bills.⁸ The court will order the receiver to pay a sum to a telegraph company, where the telegraph company otherwise will withdraw the services.⁹ A state statute regulating the powers and duties of receivers is not applicable to receivers in the federal courts.¹⁰

Even after a foreclosure decree has been entered, persons, who were not parties to the suit, but who had made an agreement with the receiver relative to the abandonment of a strip of street railway and the franchise therefor, which agreement has been confirmed by the city and carried out, may file an independent bill in equity to have the decree modified.¹¹ The purchaser at a receiver's sale may, by the terms of the purchase, as laid down in the decree authorizing the sale,

court. *Royal T. Co. v. Washburn, etc.* R. R., 139 Fed. Rep. 865 (1905).

¹ *Peoria, etc. v. Hickey*, 81 N. W. Rep. 473 (Iowa, 1900).

² *State v. City of New Orleans*, 106 La. 469 (1901).

³ *Harrigan v. Gilchrist*, 99 N. W. Rep. 909 (Wis. 1904).

⁴ A receiver will not be allowed to continue the business of an insolvent insurance corporation where the effect would be to freeze out the policyholders by the assessments. *People v. Atlantic, etc. Ins. Co.*, 15 Hun, 84 (1878); *aff'd*, 77 N. Y. 336.

⁵ Where a receiver is in charge, he will not be ordered by the federal court to reduce the rates in accordance with a state statute which is not being obeyed by other roads, and the validity of which is being tested, but he will be allowed to obey it if he thinks best, or the trustees of the mortgage desire him so to do. The court, however will allow a shipper

to sue the receiver for the excess of charges. *Re McElrath*, 2 Dill. 460 (1873); s. c., 16 Fed. Cas. 72.

⁶ In *Central Trust Co. v. Wabash, etc. Ry.*, 25 Fed. Rep. 69 (1885), the court refused to allow payment out of the fund in court of the expenses of reorganization.

⁷ The court will not authorize the receiver to borrow money by selling the rolling-stock to a car trust and then taking back the same on the instalment plan. *Taylor v. Philadelphia, etc. R. R.*, 9 Fed. Rep. 1 (1881).

⁸ *Paterson v. Gas, etc. Co.*, [1896] 2 Ch. 476, *rev'g* 74 L. T. Rep. 280.

⁹ *Newgass v. Atlantic, etc. Ry.*, 72 Fed. Rep. 712 (1894).

¹⁰ *Guaranty, etc. Co. v. Galveston, etc. R. R.*, 107 Fed. Rep. 311 (1901).

¹¹ *Thompson v. Schenectady Ry.*, 119 Fed. Rep. 634 (1903). *Cf.* *Thompson v. Schenectady Ry.*, 131 Fed. Rep. 577 (1904).

be bound to carry out all contracts which have been made by the receiver.¹

§ 873. *Rolling-stock—Liability of the receiver and the fund for car rentals—Purchases of rolling-stock.*—The court may authorize a receiver to purchase or rent rolling-stock for the operation of the road. If the rolling-stock which the receiver finds upon the road when he takes possession is not owned but is rented to the company, and if the receiver continues to use such rolling-stock, then the court will direct that a reasonable rental be paid therefor by the receiver.²

Where, however, the receiver finds the company in possession of rolling-stock under a "car trust," or lease or contract whereby the stipulated rental is really a partial payment for the cars, the court may direct the receiver to continue the payments and thus complete the purchase, or the court may order the receiver to deliver the property to the owners.³

1 See § 890, *infra*, and notes on p. 3109, *supra*. An agreement between the receiver of a street railway and a city by which the street railway is discontinued on a certain street does not bind the purchaser at foreclosure sale, such agreement having been made after the decree of foreclosure. *Thompson v. Schenectady Ry.*, 131 Fed. Rep. 577 (1904).

2 The receiver must pay a reasonable rental on car-trust cars which he decides finally to return to the owner. He is entitled to a reasonable time to decide. *Platt v. Philadelphia, etc. R. R.*, 84 Fed. Rep. 535 (1898). Where a receiver continues to use rolling-stock belonging to another, the fund in court will be used to pay the rental therefor, and also for repairs which the receiver should have made but did not make. *Turner v. Indianapolis, etc. Ry.*, 8 Biss. 527 (1879); s. c., 24 Fed. Cas. 372. The court having in its decree retained jurisdiction of the case to settle and adjudicate claims may pass upon the claim of another railroad company for rental for its cars used by the receiver and the reorganized company. *Central Trust Co. v. Wabash, etc. Ry.*, 46 Fed. Rep. 156 (1891). The receiver

may be authorized to purchase the rolling-stock which is found on the road, but which belongs to another company, the stock having been placed on the road without any contract whatsoever. *Central Trust Co. v. Marietta, etc. R. R.*, 48 Fed. Rep. 32 (1891). Where the road is entirely without rolling-stock, the court may authorize the receiver to purchase such as is necessary for the operation of the road. *McLane v. Placerville, etc. R. R.*, 66 Cal. 606, 626 (1885).

3 The receiver should pay instalments due to a car trust, although the trust has merely a mortgage interest in the cars. The receiver should pay this the same as though he were purchasing rolling-stock to operate the road. It is a proper charge on income in preference to the bondholders' interest. It is for the court to say whether rental be paid or the contract of purchase of the cars be completed. In this case the receiver was ordered to continue making the partial payments. But inasmuch as supply and labor claims were in arrears, the court ordered a cessation of the payments on the cars for the time being. The court

§ 874. *Contracts in force when the receiver is appointed—Leaseholds which pass into the hands of a receiver—Rent paid by the receiver on lines of railroad leased to him—Royalties, etc., paid by the receiver.*—When a receiver is appointed, he generally finds a number of executory contracts in force—contracts of employment or for rental of premises or for purchase of material, etc. He then must decide whether he wishes to adopt any of these contracts as his own. If he does not adopt a particular contract, then that contractor has no preferred claim against the receiver, as a part of the receiver's expenses or disbursements, but has merely a claim against the corporation and its general assets, and this claim may be for past sums due, or for breach of contract, or both. On the other hand if the receiver does adopt the contract, then as to sums becoming due

held that the labor and supply claims took precedence over the car claims in payments from income. *Frank v. Denver, etc. Ry.*, 23 Fed. Rep. 123 (1885). Car rentals during the receivership in foreclosure proceedings should be paid out of the final assets, even though the receiver operated the road at a loss. All the rolling-stock is entitled to the rental, whether used by the receiver or not. If there was too much, the bill of foreclosure should not have asked for a receiver of all of it. *Kneeland v. American L. & T. Co.*, 136 U. S. 89 (1890). Where a receiver avoids a lease he must return equipment equal to what was received, where the lease expressly so provided. *Johnson v. Lehigh, etc. Co.*, 138 Fed. Rep. 601 (1905). In a railway mortgage foreclosure a car claim will be determined upon its merits and not upon the agreements, where the same persons controlled the railway and also the car company. Such rental will be allowed as similar cars would have received from other railroad companies. The rental on the cars for six months prior to the appointment of the receiver and for subsequent time will be paid out of the income and out of the fund realized upon the sale of the property. Interest is allowed where there has been a vexatious and unreasonable delay in payment. Certain

repairs also, which the receiver had agreed to make, were allowed. *Thomas v. Peoria, etc. Ry.*, 36 Fed. Rep. 808 (1888). Although a receiver continues to use the cars of a car trust, after delivery thereof to the car trust has been demanded by the latter, the partial payments therefor not having been met by the receiver, nevertheless the court will not order the receiver to make such partial payments. The court will allow the car trust a reasonable rental. *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 42 Fed. Rep. 6 (1889). The lessor of the rolling-stock which the lessee contracts to purchase on the instalment plan cannot insist on the receiver paying the balance due and taking the rolling-stock, where the contract provided for a return of the rolling-stock in case of inability to pay. It is doubtful whether the partial payments could be recovered back by the receiver. *Sunflower Oil Co. v. Wilson*, 142 U. S. 313 (1892); *Fosdick v. Schall*, 99 U. S. 235 (1878); *Fosdick v. Car Co.*, 99 U. S. 256 (1878); *Huidekoper v. Locomotive Works*, 99 U. S. 258 (1878). In determining the amount of rent which the receiver should pay for rolling-stock, the court will add to the cost price any increase in the value thereof. *Central T. Co. v. Marietta, etc. Ry.*, 48 Fed. Rep. 875 (1891).

before such adoption, the contractor is a general creditor only, but as to sums becoming due after such adoption, they are a part of the receiver's expenses or disbursements and must be paid as such. The law is clear that a receiver may refuse to carry out an executory contract of the corporation.¹ This rule works both ways. Where a contractor has but partially completed his contract, and a receiver is appointed, he is entitled to consider the contract as abandoned on that day, but before deciding he may wait a reasonable time to see what the parties in interest or the receiver do in regard to the completion of the contract.²

These principles of law are applicable where a receiver is put in charge at the instance of a mortgagee, and he finds several lines of railroad already leased to and in operation by the insolvent mortgagor company. The question then arises, what shall he do? Shall he continue to operate the leased lines and pay the stipulated rental, or shall he cut them off? The courts have finally settled on the rule that he may operate them for a short time to determine whether he cares to assume the lease and the payment of the rental. The court will then direct him to assume the lease, or, if an opposite course is determined upon, the court will authorize the lessor company to retake its property, unless it is willing that the receiver retain possession and pay such rental as the profits of the leased line will justify.³

1 *Scott v. Rainier, etc. Ry.*, 13 Wash. 108 (1895). The receiver need not fulfill an executory contract of the corporation to purchase land. *Central Trust Co. v. East Tennessee Land Co.*, 79 Fed. Rep. 19 (1897). An agreement between a railroad and its employees does not bind a receiver. *Re Seattle, etc. Ry.*, 61 Fed. Rep. 541 (1894). Where the receiver refuses to accept merchandise bought by the company, and the vendor sells it for the receiver's account, without consent of the court, he is not guilty of contempt of court, and cannot recover the loss. *Moore v. Potter*, 155 N. Y. 481 (1898), rev'g 87 Hun, 334. The court, however, may authorize a receiver appointed in a suit for dissolution to execute and carry out existing contracts of the corporation, or to enter into and carry out new contracts. Even after the dissolution the receiver may be authorized to com-

plete contracts. *Florence Gas, etc. Co. v. Hanby*, 101 Ala. 15 (1893). The court may authorize the receiver to adopt a traffic or running contract whereby each of two railroads ran over tracks of the other. *Seibert v. Minneapolis, etc. Ry.*, 58 Minn. 53 (1894). A guaranty of coal that may be bought may be enforced by a receiver, although the guaranty was before the receivership, and the sale of coal was by the receiver himself. *Philadelphia, etc. Co. v. Daube*, 71 Fed. Rep. 583 (1896). See also § 642, *supra*.

2 *Commonwealth, etc. Co. v. North American T. Co.*, 135 Fed. Rep. 984 (1905).

3 A receiver may take possession of leased property and use the same for a reasonable time to enable him to elect whether he will assume the lease as to rent accruing after his appointment, or whether he will surrender

Such a receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of the insolvent mortgagor,

the lease and pay rent for the time he actually holds it. Where the order of the court directs the receiver to take possession of all the properties, the fact that certain leasehold property was not in use is immaterial, where the receiver delays for over a year after the lessor has demanded the rent in deciding whether he will assume the lease. *Dayton, etc. Co. v. Falsenthall*, 116 Fed. Rep. 961 (1902). Where the receiver, under authority given by the court, continues to operate leased lines instead of cutting them off or negotiating for a reduction of rental, he must pay the contract rental, even though he operates them at a loss. *Woodruff v. Erie Ry.*, 93 N. Y. 609 (1883). The court will order a receiver to pay the rent of a railroad for the time during which the receiver operated it, where the continuance and preservation of the leasehold was clearly intended in the foreclosure proceedings. The lessor railroad is not liable for any part of the expenses of foreclosure. *Brown v. Toledo, etc. R. R.*, 35 Fed. Rep. 444 (1888). The appointment of a receiver of a system of railroads, made up largely of leased lines, does not obligate the receiver to pay the rental on such leased lines as do not pay operating expenses. But the court will order payment of the rent on those leased lines which earn more than operating expenses, such payment to be made from the profits derived from such leased lines. *Central Trust Co. v. Wabash, etc. Ry.*, 34 Fed. Rep. 259 (1888). Where the receivers are operating the whole system, consisting of many leased lines, the accounts of each leased line will be kept separately, and the expenses of each reduced if possible, until it pays operating expenses. If unable to do so, receiver's certificates on the whole system will be issued to aid such leased line. *Central Trust Co. v. Wabash, etc. Ry.*, 23 Fed. Rep. 863 (1885). Where the court orders that any lessor of a railroad to a system of railroads which is undergoing foreclosure may retake possession for non-payment of rent, and then orders the receiver to pay certain rent to a certain lessor after other previous orders for payments of money are fulfilled, such lessor, on the final accounting, cannot claim that he is entitled to payment absolutely. *Central Trust Co. v. Wabash, etc. Ry.*, 38 Fed. Rep. 63 (1889). Where the statute does not vest title in the receiver, he is not liable on a lease merely because he takes possession of it, but is liable only for a reasonable rental. *Bell v. American Protective League*, 163 Mass. 558 (1895). A lessor has no preferred claim for rentals accruing during the receivership, where the lessor did not demand either possession or a confirmation of the lease when the receiver went in. *New York, Pa. etc. R. R. v. New York, Lake Erie, etc. R. R.*, 58 Fed. Rep. 268 (1893). As against rentals accruing during the receivership, the receiver cannot set off claims existing prior to the receivership. *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 58 Fed. Rep. 257 (1893). Where, upon the appointment of the receiver, a lessor of a line of which the receiver takes possession demands of the receiver and of the court either an adoption or a rescission of the lease, and the decision of the court is delayed several months, the receiver must pay the full rental up to the time of the decision. *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 58 Fed. Rep. 257 (1893). Where by the terms of a lease the net earnings are to be used to pay mortgage bondholders of the lessor, and the lessee afterwards passes into a receiver's hands, the

if, in his opinion, it would be unprofitable or undesirable to do so. The receiver is entitled to a reasonable time in which to elect

court will enforce such agreement. *Grand Trunk Ry. v. Central R. R.*, 78 Fed. Rep. 690 (1897). Past-due rent on a road leased to the insolvent company will not be paid out of the proceeds of the foreclosure sale of the property of the lessee, where the receiver of the latter threw up the lease. *Central Trust Co. v. Charlotte, etc. R. R.*, 65 Fed. Rep. 264 (1895). Rentals accruing prior to a receivership are unsecured liabilities, even though the lease provides that the lessor shall have a certain part of the rental when it does not exceed a certain figure. *New York, Pa. etc. R. R. v. New York, Lake Erie, etc. R. R.*, 58 Fed. Rep. 268 (1893). Where the receiver operates the leased line for eighteen months and pays part of the rent and keeps no separate account, the stipulated rent must be paid from the time that the receiver was in possession. *Central, etc. Co. v. Farmers' L. & T. Co.*, 79 Fed. Rep. 158 (1897). Where the receiver continues the operation under a lease, which lease contains a provision for purchase also, the receiver is bound by the instrument. *Mercantile Trust Co. v. Atlantic, etc. R. R.*, 80 Fed. Rep. 18 (1897). The expenses and deficits incurred by the receiver in operating a leased road during the time when he was deciding as to whether to accept the lease or not are not chargeable upon the mortgaged property in the receiver's hands. *Mercantile Trust Co. v. Farmers' L. & T. Co.*, 81 Fed. Rep. 254 (1897). If the receiver continues a lease of cars he must pay the rental, even though the payment is made out of the *corpus* of the estate. *Mercantile, etc. Co. v. Southern, etc. Co.*, 113 Ala. 543 (1897). A receiver, within a reasonable time after taking possession, may refuse to continue a lease which the company had accepted, and may refuse to be bound by a guaranty

of the bonds of the lessor. *Ames v. Union Pac. Ry.*, 60 Fed. Rep. 966 (1894). Even though the receiver retains possession of a leased railroad for ten months, he may be liable only for a reasonable rental, it being shown that negotiations had been going on during that time for a reduction of the contract rental. *Carswell v. Farmers' L. & T. Co.*, 74 Fed. Rep. 88 (1896). A receiver will not be ordered to assume a lease merely because the company which he represents is solvent. *Empire Distilling Co. v. McNulta*, 77 Fed. Rep. 700 (1897).

Where a lease gives to the lessor thirty per cent. of the gross earnings this thirty per cent. is not a rental or a mere obligation to pay, but is impressed with the trust, and having been made payable to the bondholders of the lessor they may collect it from the receiver of the lessee. *Terre Haute, etc. R. R. v. Cox*, 102 Fed. Rep. 825 (1900). The court will order the receiver to pay rent for premises which he continues to occupy after he takes possession. *People v. Universal, etc. Co.*, 30 Hun, 142 (1883). A lease of one railroad to another is valid in California, even though in the contract of lease there is a provision that the lessee shall have the right to buy the property. A provision that the lessee shall pay the taxes may be enforced against a receiver of the lessee. *U. S. Trust Co. v. Mercantile Trust Co.*, 88 Fed. Rep. 140 (1898). The court may order its receiver to maintain gates and other safeguards at a railway crossing in accordance with the terms of an existing contract. *Hunt v. Illinois, etc. R. R.*, 96 Fed. Rep. 644 (1899). A receiver cannot have a contract of a corporation set aside as *ultra vires* and cannot recover back payments already made thereon, especially where

whether he will adopt or discontinue such contracts and leases. If he adopts the lease in a foreclosure suit, he becomes vested with the title to the leasehold interest, and becomes liable upon the covenant to pay rent, but a delay of nearly a year by the receiver in deciding to refuse a lease does not prevent his declining to operate under the lease any longer, even though he has operated under it during the

the contract was carried out by the corporation for several years, and was then canceled by mutual agreements before the receiver was appointed, the contract in this case being a ninety-nine year lease of real estate to a bank, upon which real estate the bank erected a building for its own use and for rental. *Brown v. Schleier*, 112 Fed. Rep. 577 (1901); *aff'd*, 194 U. S. 18. Where an express company has an exclusive contract with a railroad company for the entire system of that company, and the system becomes insolvent and disintegrates, and the receiver of the main company refuses to continue the contract, the contract falls as to the entire system. *Smith v. Wells, etc. Co.*, 96 Fed. Rep. 375 (1899). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforceable against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. *Kinsman v. Fisk*, 37 N. Y. App. Div. 443 (1899). A receiver has no power to adopt a contract of a company by which the latter agreed to retain in its employ one of its employees who had been injured. *Whightsel v. Felton*, 95 Fed. Rep. 923 (1899). A person claiming rent accruing during the receivership should file a petition, and it is not the duty of the receiver to file it. *Halsted v. Forest Hill Co.*, 109 Fed. Rep. 820 (1901). Creditors who, after a receiver has been appointed, advance money in compromise of a

claim against the corporation and take notes of the company for the money so advanced, are not entitled to a preference therefor. *Maxwell v. Wilmington, etc. Co.*, 101 Fed. Rep. 852 (1900).

Where a receiver of a lessor railroad is appointed and takes possession, the receiver of the lessee railroad is no longer bound. *Ames v. Union Pac. Ry.*, 60 Fed. Rep. 966 (1894). The receiver of a large system may renounce a lease, even after sixty-five days have expired since he assumed control. *Ames v. Union Pacific Ry.*, 60 Fed. Rep. 966 (1894). Where the receiver operates leased lines for a year, and uses the earnings to pay interest, the court will order him, to that extent, to pay taxes on the road as required by the terms of the lease. *Clyde v. Richmond, etc. R. R.*, 63 Fed. Rep. 21 (1894). Where a receiver has paid back rental to a lessor line amounting to more than the net profits received for many years from that line, although the amount so paid is not equal to the stipulated rental, and about two weeks after the appointment of the receiver the lessor petitions the court to order the receiver to pay the full rental, and to issue receiver's certificates therefor, which certificates shall be prior to all other claims on the lessee's property, the court will refuse to so order. The two weeks' use of the road by the receiver does not constitute an agreement to accept the lease and pay full rental. *Park v. New York, Lake Erie, etc. R. R.*, 57 Fed. Rep. 799 (1893). Where a receiver acts under a lease until its termination, he cannot claim that

intervening time. The lessor or the trustees of its mortgage may intervene at any time in order to compel the receiver to elect. The court may order rent to be paid after certain other preferred debts

the rent should be on a *quantum meruit*, but he must pay the stipulated rent. *Spencer v. World's Columbian Exposition*, 163 Ill. 117 (1896). A receiver cannot, by agreement with a lessor company, abrogate the lease pending the receivership, except by consent of the court. The court will consider the relations to be as they were when the receiver was appointed. *Day v. Postal Tel. Co.*, 66 Md. 354 (1887). Where a lease to a railroad is declared void in a foreclosure suit against the latter, the lessor company has no right to payment of a *quantum meruit* out of the fund arising from the foreclosure sale, it being shown that the lease had been for many years a source of loss to the lessee of the company. *St. Louis, etc. R. R. v. Cleveland, etc. Ry.*, 125 U. S. 658 (1888). The lessor of a railroad to a company that has passed into the hands of a receiver cannot by petition compel the receiver to pay the rent, where the receiver denies that he is operating the road under the lease. The disputed questions of fact and important legal questions involved should be tried by action. The bondholders are necessary parties to such an action. *People v. Erie Ry.*, 54 How. Pr. 59 (1877). The court may authorize the receiver to pay a fair rental, even in preference to the bondholders; also to pay for depreciation, and for supplies used on such road, all in preference to the bondholders. *Miltenberger v. Logansport Ry.*, 106 U. S. 286 (1882). In *Milwaukee, etc. Ry. v. Brooks, etc. Works*, 121 U. S. 430 (1887), the trustee, upon taking possession, notified the lessor of a railroad to the mortgagor company that he, the trustee, discontinued the lease, but would pay a fair compensation. The court upheld this notice. A re-

ceiver may be given power to continue to operate leased railroads and to pay the rental out of the *corpus* of the estate. If he does operate them, the rental fixed by the original contract of lease must be paid. It is no defense to allege that the original lease was *ultra vires*. The court may order the rights of the parties to be determined by action instead of on motion. *Woodruff v. Erie Ry.*, 93 N. Y. 609 (1883). Upon a receiver being appointed, it is proper to order the receiver to take possession of a line which the insolvent mortgagor was operating under a lease, and the receiver is then bound to take possession. If on the final sale, however, there are no surplus assets, and the leased road was operated at a loss, the lessor has no right to payment of rent accruing during the receivership. The court may refuse to order such payment. The receivers are entitled to a reasonable time after taking possession to ascertain whether they desire to assume the lease. *Quincy R. R. v. Humphreys*, 145 U. S. 82 (1892); *St. Joseph, etc. R. R. v. Humphreys*, 145 U. S. 105 (1892). Where the receiver makes a valid contract for repairs on a leased line, he is liable thereon as receiver, although the line is afterwards turned over to another receiver. *Central Trust Co. v. Wabash, etc. Ry.*, 52 Fed. Rep. 908 (1892). Where the receiver is ordered to pay rental for cars he cannot offset repairs made by him while using the cars. *Central Trust Co. v. Wabash, etc. Ry.*, 50 Fed. Rep. 857 (1892). A receiver is not bound by and need not carry out contracts which are in operation relative to rates at the time he takes possession. *Central Trust Co. v. Marietta, etc. Ry.*, 51 Fed. Rep. 15 (1892); *Moran v. Pittsburgh, etc. R. R.*, 32 Fed. Rep.

are paid.¹ A common-law or chancery receiver is a receiver *pendente lite* and does not take title, and hence differs from a statutory receiver, who is practically an assignee; and hence the fact that a common-law receiver continues to occupy leased premises does not render him liable as assignee of the term upon the covenant to pay rent. He may be liable for the time he actually occupies the premises, but such liability can be enforced only in that suit.² A lessor's lien created by the lease itself is good against a receiver for rent accruing during the receivership.³ Where a lessor to a corporation causes a receiver to be appointed of the corporation, and the receiver continues the lease for three months, the latter is bound by the lease, and a lien on the property is valid according to the terms of the lease.⁴ Where the lessor of a railroad serves notice of cancellation of the lease for non-payment of rent, but such notice is not served until after a receiver of the lessee has been appointed, the court may refuse to allow the forfeiture, provided payment of the rent is made.⁵ A receiver who continues to use patents on which royalties are to be paid must comply with the contract.⁶ The court will order the receiver to pay

878 (1887); *St. Paul, etc. R. R. v. U. S.*, 112 U. S. 733 (1885). See also § 890, *infra*, as to how far a purchaser is bound by leases and contracts. If the mortgage does not cover after-acquired property, the receiver may not have the right to hold the leased road. See § 831, *supra*. As to leased rolling-stock, see § 873, *supra*. As to whether the mortgage covers leaseholds, see § 857, *supra*.

¹ *U. S. Trust Co. v. Wabash Ry.*, 150 U. S. 287 (1893), allowing only one month's rent, although the receiver had operated the road for nearly a year under the lease before electing to cancel the lease.

² *Stokes v. Hoffman House*, 167 N. Y. 554 (1901). A statutory receiver who takes title is liable for rent, but a chancery or court receiver who takes no title, but acts merely as an arm of the court to preserve the property, is liable only for the period of occupancy. *Prince v. Schlesinger*, 116 App. Div. 500 (1906). A receiver may not be liable on leaseholds which the mortgage covered but were not

assigned to the trustee, even though the receiver entered into possession and afterwards gave up possession. *Hand v. Blow*, [1901] 2 Ch. 721.

³ *Lane v. Washington Hotel Co.*, 190 Pa. St. 230 (1899).

⁴ *Link, etc. Co. v. Hughes*, 174 Ill. 155 (1898).

⁵ *Johnson v. Lehigh Valley Traction Co.*, 130 Fed. Rep. 932 (1904).

⁶ A receiver must pay royalties the same as the company would have had to do before it could sell the patented article. *People v. Remington*, 59 Hun, 282 (1891); *aff'd*, 126 N. Y. 654. Where a receiver has taken the benefit of a contract whereby he was to pay royalties, and the patentee applies to the court for pay, it is error for the court to refuse on the ground that the remedy is at law. A petition is the proper remedy. *Andrews v. Stanton*, 18 Ill. App. 163 (1885). Although a license to use a patent is not assignable, yet, where the licensee is a corporation, its receiver may operate under the license. *Emigh v. Chamberlain*, 8 Fed. Cas. 648 (1861).

a sum to a telegraph company, where the telegraph company otherwise will withdraw the services.¹

§ 875. *Payment of operating expense, car rentals, damages, etc., incurred during the receivership—Liability of the company.*—Inasmuch as a receiver takes the income of a railroad, he of course must apply that income first to the payment of the wages of employees, cost of repairs, and to all liabilities incurred by him as receiver in the operation of the road, including damages due to the negligence of his employees. The bondholders will not be allowed to take the income until all the liabilities incurred by the receiver in earning that income are paid. This includes, of course, the ordinary wages of his employees, and the order appointing the receiver generally has a provision to that effect. There are a few cases which pass upon special applications of the rule.²

¹ *Newgass v. Atlantic, etc. Ry.*, 72 Fed. Rep. 712 (1894).

² A receiver may be sued as receiver for coal furnished to a prior receiver. *Cobb v. Sweet*, 46 N. Y. App. Div. 375 (1899). Cars destroyed during the receivership are proper expenses of operation to be paid by the receiver where such cars belonged to third parties. *Grand Trunk Ry. v. Cent. Vt. R. R.*, 88 Fed. Rep. 636 (1898). A bank may charge to a receiver past-due notes of the receiver held by the bank as against deposits of the receiver in the bank. *Durkee v. National Bank, etc.*, 102 Fed. Rep. 845 (1900). Where rolling-stock is purchased by the receivers on the installment plan, the court may order such rolling-stock sold and may order the receiver to pay any deficiency. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). Receiver's certificates and receiver's debts stand alike in distribution, without preference of one over the other, the only preference being for taxes. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). The federal court is not bound to follow state statutes as to payment of employees and the distribution of funds in the hands of its receiver, and the act of congress relative to the management and operation of the property

by a federal receiver does not constitutionally apply to such distribution. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). Personal injuries received in the operation of a road by a receiver are a part of the operating expenses. *South Carolina, etc. R. R. v. Carolina, etc. Ry.*, 93 Fed. Rep. 543 (1899). Where contractors with the receiver have failed to comply and nothing is due them, the subcontractors have no equitable claim on the receiver. *Denison, etc. Ry. v. Ranney-Alton, etc. Co.*, 104 Fed. Rep. 595 (1900). Where a receiver uses materials for repairing the track which were on hand when he was appointed, the party who furnished the same may hold the receiver liable therefor. *Central, etc. Ry. v. Hitchcock*, 91 Fed. Rep. 209 (1899). Persons furnishing labor and furnishing supplies to an assignee for the benefit of creditors are entitled to a preference. *Bank of Visalia v. Dillonwood, etc. Co.*, 82 Pac. Rep. 374 (Cal. 1905). *Cf.* §§ 860, 861, *supra*.

The court may direct the receiver to pay wages to an employee during recovery from an injury received while on duty. *Missouri Pac. Ry. v. Texas, etc. Ry.*, 41 Fed. Rep. 319 (1890); *Thomas v. East Tennessee, etc. Ry.*, 60 Fed. Rep. 7 (1894). The

It has been held in England that a judgment against a receiver for damages to a ship due to the defective condition of a wharf in the possession of the receiver has no priority over other judgment creditors of the company, such damages being neither working expenses nor other obligations in respect of the undertaking.¹

Where a receiver is appointed at the instance of a foreclosing mortgagee, and the receipts of the receiver are not sufficient to pay his expenses of operating and preserving the property, the court may order any deficiency to be paid out of the fund realized at the foreclosure sale.² If the fund itself is insufficient to pay such expenses

court will consider applications from the employees of the receiver for advanced pay. *Frank v. Denver, etc. Ry.*, 23 Fed. Rep. 757 (1885). A person who made a contract with the receiver in regard to carting away ashes, etc., may file a bill in equity and ask the court to decree him damages out of the property, although the receiver has retired and a new one been appointed. *Kerr v. Little*, 39 N. J. Eq. 83 (1884). Where the receiver employs a manager, and the court directs that the receiver, out of his compensation, shall pay the manager a certain sum, the receiver may set off a sum due from the manager to the receiver. *Gatzmer v. Philadelphia, etc. R. R.*, 39 N. J. Eq. 363 (1885). In estimating the amount to be paid on a contract made by the receiver, the contract having been only partly performed, and the performance of the remainder stopped without fault of the contractor, the claims growing out of subcontracts will not be allowed except so far as disbursements to subcontractors were actually made. *Little v. Vanderbilt*, 26 Atl. Rep. 1025 (N. J. 1893).

¹ *Re Wrexham, etc. Ry.*, [1900] 2 Ch. 436.

² Damage occurring during the receivership must be paid out of the receipts, and if necessary out of the *corpus*. *Cross v. Evans*, 86 Fed. Rep. 1 (1898). Necessary supplies purchased by the receiver are chargeable upon the fund left upon foreclosure

sale. The amount may be divided among various divisions of the road. *Kneeland v. Foundry, etc. Works*, 140 U. S. 592 (1891). In ordering payment of the operating expenses the court will not apportion them according to underlying mortgages, but will order them paid from the general fund in the receiver's hands. *Calhoun v. St. Louis, etc. Ry.*, 14 Fed. Rep. 9 (1880); *Central T. Co. v. Wabash, etc. Ry.*, 30 Fed. Rep. 332 (1887). The expenses and liabilities of a receiver appointed at the instance of the mortgagee to operate the property are a first charge on the *corpus* as well as earnings. *People's Nat. Bank v. Virginia, etc. Co.*, 104 Va. 34 (1905). Where the mortgage prescribes that the trustee shall take possession and operate or sell the road upon default, and as a matter of fact possession is taken by a reorganization committee, which holds practically all the bonds and stock, and a friendly foreclosure is had and a reorganization carried out, expenses incurred by the committee in operating the road must be paid prior to the mortgage, the foreclosure decree having a provision that debts prior in equity to the mortgage and entitled to payment from the *corpus* shall be paid by the purchasers. *Queen Anne's, etc. Co. v. Queen Anne's R. R.*, 148 Fed. Rep. 41 (1906). Employees of the receiver have no claim upon the body of the estate for their wages, unless the order appointing the

of the receiver and also his fees, he cannot always hold liable therefor

receiver so provided. *Farmers' L. & T. Co. v. Oregon, etc. R. R.*, 31 *Oreg.* 237 (1897). In *Re Woerishoffer*, 75 *Fed. Rep.* 335 (1896), current expenses of the receivership were given priority over receiver's certificates. Where a parent company, owning the stock of branch companies, passes into a receiver's hands, and the latter expends money in operating one of the branch companies, he cannot recover it as against a mortgagee of the branch company. The rule is otherwise as to necessary improvements. Coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. *Phinizy v. Augusta, etc. R. R.*, 62 *Fed. Rep.* 771 (1894). Where the railroad earns nothing over its running expenses while in the hands of a receiver at the instance of a judgment creditor, car rentals during the four months at the end of which foreclosure is commenced cannot be allowed for those four months in preference to the mortgage debt. *Kneeland v. American L. & T. Co.*, 136 *U. S.* 89 (1890). See also § 861, *supra*.

A claim for personal injuries happening during the receivership is chargeable upon the *corpus* of the estate, and where the receiver's certificates are by their terms to be paid after the operating expenses are paid, such a claim for damages is to be paid before the receiver's certificates are paid. *Anderson v. Conduct*, 93 *Fed. Rep.* 349 (1899). The expense of rebuilding bridges incurred by the receiver of the lessee of a railroad cannot be made a first lien on the property itself, as the lessor is not bound to make such repairs. *Felton v. City of Cincinnati*, 95 *Fed. Rep.* 336 (1899). Debts incurred by the receiver in operation have a priority over the claims of general creditors who caused the receiver to be appointed. *Ruhlender v. Chesapeake, etc. R. R.*, 91 *Fed. Rep.* 5 (1898). The *corpus* of a mining

property which has passed into a receiver's hands may be used to pay the expenses of receivership, including debts for labor and supplies, and such expenses may also be paid in preference to a mortgage, where, after the receivership, foreclosure is commenced and the foreclosure decree provides for the payment of the same without objection. *Reinhart v. Augusta, etc. Co.*, 94 *Fed. Rep.* 901 (1899). Mileage tickets issued by an insolvent railroad company over another line and redeemed by the latter within six months prior to the receivership may be repaid out of the income of the receivership, but not out of the *corpus* of the mortgaged property. Such mileage tickets having been issued under an agreement between two companies, the tickets actually issued are good as against the solvent company, and the agreement of the receiver to pay such of the old mileage tickets as are honored during the receivership does not change the obligation of the insolvent company therefor into a debt of the receiver. *Monsarrat v. Mercantile T. Co.*, 109 *Fed. Rep.* 230 (1901). Indebtedness created by a receiver appointed at the instance of stockholders and general creditors of an insolvent corporation is not prior in right of payment to a mortgage resting on the property. *Seiler v. Union, etc. Co.*, 50 *W. Va.* 208 (1901). A receiver of a hospital corporation cannot contract debts in operating the hospital so as to give such debts priority over an existing mortgage. *United States, etc. Corp. v. Portland Hospital*, 40 *Oreg.* 523 (1902).

Where foreclosure is by cross-bill, the *corpus* of the property is not liable for rentals of leased lines operated by the receivers, there having been no demand for them during the time. The case is different from one where the mortgagee files a bill and asks the court to take charge. *Central Trust*

the party who commenced the suit.¹ Thus where the trustee of the mortgage of a canal and irrigation company institutes foreclosure

Co. v. Wabash, etc. Ry., 46 Fed. Rep. 26 (1891). A receiver appointed by the state, under a statute by which the state has a lien on the property, does not have the powers of a receiver appointed by a court of equity, and his debts are not enforceable against the property, although they may be as against the income of the property while in the hands of the receiver. *State v. Edgefield, etc. R. R.*, 6 Lea (Tenn.), 353 (1880). Where the receiver rents cars which were sold on instalments and pays the rental, the vendor of the cars cannot recover anything from the fund arising from the foreclosure sale. *Fosdick v. Schall*, 99 U. S. 235 (1878). If under such a contract of sale the cars are nevertheless sold with the railroad at foreclosure sale, the purchasers must pay the amount due on the contract or restore the cars. *Fosdick v. Car Co.*, 99 U. S. 256 (1878). Under a similar contract to sell cars, the vendor whose cars are returned cannot be paid out of the receiver's funds for injuries to the cars. *Huidekoper v. Locomotive Works*, 99 U. S. 258 (1878). Where during the receivership granted to enforce a judgment, the parties or most of them agree upon a reorganization without completing the foreclosure, and the receiver by such agreement is directed to continue in control and management, the liability is a complicated one. See § 882, *infra*, on this subject. "Net earnings of the road are to be applied primarily to the payment of the employees of the company and of the amounts due for supplies and materials furnished, and if, instead of making these payments, the earnings are diverted either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced." *Calhoun v. St. Louis, etc. Ry.*, 14 Fed. Rep. 9 (1880). Where moneys are taken from the earnings to make permanent improvements, the materialmen are entitled to reimbursement from the bondholders to that extent. *Finance Co. v. Charleston, etc. R. R.*, 52 Fed. Rep. 524 (1892). Where the road does not pay operating expenses, the court will not order damages for an accident, occurring during the receivership, to be paid out of the property. The party damaged is no better off than he would have been if the company had continued to operate the road. The mortgages must be paid first. *Davenport v. Alabama, etc. R. R.*, 2 Woods, 519 (1875); s. c., 7 Fed. Cas. 8. Where the order appointing the receiver does not expressly so provide, claims for labor, etc., due to the receiver's management of the property cannot be paid out of the *corpus*; they can be paid only from the income, and are not paid at all if there is no income. Nor can the cost of an extension be paid out of the *corpus*, except as against those bondholders who have consented. *Hand v. Savannah, etc. R. R.*, 17 S. C. 219, 266 (1881). But see § 876, *infra*. Where a receiver is appointed, and a mortgagee intervenes and asks for a foreclosure, and does not object to the receiver, the mortgagee is bound by the receiver's acts. Under the Texas statute, the disbursements, contracts, etc., of the receiver must be first paid, including receiver's certificates, but claims of creditors prior to the receivership are not to be paid in priority to the mortgage. *Ellis*

¹ See § 879, *infra*.

suit at the request of the company itself and of the bondholders, and causes a receiver to be appointed and with the consent of all the parties the court orders the property to be operated by the receiver, the mere fact that the price realized on foreclosure sale was sufficient only to pay the receiver's fees and a small part of the receiver's certificates which he had issued, does not render the trustee as complainant liable for the deficiency.¹

A person injured by the negligence of the receiver or his employees has no absolute right to payment of damages therefor. He obtains payment only by favor of the court. He is not entitled to a jury trial of his case. He must apply to the court of equity which appointed the receiver. The court will consider the application, and if it appears just will send the case to a jury to ascertain the amount of damage done, or the court will itself fix the amount and

v. Vernon, etc. Co., 4 Tex. Civ. App. 66 (1893). Where the same receivers are appointed for a system of railroads, and the profits of one are used by them to pay the losses of operation by another, the amount so paid must be repaid from the property of the latter. *Ames v. Union Pac. Ry.*, 74 Fed. Rep. 335 (1896). Where a building in process of construction is not covered by a mortgage, and the receiver causes the contractor to complete it, and then refuses to pay for it, the court will order the receiver to pay for such building, if the building is to be sold and the proceeds applied on the mortgage debt. *Girard Ins. & T. Co. v. Cooper*, 162 U. S. 529 (1896). A creditor obtaining judgment after a receiver is appointed has no preference, even though he advances money to keep the institution running. *Cowan v. Pennsylvania, etc. Co.*, 184 Pa. St. 1 (1898). Where a lease has been assumed by a receiver with the consent of the court, the rent thereon should be paid, even though payment is made out of the corpus of the estate. *Central Trust Co. v. Continental Trust Co.*, 86 Fed. Rep. 517 (1898).

A receiver is liable as receiver for torts committed while the railroad

property is in his hands or the hands of his predecessor. *McNulta v. Lockridge*, 137 Ill. 270 (1891); *Cowdrey v. Galveston, etc. R. R.*, 93 U. S. 352 (1876). The receiver is a common carrier, and hence the mortgagees who cause him to be appointed must expect that the earnings received by him shall be subject to the liabilities incurred by him as a common carrier. *Douglass v. Cline*, 12 Bush (Ky.), 608, 628 (1877); *Melendy v. Barbour*, 78 Va. 544 (1884); *Lyman v. Central Vt. R. R.*, 59 Vt. 167 (1886); *Kinney v. Crocker*, 18 Wis. 74 (1864); *Paige v. Smith*, 99 Mass. 395 (1868). In *Ex parte Brown*, 15 S. C. 518 (1880), the court held that damages for an injury while the receiver was operating the road should be paid before the bondholders were paid. Damages for injuries occurring during the receivership are not entitled to payment, even out of the earnings of the road, unless the order of the court placing the receiver in possession so provided. *Davenport v. Alabama, etc. R. R.*, 2 Woods, 519 (1875); s. c., 7 Fed. Cas. 8.

¹ *Atlantic Trust Co. v. Chapman*, 208 U. S. 360 (1908), rev'g *Chapman v. Atlantic Trust Co.*, 119 Fed. Rep. 257, and 145 Fed. Rep. 820.

place that amount among the liabilities of the receiver, to be paid if his funds are sufficient.¹

¹ A receiver is liable, as receiver, in the operation of the road, the same as the company would have been liable if it had continued to operate the road. The court may try the case itself—a case of negligence in this instance—or may send it to a jury. *Klein v. Jewett*, 26 N. J. Eq. 474 (1875); *Murphy v. Holbrook*, 20 Ohio St. 137 (1870), overruling a demurrer. For injuries caused by a railroad while in a receiver's hands a party has no remedy except to apply to the court by petition. The court may then, in its discretion, order a reference, or a trial by jury, or adopt some other procedure. The injured party has no constitutional right to a trial by jury. *Kennedy v. Indianapolis*, etc. R. R., 3 Fed. Rep. 97 (1880). A person who intervenes in the suit to obtain damages waives his right to trial by jury. *Flippin v. Kimball*, 87 Fed. Rep. 258 (1898). The court may allow the receiver to appeal from a decree awarding damages against him as receiver for injuries. *Thom v. Pittard*, 62 Fed. Rep. 232 (1894). In *Re Atlantic*, etc. R. R., 4 Hughes, 157 (1880), where the administrator petitioned for a jury to assess damages due to negligence during a receivership, the court said that the amount of damages would be submitted to a jury for settlement, but whether there was negligence the court itself would first determine; and in this case the court held, on all proofs taken before the master, that there had not been any negligence. The court held also that a federal court will allow damage claims against the receiver to be adjudicated on petition, and, if a case for a jury, will impanel one, but will not allow suit to be brought in the state court. In *Morse v. Brainerd*, 41 Vt. 550 (1869), the court enjoined the action at law brought without its leave, and then on a petition ordered

a trial before a master and gave damages for loss of freight on a connecting line over which the receiver forwarded the freight. The judgment at law against the receiver "would not constitute a lien on the property of either the nominal or real defendant. It could not be enforced by execution. In short, the action is simply the means adopted by the court of chancery to ascertain whether the plaintiff has a cause of action, and if so, the amount of damages which have accrued." *Bartlett v. Keim*, 50 N. J. L. 260 (1888). In *Thompson v. Scott*, 4 Dill. 508 (1876); s. c., 23 Fed. Cas. 1088, the court said that the proper practice was to bring the demand into the court which appointed the receiver. That court will then, through its master, examine into the case, and, if meritorious, the court will order a trial at law. The court may refuse to allow a regular trial, and may order a reference to try claims against a receiver, the claims having arisen during the receivership. *People v. Remington*, 45 Hun, 347 (1887). The court should refuse to allow a trial at law for damages, where on the face of the petitioner's papers he does not make out a *prima facie* case. *Jordan v. Wells*, 3 Woods, 527 (1879); s. c., 13 Fed. Cas. 1111. Although the receiver cannot appeal from the decision of the court fixing the damages for the loss of freight, inasmuch as he is but the agent of the court and cannot question the judgment, yet the party claiming damages may appeal. Where there had been three trials by the court below in fixing the damages due to loss of freight by a receiver, the upper court, in reversing the judgment, ordered the issue to be tried before a jury. *Melendy v. Barbour*, 78 Va. 544 (1884). The better practice is to direct a trial at law of a contractor's claim for

The effect of a discharge of the receiver is considered elsewhere.¹

The mortgagor company itself is not liable for damages due to accidents while the receiver is in charge.² A company, however, may be liable for damages due to negligence of the receiver, the

supplies furnished to the receiver, yet the court in this case seems to have adopted the other practice. *Vanderbilt v. Central R. R.*, 43 N. J. Eq. 669, 688 (1887). The federal court which appointed a receiver will not question or reduce the amount of a judgment recovered against the receiver in a state court. It will not permit execution to be levied upon the property, however. *Central Trust Co. v. St. Louis, etc. Ry.*, 41 Fed. Rep. 551 (1890). In *Palys v. Jewett*, 32 N. J. Eq. 302 (1880), the court in a dictum said that a person injured during a receivership had a right to a trial by jury, and that the chancellor was bound to give it to him; yet, inasmuch as the party acquiesced in the chancellor's assessing the damages, the appellate court would review the assessment, and in this case the court (reversing 30 N. J. Eq. 604) gave \$3,000 to plaintiff.

¹ See § 882, *infra*.

² The company itself is not liable for accidents occurring while the receiver is in possession and control. *Ohio, etc. R. R. v. Davis*, 23 Ind. 553 (1864); *Bell v. Indianapolis, etc. R. R.*, 53 Ind. 57 (1876); *Memphis, etc. Ry. v. Stringfellow*, 44 Ark. 322 (1884); *Kansas Pac. Ry. v. Searle*, 11 Colo. 1 (1887); *Ellis v. Indianapolis, etc. R. R.*, 6 Am. L. Rec. 288 (Cir. Ct. 1877). The company itself is not liable for damages occurring during the receivership. *Ryan v. Hays*, 62 Tex. 42 (1884); *International, etc. Ry. v. Ormond*, 62 Tex. 274 (1884); *Thurman v. Cherokee R. R.*, 56 Ga. 376 (1876). Compare, on this subject, § 823, note, *supra*. The company is not liable in damages for an accident occurring while a receiver is in charge. *Ohio, etc. R. R. v. Anderson*, 10 Ill. App. 313 (1882); *Wyatt v. Ohio, etc. R. R.*, 10 Ill. App. 289

(1881), holding, however, that the objection should not be raised by a motion to dismiss for want of jurisdiction, and holding also that the fact that the receiver was appointed by the federal court was no bar to this action. The company itself is not liable for negligence of the receiver. *Chamberlain v. New York, Lake Erie, etc. R. R.*, 71 Fed. Rep. 636 (1895); *Memphis, etc. R. R. v. Hoechner*, 67 Fed. Rep. 456 (1895). The company is not liable for the loss of goods by the agent of a receiver, even though the receiver was not legally appointed. *Ocean, etc. Co. v. Wilder*, 107 Ga. 220 (1899). Where the mortgaged property is turned over to the mortgagee to operate, the company is not liable for debts incurred by the latter, unless such was the agreement. *Sibson v. Hamilton & Rourke Co.*, 21 Wash. 362 (1900). A railroad company is not liable for damages due to an accident while the road was in the hands of a federal receiver, unless it is shown that the receiver had made betterments, or that the company had assumed the liability, or that the court had decreed that the company should be liable for such injury. *Missouri, etc. Ry. v. Wood*, 52 S. W. Rep. 93 (Tex. 1899). Where the receiver is discharged and the property restored with improvements, the company is liable for accidents during the receivership. *Brown v. Rosedale St. Ry.*, 15 S. W. Rep. 120 (Tex. 1890); *Texas, etc. Ry. v. Geiger*, 79 Tex. 13 (1890). "The railroad company is not liable for the injuries complained of in the bill, for the reason that they were committed while it was out of possession of the property and had no control over it. This conclusion is sustained by principle and authority." *Davis v. Duncan*, 19 Fed. Rep. 477 (1884). The receiver

receiver having been discharged and the property restored to the company.¹ Thus where the revenue during receivership is used for improvements and the property is afterwards returned to the corporation, the corporation is liable for torts occurring during the receiver-

is not liable for injuries occurring by the negligence of the company's servants, nor is the company liable for those occurring by the negligence of the receiver. *Texas, etc. Ry. v. Bledsoe*, 2 Tex. Civ. App. 88 (1893); *Turner v. Hannibal, etc. R. R.*, 74 Mo. 602 (1881). The company may be sued, even though a receiver is in charge. No leave of the court need be obtained in such a case unless there is an injunction. The company, however, is not liable for the receiver's obligations or liabilities. Service on the receiver's agent is not service on the company. *Heath v. Missouri, etc. Ry.*, 83 Mo. 617 (1884). Although a receiver is in charge, the corporation is liable under a statute rendering all railroad corporations liable for double the value of a fence which is built by adjoining property owners in cases where the company neglects or refuses to build it. *Ohio, etc. Ry. v. Russell*, 115 Ill. 52 (1885).

¹ *Texas & Pac. Ry. v. Bloom*, 164 U. S. 636 (1897). In *Texas Pac. Ry. v. Johnson*, 151 U. S. 81 (1894), aff'g 76 Tex. 421, the court refused to reverse a state decision holding the company liable for injuries incurred during the receivership, the receiver having been discharged and the property returned to the company, even though the claim was never presented in the receivership, and the time limited for presenting claims had elapsed. The property had been largely improved by the receiver from the net earnings. Where the earnings are used for betterments and the property returned to the company, the latter is liable for an injury incurred during the receivership, even though the claim was not presented within the time prescribed by the court in winding up the receivership. *Texas & Pac. R. v. Bloom*, 60 Fed. Rep. 979 (1894).

If a federal receiver is discharged and the earnings exceeded expenses, a person damaged while he was in charge may hold the company liable, there having been no sale. *Texas, etc. Ry. v. Boyd*, 6 Tex. Civ. App. 205 (1893). Where the property is returned to the company, the company is liable for personal injuries sustained during the receivership. *International, etc. R. R. v. Cook*, 16 Tex. Civ. App. 386 (1897). The railway company receiving its property back from a receiver is not liable on claims accruing against him. *Missouri, etc. Ry. v. McFadden*, 89 Tex. 138 (1896). The company is liable for damages incurred while the receiver is in charge if the property and earnings are turned back. *Texas, etc. Ry. v. Donovan*, 86 Tex. 378 (1894). Such is the statutory rule in Texas, even if there were no earnings. *Bonner v. Blum*, 25 S. W. Rep. 60 (Tex. 1894). Where the receiver wrongfully enters upon land and takes it for the use of the railroad, and is afterwards discharged and the property delivered back to the corporation, the corporation is liable therefor, even though the receiver gave notice for the presentation of the claim and this was not presented. *Bloomfield R. R. v. Van Slike*, 107 Ind. 480 (1886). Where the federal court returns the property to the company, the latter is liable for injuries incurred during the receivership, although the federal court ordered otherwise. *Texas, etc. Ry. v. Watts*, 18 S. W. Rep. 312 (Tex. 1891). The company is liable after the receiver is discharged where the earnings were used for improvements. *Texas Pac. Ry. v. White*, 82 Tex. 543 (1891); *Texas, etc. Ry. v. Bailey*, 83 Tex. 19 (1892). The corporation is not liable for the negligence of the receiver unless the earnings of the

ship.¹ And where a receiver orders more material than he needs, and is discharged before it is all received by him, and he refuses to receive the balance and is then discharged, it is discretionary with the court as to whether the corporation will be held on the contract.² Even though the receiver turns back a leased railroad to the lessor, yet the latter may be liable in regard to the receiver's negligence.³

The earnings are liable for an accident after the sale and before the property is turned over to the purchaser.⁴ The decree may direct that the purchaser at the foreclosure sale shall be liable on all claims against the receiver. This is the most modern and practical mode of adjustment, inasmuch as the purchaser is nearly always a reorganization committee, whose bonds will be subject to such claims upon distribution, and hence it is better that they control the litigation and adjustment of such claims.⁵ A receiver of an electric light company, who is operating the same under the orders of the court, is liable for damages to one of his employees on account of negligence, and if the receiver pays out all his receipts without making provision for such damages, he is liable personally therefor.⁶ Creditors of the receiver are paid through allowances to the receiver and not by a judgment in favor of such creditors.⁷ A judgment against the receiver after he is discharged is not good against the property or company.⁸ Where a mortgage does not cover income and a receiver is appointed, and his income is more than to pay his operating expenses and he uses the

receiver have been invested in improvements. *Ray v. Dillingham*, 41 S. W. Rep. 188 (Tex. 1897). A judgment against the receiver is not binding upon the company. *Abbey v. International, etc. Receivers*, 5 Tex. Civ. App. 261 (1893). Where receivers are discharged and the property restored to the corporation itself, the corporation may be liable for the receivers' obligations. *Stannard v. Reid & Co.*, 118 N. Y. App. Div. 304 (1907).

¹ *Bartlett v. Cicero, etc. Co.*, 177 Ill. 68 (1898).

² *Brunner, etc. Co. v. Central, etc. Co.*, 18 Ind. App. 174 (1897).

³ *Pennsylvania Co. v. Jacksonville, etc. Ry.*, 66 Fed. Rep. 421 (1895). The lessor is liable for the negligence of the lessee's receiver. *Parr v. Spartanburg, etc. R. R.*, 43 S. C. 197 (1895).

⁴ *Houston, etc. R. R. v. Crawford*, 31 S. W. Rep. 176 (Tex. 1895).

⁵ The decree may be moulded so that the purchaser at foreclosure sale

shall be made liable for none of the debts, or part of the debts, or all of the debts, and the court may retain jurisdiction of the case in passing upon such claim. Sometimes also a statute covers this subject. See § 890, *infra*. The plaintiff must allege that the purchaser assumed the liability incurred during the receivership. *Houston, etc. Ry. v. Norris*, 41 S. W. Rep. 708 (Tex. 1897). Where a corporation is taken out of the hands of a receiver on condition that it pay all claims that are adjudicated against the receiver, it may be made a party defendant in a petition of intervention to recover damages for an injury. *Baltimore, etc. R. R. v. Burris*, 111 Fed. Rep. 882 (1901).

⁶ *Robinson v. New York, etc. Co.*, 99 N. Y. App. Div. 509 (1904).

⁷ *Hendrie, etc. Co. v. Parry*, 86 Pac. Rep. 113 (Col. 1906).

⁸ *Texas, etc. Ry. v. Watson*, 24 S. W. Rep. 952 (Tex. 1894).

surplus to improve the property, the general creditors of the corporation may claim a sum of money equal to such surplus.¹

§§ 876, 877. *Receiver's certificates—Loans of money to the receiver—Purchasing on credit.*—Receiver's certificates are merely evidences of debts due from the receiver. They are very similar to a due-bill. There has been a vast amount of discussion and litigation over the legality and desirability of allowing receiver's certificates. The real questions involved have been whether the receiver should be allowed to create a debt which should be paid before the mortgage bondholders are paid. The question here is, not whether certain debts and liabilities should be paid out of the income before any of that income should be paid to the bondholders, but whether the court, in order to keep a road in operation or to improve it, may authorize the receiver to borrow money for those purposes, and whether the court may decree that such borrowed money shall be repaid out of the proceeds of the sale of the property before the bondholders are paid any part of their debt.

The law is clear that such an extraordinary power cannot be exercised by the receiver except upon the express order of the court. The receiver has no implied power to create a debt that shall displace the bonds.² The court may of course expressly authorize the receiver

¹ See note 2, p. 3012, *supra*. New construction by receivers does not give general creditors a preference unless the net income was diverted thereby. *Fordyce v. Omaha*, etc. R. R., 145 Fed. Rep. 544 (1906).

² In *Vilas v. Page*, 106 N. Y. 439 (1887), the court said: "The receiver had no power, as incident to his general authority as receiver, to create a lien on the property of the railroad company for the purchase of rolling-stock. The jurisdiction of the court to appoint receivers of property has for its primary object the care and custody of the property which is the subject of the receivership, pending the determination of the questions involved in the litigation, and to enable the court, by placing the property under the control of its officer, to preserve it to answer the final decree which may be made in the action. But the receiver cannot of his own motion contract debts chargeable upon the fund in litigation. The court must authorize expenditures on ac-

count of the property before they can be charged thereon; and while it may, and does in its discretion, allow expenses incurred by a receiver strictly for preservation to be charged upon the fund, although incurred without the prior sanction of the court, it is nevertheless the order of the court, and not the act of the receiver, which creates the charge and upon which its validity depends." A loan to a receiver whose appointment is void cannot be collected, especially where the court had not authorized the loan. *Ludington v. Thompson*, 4 N. Y. App. Div. 117 (1896); *aff'd*, 152 N. Y. 499. A receiver has no power, except by the express order of the court, to issue notes or certificates. The holder thereof cannot enforce them. If, however, the proceeds were properly used for the benefit of the property, the holder may have an equitable claim. *Wesson v. Chapman*, 77 Hun, 144 (1894), a case of a railroad receivership. Where the receiver incurs debts without being expressly au-

to borrow money and to pledge some of the property for that purpose in order to protect and preserve the property during the receivership.¹ In England money loaned to the receiver as authorized by the court is to be repaid before debenture-holders are paid, but after the costs, charges, and other expenses of the receiver are paid.²

thorized so to do by the court, the court will dispose of them equitably, and if the assets are insufficient, the receiver's compensation will be paid only proportionately with such debts. *Nessler v. Industrial, etc. Co.*, 56 Atl. Rep. 711 (N. J. 1903). Where the receiver incurred debts in excess of an amount which by order of the court he was authorized to borrow, the court will ratify such excessive debts, only to the extent that the receiver had power to incur them without first applying to the court, even though they were incurred *bona fide* and in the ordinary course of business. *Re British Power, etc. Co.*, 94 L. T. Rep. 479 (1906).

¹ See § 872, *supra*. The court will not allow the receivers to borrow \$1,000,000 on the company's rolling-stock as security, in order to pay interest on the debt which is the basis of the foreclosure. *Taylor v. Philadelphia R. R.*, 9 Fed. Rep. 1 (1881). In *Ex parte Carolina Nat. Bank*, 18 S. C. 289 (1882), the receiver borrowed money to operate the railroad and pledged the unissued bonds of the company. He borrowed \$20,000 and pledged \$134,000 of bonds. The pledgee sold them out for \$13,000 and then applied to have the remaining \$7,000 paid out of the income. The court so ordered, the bondholders having failed to object for six years. In *Clarke v. Central, etc. Co.*, 54 Fed. Rep. 556 (1893), where a receiver was in charge of the property at the instance of the corporation itself, the court held that it might authorize the receiver to pledge the property of the company to secure loans necessary to the operation of a road, and also incur liabilities for the expenses of a refunding scheme. Inasmuch, however, as creditors claiming liens had

been made parties, the court refused to order such acts until such lien-holders had been notified. A contractor has no rights prior to holders of receiver's certificates secured by a mortgage on the property. *Postal, etc. Co. v. Vane*, 80 Fed. Rep. 961 (1897).

² *Strapp v. Bull, etc. Co.*, [1895] 2 Ch. 1. A receiver appointed at the instance of debenture-holders may be authorized to borrow money to keep the railroad from suspending by reason of landslides. *Greenwood v. Algesiras Ry.*, [1894] 2 Ch. 205. Where the court authorizes the receiver to raise money to carry on the business, and he does so and makes the loan a charge on the assets in priority to other claims, such priority will be upheld by the court; but if the receiver does not make such charge on the assets, the loan will come in equally with the debentures. *Lathom v. Greenwich Ferry Co.*, 72 L. T. Rep. 790 (1895). Under the English statutes the court has no power to authorize a liquidator of a company appointed at its instance to incur debts in the carrying on of the business, which shall be paid before the debenture debt is paid, the debenture-holders not being before the court. *Re Regents', etc. Co.*, L. R. 3 Ch. D. 411 (1875). Where, upon the application of one debenture-holder, a receiver is appointed and is given power to borrow a certain sum and carry on the business, an application to allow the receiver to borrow a further sum, the first sum having been lost, will not be granted where the expense is merely speculative, and special urgency is not shown, there being no danger of the property being destroyed or forfeited, and all of the parties interested not being before the court. *Securities, etc. Corp. v. Brighton Alhambra*, 68 L.

The controversy, however, as to whether the court could authorize the receiver to borrow large sums of money which should be repaid before the bondholders are paid has been a long one. The power to so borrow has been vigorously contested and denied. Nevertheless the necessities of the situation in such cases have been too strong to be withstood, and the power has been sustained. The courts hold that they may authorize the receiver to borrow money and issue receiver's certificates therefor. And the court may make the receiver's certificates payable in preference to the bonds, and may order that the money so borrowed by the receiver may be used to make repairs, buy rolling-stock, construct more road, complete an unfinished road, build a bridge, buy materials, and pay freight balances and rents.¹ The

T. Rep. 249 (1893). A liquidator may be authorized to borrow money and make it a first charge. *Re Alexandra*, etc. Co., 61 L. T. Rep. 325 (1889).

¹ Receiver's certificates to repair and operate the road and obtain rolling-stock may be issued. *Wallace v. Loomis*, 97 U. S. 146 (1877). Receiver's certificates and debts created by order of the court for purchasing rolling-stock, constructing new road and a bridge, materials, repairs, freight balances, ninety days' arrears of wages and operating debts, and rents to leased lines, may be paid first out of the fund before the bondholders are paid. *Miltenberger v. Logansport Ry.*, 106 U. S. 286 (1882). Receiver's certificates for repairs, taxes, operating expenses, replacing worn-out material, etc., are valid and prior to the mortgage, though issued at a discount. Certain wages, debts for supplies, damages, rentals, and running expenses were allowed over the mortgage debt. *Union Trust Co. v. Illinois, etc. Ry.*, 117 U. S. 434 (1886). In *Hale v. Nashua, etc. R. R.*, 60 N. H. 333 (1880), a receiver was appointed of a road that had not been completed and had no rolling-stock, and was not being operated. The receiver was empowered to put the road in a sufficient state of repair for its preservation and for operation, and to permit the lessee of the road to furnish the means so to do and operate the

road. The court held that expenditures so made had priority over the other debts, including the bonded debt. Receiver's certificates to make necessary repairs and improvements may be authorized by the court, but in some instances the court has refused even these. *Credit Co. v. Arkansas Cent. R. R.*, 15 Fed. Rep. 46 (1882). Where an uncompleted railroad passes into the hands of a receiver at the instance of a creditor, receiver's certificates may be issued to complete the road and may be made prior in lien to the mortgages, especially as against a bondholder who intervenes and contests such priority and does not appeal from a decision upholding such priority. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). A receiver cannot obtain specific performance of an oral agreement of a party to furnish money on receiver's certificates sufficient to complete a railroad. *Biber-White Co. v. White River, etc. R. R.*, 110 Fed. Rep. 472 (1901). A holder of receiver's certificates issued by the federal court cannot enforce the lien of those certificates in the state court while the suit in which they were issued is still pending in the federal court. *Passage v. Dansville, etc. R. R.*, 41 N. Y. App. Div. 182 (1899). Where receiver's certificates are issued after a sale has been ordered, and such certificates recite on their face that they are to be paid out

court may, as a condition of appointing a receiver, prescribe that receiver's certificates, payable out of the proceeds of the sale, be issued

of the proceeds of the sale they do not constitute a lien on the property itself. *Columbus, etc. R. R., Appeals*, 109 Fed. Rep. 177 (1901). In the case of *Grand Trunk Ry. v. Central Vermont R. R.*, 103 Fed. Rep. 740 (1900), where, in 1872, the receivers issued, under the order of the court, a large quantity of thirty-year eight per cent. bonds constituting a lien on property, and in 1883, upon reorganization, these bonds were made exchangeable for first-mortgage bonds, and in 1899 such mortgage was foreclosed, and in the decree the court provided for distribution of the selling price among the bondholders secured by the mortgage without making provision for certain bonds issued by the receiver and not actually exchanged for mortgage bonds, the court held that it could not order the purchaser at foreclosure sale to pay any outstanding receiver's bonds, inasmuch as the court, having sold and transferred the property, had no further jurisdiction to entertain a petition to enforce such receiver's bonds or to require the purchaser to pay them. A person receiving and selling receiver's certificates cannot afterwards attack their validity. *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900). In the case of *Pueblo, etc. Co. v. Allison*, 70 Pac. Rep. 424 (Colo. 1902), the court refused to authorize the receiver of a street railway to issue receiver's certificates to extend the road. In *Hoover v. Montclair, etc. Ry.*, 29 N. J. Eq. 4 (1878), all the parties being before the court, the receiver was authorized to borrow money on his certificates of indebtedness and to use the funds to make necessary repairs, the certificates to be prior to existing mortgages in right of payment. Where a land grant and also the charter will be forfeited unless twenty miles of road are built

within thirty days, and two miles thereof are not yet built, and the company is unable to build it, the court, on the application of the trustee for the bondholders, will appoint a receiver and authorize him to build the two miles, the expense turning out to be only \$5,000. *Allen v. Dallas, etc. R. R.*, 3 Woods, 316 (1878); s. c., 1 Fed. Cas. 465. The court will appoint a receiver in order to prevent a land grant lapsing by reason of a failure to complete the road within a certain time; and in order to complete the road within that time and save the grant, the court will authorize the receiver to issue receiver's certificates prior to all other liens. Without this grant the bondholders would get practically nothing. *Kennedy v. St. Paul, etc. R. R.*, 2 Dill. 448 (1873); s. c., 14 Fed. Cas. 321. The same case subsequently came before the court in 5 Dill. 519 (1878); s. c., 14 Fed. Cas. 325, where a dissenting bondholder attacked the validity of the receiver's certificates. The court, however, upheld them, it appearing that originally four-fifths of the bondholders assented and the other fifth did not object, and the money had been advanced by the bondholders themselves on the certificates, and one hundred and twenty-five miles of road had been built.

In order to preserve a grant the court may authorize the receiver to issue certificates to raise money and complete a canal. *Jerome v. McCarter*, 94 U. S. 734 (1876). The court has no power to order the issue of a receiver's certificates in order to raise money to pay taxes, the application for such issue being made by the state alone. *Central Trust Co. v. New York, etc. R. R.*, 47 Hun, 587 (1888). Compare s. c., 110 N. Y. 259 (1888). An order of the court that the receiver purchase rolling-stock and that the debt therefor shall be a first lien on

to pay claims, or may prescribe that the claims themselves shall be paid from the proceeds of the sale.¹ In a judgment creditor's suit for the sequestration of the property of a railroad, the court may authorize receiver's certificates to complete the road, and if the trustee of the existing mortgage consents thereto, the certificates may be made prior in lien to all other liens.² The court, however, has no

the mortgaged property is valid, the trustee being a party to the suit. *Vilas v. Page*, 106 N. Y. 439 (1887). For a remarkable case wherein, in 1872, the circuit court of the United States authorized a receiver to borrow money and give a mortgage to secure its repayment, see *Southerland v. Lake Superior, etc. R. R.* (referred to in 53 Ala. 338). The giving of a first mortgage, however, is not different from the order of the court making the certificate a first lien. A receiver's certificates receivable in payment for freight are legal, and where the road was sold subject to them the new company must accept them. If refused, the holder must sue for cash. *Evansville, etc. R. R. v. Frank*, 3 Ind. App. 96 (1891). Although the receiver has promised to buy rolling-stock in use by him, but belonging to other parties, and has obtained leave of the court to issue receiver's certificates therefor, yet the court will not compel him to carry out the understanding if it is improvident. But he must pay rent. *Coe v. New Jersey Midland Ry.*, 27 N. J. Eq. 37 (1876). Receiver's certificates are valid, although issued before foreclosure suit was commenced, and before the receiver took possession, it appearing that the proceeds were used for the benefit of the property. Purchasers at the foreclosure sale take subject to them. Payment may be demanded by an intervening petition even though only unpaid interest is due. *Central Trust Co. v. Sheffield, etc. Ry.*, 44 Fed. Rep. 526 (1890). Although the court passes upon all claims presented after sale, yet outstanding receiver's certificates are a valid lien on the property, even though they are not presented until

long afterwards, no notice having been given them, and the property having been sold subject to claims. The holders have a lien on the property instead of on the fund. *Mercantile Trust Co. v. Kanawha, etc. Ry.*, 50 Fed. Rep. 877 (1892). The court may authorize the receiver to issue receiver's certificates to buy rolling-stock. *Central Trust Co. v. Tappan*, 6 N. Y. Supp. 918 (1889). Where a final decree vesting the title in the purchaser vests title free from the receiver's debts or certificates, the lien of such debts or certificates is transferred to the proceeds of the sale. *Mercantile Trust Co. v. Kanawha, etc. Ry.*, 58 Fed. Rep. 6 (1893). Although the receiver's certificates contain a provision that the purchaser of the road shall pay them, yet if the decree of sale contains no such provision, the purchaser is not bound. *Wesson v. Chapman*, 76 Hun, 592 (1894). Receiver's certificates may be inferior in right to a mechanic's lien. *Gordon v. Newman*, 62 Fed. Rep. 686 (1894). The court will order the receiver to pay such obligations of the company as would imperil the property if not paid. Hence the court ordered the payment of the interest on receiver's certificates, rentals, interest on mortgage bonds, and payment of car-trust and equipment contracts in the case of *Mercantile Trust Co. v. Baltimore, etc. R. R.*, 82 Fed. Rep. 360 (1897). The president may own receiver's certificates. *McKittrick v. Arkansas Cent. Ry.*, 152 U. S. 473 (1894).

¹ *Finance Co. v. Charleston, etc. R. R.*, 62 Fed. Rep. 205 (1894).

² *Rochester, etc. Co. v. Oneonta, etc. Ry.*, 122 N. Y. App. Div. 193 (1907).

power to authorize the issue of receiver's certificates, payable from the *corpus* of the estate, to pay for labor and services rendered prior to the receivership.¹

In some instances receiver's certificates and receiver's debts have consumed the entire property, leaving nothing whatsoever for the mortgage bondholders—a natural result of courts engaging in the carrying on of business enterprises.²

There is a limit, however, beyond which the courts will not go. The issue of receiver's certificates, prior in right to a mortgage, will not be ordered unless the trustee of the mortgage bondholders is a party to the suit and has notice of the application. Sometimes the court will refuse to order an issue unless the trustee consents, and sometimes the consent of a majority or even all of the bondholders is required. And often the court sustains the issue on the sole ground

1 *Metropolitan Trust Co. v. Tonawanda, etc. R. R.*, 103 N. Y. 245 (1886). Except of course as against those who consent. *Metropolitan Trust Co. v. Tonawanda, etc. R. R.*, 103 N. Y. 245 (1886). Receiver's certificates were issued in *Calhoun v. St. Louis, etc. Ry.*, 14 Fed. Rep. 9 (1880), in payment of claims payable under the six months' rule, but these certificates were to be paid from income only. Where the receiver was appointed at the instance of stockholders, and no earnings have been used to pay interest during the receivership, the six months' rule does not apply. The net earnings received by the receiver are applicable to payment for labor, but receiver's certificates cannot be issued in such a case, except by agreement of all parties. *Street v. Maryland Cent. Ry.* 59 Fed. Rep. 25 (1893). Receiver's certificates may be issued and the proceeds used to pay employees and materialmen for labor and materials furnished prior to the appointment for the operation of the road. Such debts are entitled to payment out of the net income. *Taylor v. Philadelphia, etc. R. R.*, 7 Fed. Rep. 377 (1880). As to whether a receiver may assume an obligation incurred by the corporation prior to his appointment, see *Platt v. Philadelphia,*

etc. R. R., 115 Fed. Rep. 842 (1902). "As to the payment of labor and supply claims out of the *corpus* of the estate, see § 861, *supra*."

2 Where receiver's certificates are issued in the foreclosure of a canal mortgage, the issue being made with the consent of the trustee, and the certificates are turned in in payment of the price for which it is sold on the foreclosure sale, the sale is valid, even though the certificates exceed in amount the price of the property at the sale, thus leaving nothing for the bondholders. *Kent v. Lake Superior, etc. Co.*, 144 U. S. 75 (1892). See also *Royal Trust Co. v. Washburn, etc. Ry.*, 120 Fed. Rep. 11 (1902), where the receiver's certificates took everything, even as against a vendor's lien on iron. Where the property on foreclosure sale brings only enough to pay the receiver's certificates, a person having even a valid vendor's lien on the rails gets nothing, he having been a party to the proceedings when the receiver's certificates were issued. *Royal Trust Co. v. Washburn, etc. Ry.*, 120 Fed. Rep. 11 (1902). In *Shaw v. Railroad Co.*, 100 U. S. 605 (1879), the court said that receiver's certificates should never be issued to complete a railroad, except "under extraordinary circumstances."

that the parties in interest did not object.¹ A court has no power as against the dissent of minority stockholders and bondholders, how-

1 A bondholders' committee, under the usual reorganization agreement giving the committee power to do all things necessary as fully as the bondholders could do if personally present, has no power to consent to the issue of receiver's certificates to pay claims which are not prior in right to the bonds. *Farmers', etc. Co. v. Centralia, etc. R. R.*, 96 Fed. Rep. 636 (1899). Receiver's certificates issued by a state court in a suit brought by a creditor without joining the mortgagee as a party are not superior in right to the mortgage, and are not binding on the federal court in decreeing the foreclosure of such mortgage. *Metropolitan Trust Co. v. Lake Cities, etc. Ry.*, 100 Fed. Rep. 897 (1900). Receiver's certificates cannot be issued prior in right to a mortgage which has been foreclosed and the equity of redemption on which has expired. *Standley v. Hendrie, etc. Co.*, 27 Colo. 331 (1900). The trustee of a mortgage and the bondholders may attack receiver's certificates issued before the trustee was brought in as a party. The court will decide as to such receiver's certificates the same as though the application were then made for their issue. *Farmers', etc. Co. v. Centralia, etc. Co.*, 96 Fed. Rep. 636 (1899). Receiver's certificates may be issued to complete a railroad where the order authorizing them is made without prejudice to non-consenting bondholders. *Rutherford v. Pennsylvania Mid. R. R.*, 178 Pa. St. 38 (1896). Receiver's certificates issued to build a bridge at the instance of a third mortgagee in his foreclosure suit may become a first lien ahead of the two prior mortgages, if the two prior mortgages are subsequently foreclosed, and the former receivership is extended to the latter suits, and the receiver is directed to carry out all orders previously made, especially where the certificates are not actually issued until after the receivership is so extended. *Central Trust Co. v. Marietta, etc. R. R.*, 75 Fed. Rep. 193 (1896). So also as to receiver's certificates issued to pay for additional rolling-stock. *Central Trust Co. v. Marietta, etc. R. R.*, 75 Fed. Rep. 209 (1896). A prior mortgagee who was not made a party to the foreclosure suit of the second mortgagee is not bound by the proceedings in such suit, nor by receiver's certificates issued therein, and may commence independent suit even prior to the sale in the first suit. *Third Street, etc. Ry. v. Lewis*, 79 Fed. Rep. 196 (1897). Parties to an action cannot object to receiver's certificates on the ground that the mortgagees of the property were not parties at the time of the issue of the certificates, and especially where such objection is made for the first time on appeal. *State v. Port Royal, etc. Ry.*, 45 S. C. 413 (1895). An order authorizing the issue of receiver's certificates is appealable. Such an order cannot be made without notice to the parties having liens on the property, which liens will be affected by the certificates. *State v. Port Royal, etc. Ry.*, 45 S. C. 464 (1895). Receiver's certificates sold by an agent of the receiver without authority are nevertheless good if the receiver ratified the same, and the court recognized the validity of the certificates. *Alabama, etc. Ry. v. Anniston L. & T. Co.*, 57 Fed. Rep. 25 (1893). Receiver's certificates may be enforced though issued on an order made without notice. *Mercantile Trust Co. v. Kanawha, etc. Ry.*, 50 Fed. Rep. 877 (1892). An application of a receiver to issue first-lien certificates for new construction and extensive improvements, the application being sustained by a large proportion of the bondholders, will be granted as to

ever small their holdings, to reorganize the company by authorizing the receivers to lease the property for a long period of time and allow

consenting bondholders, but the certificates will not be a first lien as regards non-appearing and dissenting bondholders. Leave may be given to apply for an order that the certificates be a first lien as to all, but notice to all must be given, and it must be clearly proved that the expenditure has increased the value of the property to such an extent as to make the order equitable. *Investment Co. v. Ohio, etc. R. R.*, 36 Fed. Rep. 48 (1888). An order of the circuit court, made after the whole case has been appealed, authorizing receiver's certificates, is appealable. *Farmers', etc. Trust Co., Petitioner*, 129 U. S. 206 (1889). Receiver's certificates issued in a foreclosure suit of a second mortgagee are not valid as against the first mortgagee, who was made defendant, but who did not join in the application for a receiver. *Metropolitan T. Co. v. Tonawanda, etc. R. R.*, 103 N. Y. 245 (1886). Where no notice is given, the certificates are not valid. *Raht v. Attrill*, 106 N. Y. 423 (1887). Where a bondholder, who is also a director, knows that, on the application of the trustee of the mortgage, the receiver has been authorized to issue receiver's certificates, as a prior lien on the property, to pay off a chattel mortgage and taxes, and such bondholder does not object, but allows the certificates to be sold, neither he nor his vendee, who purchases his bonds with notice, will be allowed to attack the validity of the issue. *Humphreys v. Allen*, 101 Ill. 490 (1882). Bondholders objecting to receiver's certificates must intervene promptly. *Miltenberger v. Logansport Ry.*, 106 U. S. 286 (1882). Receiver's certificates issued to complete and equip an uncompleted road are not prior in right to the holder of a mechanic's lien who was not made a party to the foreclosure suit. *Snow v. Winslow*,

54 Iowa, 200 (1880). Where a general creditor is about to sell the stock of a company whose road forms part of a railroad line, such stock having been pledged to him by the main company, and the court orders receiver's certificates to be issued in payment of the claim, thus saving the stock, such receiver's certificates being assented to by the trustee and his counsel for the general mortgage which is being foreclosed, a purchaser at the foreclosure sale who takes also the stock cannot object to the certificates. *Kneeland v. Luce*, 141 U. S. 491 (1891), holding also that the consent of a trustee in a mortgage to the issue of receiver's certificates binds every bondholder. The assent of the complainant trustee to the issue of receiver's certificates in settlement of a claim prevents such trustee from afterwards objecting to the certificates. *Central Trust Co. v. Seasongood*, 130 U. S. 482 (1889).

Receiver's certificates issued by a receiver appointed in New York may be contested by a trustee foreclosing a mortgage on lands in Texas, so far as such mortgage is concerned. The suit in Texas will not be enjoined by the New York courts. *Walton v. Grand, etc. Co.*, 56 Hun, 211 (1890). A Texas court, in the foreclosure of a mortgage on property in Texas, will not recognize as valid certain receiver's certificates issued by order of a New York court in an action in the New York court to wind up the corporation. *Pool v. Farmers' L. & T. Co.*, 7 Tex. Civ. App. 334 (1894). Receiver's certificates issued in a suit brought by judgment creditors have no priority over the corporate mortgages, the mortgagees not being parties to the suit. But the court may, after the mortgagees become parties, allow such certificates to have priority, the mortgagees having been allowed to contest them. *Hervey v.*

the lessee to place a large mortgage on the property, even though the proceeds of the mortgage are to be used for rebuilding the property, especially where the rebuilding is not subject to the orders of the court or the wishes of the security holders.¹

Illinois Mid. Ry., 28 Fed. Rep. 169 (1884); aff'd on this point in *Union T. Co. v. Illinois Mid. Ry.*, 117 U. S. 434 (1886). A receiver does not represent and bind bondholders who are hostile to his acts. *Vermont, etc. R. R. v. Vermont Central, etc. R. R.*, 50 Vt. 500, 594 (1877). Where a receiver's certificates are issued without notice to some of the parties, and without sufficient notice to any of those representing creditors, they may move to set the issue aside, except such part as was necessary to operate the property. Those issued to buy necessary rolling-stock and repairs will be allowed. Ten per cent. on such certificates and their issue at ninety cents on the dollar are illegal under the usury laws of Alabama. *Meyer v. Johnston*, 53 Ala. 237, 350 (1875). In the *Alabama & Chattanooga Railroad Case* (see statement in 53 Ala. 341), Mr. Justice Bradley, sitting at circuit in 1872, allowed the receiver to borrow money and complete a railroad then under foreclosure, but the order was by consent, and the receiver's certificates of indebtedness were not to be good unless signed by a majority of the trustees in the mortgage. An order authorizing the receiver to borrow and expend \$75,000 for cross-ties, iron, and rolling-stock is invalid where it is not made on a motion with notice and after a proper investigation and hearing. *Ex parte Mitchell*, 12 S. C. 83 (1879). In *Hand v. Savannah, etc. R. R.*, 17 S. C. 219, 276 (1881), where most of the bondholders had consented to the issue of receiver's certificates to build an extension, such extension to be subject to the receiver's certificates, the court held that, except as against a bondholder who was expressly excepted in the order, the amount realized upon the sale of

such extension should be applied first to the payment of the certificates, and that any deficiency should not be good against the other property. In *Re U. S. Rolling Stock Co.*, 55 How. Pr. 286 (1878), the foreclosure being by second mortgagees, receiver's certificates were authorized and made a lien prior to the second mortgage, but not to the first. In *Hyde v. Sodus Point R. R.*, decided by the New York supreme court at special term in 1874 (see 53 Ala. 338, 339), a judgment creditor caused a receiver to be appointed, and receiver's certificates for \$125,000 were issued to build wharves, connections, etc., about \$649,000 out of the \$700,000 bondholders acquiescing therein. Holders of receiver's certificates are not affected by the suit of other holders of similar receiver's certificates to test the validity thereof, the former not being parties to the suit of the latter. *Sheffield, etc. Ry. v. Newman*, 77 Fed. Rep. 787 (1896). But the holder of receiver's certificates is put upon inquiry as to all that has been done in the litigation in which the certificates were authorized, and is charged with notice of all subsequent proceedings therein, and that by final action of the court the validity or security of the certificates may be prejudicially affected; the holder's duty being to advise the court of his claim at an early day. Where the certificates were authorized *ex parte*, and the proceeds therefrom were diverted, and the certificates were not presented for three years, and were presented after the foreclosure sale had been confirmed and the debts ascertained, the certificates not being included, the court excluded the certificates on the ground of laches. *Mercantile Trust Co. v. Kanawha, etc. Ry.*, 58 Fed. Rep. 6 (1893).

¹ The court has no such power, even

Receiver's certificates for improvements will not be authorized where the receiver was appointed at the instance of stockholders, and the mortgage is being foreclosed separate from the receivership.¹ Hence receiver's certificates in a suit to which a mortgagee is not a party may have no priority over the lien of a mortgage on the property and profits except to the extent that the profits have been diverted to the improvement of the property.² Bondholders are bound by the consent of their trustee to the issue of receiver's certificates.³ Where receiver's certificates are issued in an ancillary suit, the court where the main suit is pending will refer the payment of the receiver's certificates to the other court.⁴

The extent of the priority of receiver's certificates as between different issues and as related to other debts of and claims against the receiver depends upon the wording of the certificates themselves. Thus, one set of receiver's certificates may have priority over another set.⁵ Where a receiver's certificate by its terms is declared to be prior in right to any certificates issued subsequently, the subsequent certificates are bound thereby, even though they do not recite that fact

though the system is made up of a great many different street railways with different franchises, some of which lapsed and there is danger that the entire property will be lost if the offer of the city to grant a new franchise on certain terms is not accepted. *Merchants', etc. Co. v. Chicago Rys.*, 158 Fed. Rep. 923 (1907), rev'g *Guaranty T. Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 913 (1907). Thereupon the trustees in their foreclosure suit applied for decrees of foreclosure and petitioned the court in the meantime to have the company operated by the reorganized company, and the court so ordered. *Guaranty Trust Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 1015 (1908).

¹ *Street v. Maryland Cent. Ry.*, 59 Fed. Rep. 25 (1893).

² *Fordyce v. Omaha, etc. R. R.*, 145 Fed. Rep. 544 (1906).

³ *Rochester, etc. Co. v. Oneonta, etc. Ry.*, 122 N. Y. App. Div. 193 (1907).

⁴ *Doe v. Northwestern, etc. Co.*, 78 Fed. Rep. 62 (1896). The court in which ancillary proceedings are had may enforce the certificates, although they were issued in the main action.

Mercantile Trust Co. v. Kanawha, etc. Ry., 50 Fed. Rep. 874 (1892).

⁵ In the case *Farmers', etc. Co. v. Stuttgart, etc. R. R.*, 106 Fed. Rep. 565 (1901); aff'd, 115 Fed. Rep. 879, where one series of receiver's certificates was for money loaned to the receiver to repair the road, and another series was issued to pay for supplies which had been adjudged to be prior in right to the mortgage, the court held that the former series had priority over the second, the assets being insufficient to pay both series. Receiver's certificates issued to pay an indebtedness incurred by the receiver in operating the property have priority over receiver's certificates issued to pay preferred debts of the company itself, inasmuch as the former are debts incurred by the court, and the latter are debts incurred by the company. *Bank of Commerce v. Central, etc. Co.*, 115 Fed. Rep. 878 (1902). The holders of receiver's certificates may of course agree among themselves for priority of a part of the certificates over others. *Fletcher v. Waring*, 137 Ind. 159 (1894).

on their face.¹ But where receiver's certificates are issued partly to take up all the outstanding bonds and the remainder are insufficient to complete the road, such certificates being a first lien upon the property, the court cannot subsequently authorize a further issue of receiver's certificates which shall be prior in lien and right to the certificates first issued.² Ordinarily receiver's certificates and receiver's debts stand alike in distribution, without preference of one over the other, the only preference being for taxes.³ But receiver's certificates which, by their terms, are a first lien on the property, are prior in right to subsequent debts incurred by the receiver.⁴ Sometimes the certificates are subordinate to other claims against the receiver.⁵ A receiver's costs and expenses must be paid prior to receiver's certificates.⁶

Receiver's certificates issued under the order of the court by a receiver of a hotel, improvement company, or mining company have been declared illegal.⁷ Receiver's certificates are transferable, but

¹ *Nisbet v. Great, etc. Co.*, 83 Pac. Rep. 15 (Wash. 1905).

² *Bibber-White Co. v. White River, etc. R. R.*, 115 Fed. Rep. 786 (1902).

³ *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168 (1900); *Lewis v. Linden, etc. Co.*, 183 Pa. St. 248 (1897).

⁴ *Kampmann v. Sullivan*, 63 S. W. Rep. 173 (Tex. 1901).

⁵ Receiver's certificates may be subordinate to a statutory lien of a connecting railroad for traffic balances due on an interchange in business. *International, etc. R. R. v. Coolidge*, 62 S. W. Rep. 1097 (Tex. 1901). An agreement of a receiver to turn over to a bank what he collects on notes held by the bank and indorsed by the receiver has priority over receiver's certificates, even though the bank took the receiver's certificates when it delivered back the notes to the receiver. *State Bank v. Domestic, etc. Co.*, 99 Va. 411 (1901). A claim for personal injuries happening during the receivership may be chargeable upon the *corpus* of the estate, and where the receiver's certificates are by their terms to be paid after the operating expenses are paid, such a claim for damages is to be paid before the receiver's certificates are paid. *Anderson v. Condict*, 93 Fed. Rep. 349 (1899).

⁶ *English, etc. Co. v. Glasdir, etc. Mines, Ltd.*, 94 L. T. Rep. 8 (1905).

⁷ *Fidelity, etc. Co. v. Roanoke, etc. Co.*, 68 Fed. Rep. 623 (1895). A receiver of a mining company cannot be authorized by the court to borrow money and issue receiver's certificates to carry on the business, except with the consent of the creditors who will be affected. *International T. Co. v. Decker Bros.*, 152 Fed. Rep. 78 (1907). A receiver's certificates of a sugar company issued by a receiver appointed at the instance of a stockholder, neither the trustee nor the mortgage nor any bondholder being a party to the suit, are not prior to the mortgage, they having been issued for expenses. *Smiley v. Sioux, etc. Co.*, 99 N. W. Rep. 263 (Neb. 1904). Receiver's certificates may be issued to preserve a hotel property, pending an appeal from an order refusing to confirm a sale by the receiver. *Porch v. Agnew Co.*, 57 Atl. Rep. 546 (N. J. 1904). Receiver's certificates issued for past indebtedness of a lumber company have no priority over mortgage bonds, especially where neither the trustee nor the bondholders were

not negotiable, even though payable to bearer. A *bona fide* purchaser stands in no better position than the original party who took them.¹

parties to the suit. *Bernard v. Union T. Co.*, 159 Fed. Rep. 620 (1908). Receiver's certificates may be issued to pay taxes, but not to continue the business, etc., of an irrigation company. *Hanna v. State Trust Co.*, 70 Fed. Rep. 2 (1895). Receiver's certificates issued by the receiver of a private car manufacturing company, and without notice to the bondholders, and to pay old debts of the company, are not good. *Laughlin v. U. S. Rolling Stock Co.*, 64 Fed. Rep. 25 (1894). Receiver's certificates, issued by the receiver of a merely private corporation, are not a charge upon the assets of the corporation in preference to existing liens, as against lienors who have not consented to their issue. *Doe v. Northwestern, etc. Co.*, 78 Fed. Rep. 62 (1896). Where there are liens ahead of mortgage bonds issued by an iron company, the court will not authorize the issue of receiver's certificates to pay the interest on the bonds for the purpose of avoiding foreclosure. *Newton v. Eagle, etc. Co.*, 76 Fed. Rep. 418 (1896). Where a West Virginia corporation is building a hotel in Maryland and there are lien claimants in Maryland, the United States court in West Virginia has no power to issue receiver's certificates to finish the hotel, such lien claimants being necessary parties and of the same state as the complainant. *Baltimore, etc. Assoc. v. Alderson*, 90 Fed. Rep. 142 (1898). Receiver's certificates prior in right to the mortgage cannot be issued in a suit to foreclose a mortgage on the property of a land company. *Lamar, etc. Co. v. Belknap, etc. Bank*, 28 Colo. 344 (1901). Bondholders are not estopped by the action of the trustee in consenting to the issue of receiver's certificates where the corporation which gave the mortgage was a land company. *Belknap, etc. Bank v. Lamar, etc. Co.*, 28 Colo. 326 (1901). The court has no power to authorize a receiver of a coal company appointed at the instance of a simple-contract creditor to issue receiver's certificates prior in lien to an existing mortgage, as against the protest of the trustee of the mortgage, the proceeds to be used to continue the business. *International T. Co. v. United, etc. Co.*, 27 Colo. 246 (1900). A court of equity may authorize the receiver of waterworks to incur debts which shall be prior in right to a pre-existing mortgage. *Ellis v. Vernon, etc. Co.*, 4 Tex. Civ. App. 66 (1893). Receivers' certificates issued by the receivers of an insolvent hotel company, in a suit brought by a stockholder for a winding up of the business, do not take preference over the mortgage bondholders, the trustee of the mortgage not being a party to the suit. The certificates were issued by order of the lower court, and were declared to be a first lien, but the court of appeals declared them to be subject to the mortgage. They were issued to complete the hotel. Labor debts have no preference over the mortgage. *Raht v. Attrill*, 106 N. Y. 423 (1887). The court cannot authorize the receiver of a coal company to issue receiver's certificates in order to operate the mines, where some of the bondholders object. *Farmers' L. & T. Co. v. Grape, etc. Co.*, 50 Fed. Rep. 481 (1892). See also § 861, *supra*.

¹ A receiver's certificate is not negotiable even though it purports so to be on its face. *Bernard v. Union T. Co.*, 159 Fed. Rep. 620 (1908). In *Stanton v. Alabama, etc. R. R.*, 2 Woods, 506 (1875); s. c., 22 Fed. Cas. 1065, the order appointing the receivers directed them to complete and put the road in repair and equip it, and the same order authorized them to issue \$1,200,000 of receiver's cer-

Receiver's certificates are sometimes issued in payment of past-due certificates for that purpose, bearing eight per cent. interest and disposable at ninety cents on the dollar, the certificates to be a first lien on the property. The receivers issued them in pledge at less than ninety cents on the dollar and misappropriated the money received for them. The court held that they were not negotiable, but that they were enforceable to the extent that the money actually paid for them would buy them at ninety cents on the dollar, the purchaser not being bound to see that the receiver properly applied the money. Where a receiver's certificate is issued to a party for no consideration whatever, neither he nor a *bona fide* purchaser from him can enforce it, although the court had authorized the receiver to issue certificates. *Turner v. Peoria, etc. R. R.*, 95 Ill. 134 (1880). Receiver's certificates are not negotiable, inasmuch as they lack nearly every essential quality of negotiable paper; they are not payable unconditionally, and are payable only from the fund and in case the fund of the receivers therefor is sufficient. The fact that the certificates are payable to bearer does not change the rule. *Turner v. Peoria, etc. R. R.*, 95 Ill. 134 (1880). Receiver's certificates in excess of the amount authorized by the court are void, but, if the money received therefor was used to pay interest coupons, the holder of the certificates is subrogated to an interest in such coupons and may enforce them. *Newbold v. Peoria, etc. R. R.*, 5 Bradw. (Ill.) 367 (1879). Where receiver's certificates are sold at a discount on fraudulent representations made to the court, the court may cancel the certificates to the amount of the discount. *Belknap, etc. Bank v. Lamar, etc. Co.*, 28 Colo. 326 (1901). Where a receiver is authorized to issue certificates of indebtedness for "money borrowed, material furnished, labor performed, or on account of contracts made by him on account of the construction of the road," in order to construct, complete, and equip the road, certificates issued for material before it is furnished cannot be enforced, where such material is not furnished afterwards. A transferee of the certificates cannot enforce them. They are not negotiable, since they refer to the order authorizing them. *Bank of Montreal v. Chicago, etc. R. R.*, 48 Iowa, 518 (1878). A receiver's certificate is not negotiable, and a purchaser of it cannot collect if the original holder thereof never paid for it the sum he agreed to pay. *Union Trust Co. v. Chicago, etc. R. R.*, 7 Fed. Rep. 513 (1881). Although receiver's certificates recite that they are a first lien on the property and were issued under the authorization of the court, yet, if the court subsequently refuses to enforce them, a purchaser cannot hold the receiver liable for false and fraudulent representations. *Bank of Montreal v. Thayer*, 7 Fed. Rep. 622 (1881). Receivers who wilfully and corruptly exceed their powers are liable for the actual damages sustained by reason of their misconduct, but for nothing more. Even though they have issued receiver's certificates at a greater discount than authorized by the court, yet, inasmuch as the court will not enforce such certificates at the excessive rate of discount, the receivers will not be held personally liable. *Stanton v. Alabama, etc. R. R.*, 2 Woods, 506 (1875); s. c., 22 Fed. Cas. 1065. A receiver's certificate is not entitled to payment where the debt for which it was issued was not entitled to payment. *Fidelity Ins. Co. etc. Co. v. Shenandoah, etc. Co.*, 42 Fed. Rep. 372 (1889). Receiver's certificates are transferable, but not negotiable. If they are issued for purposes other than those specified in the order authorizing them, they are not enforceable. *Stanton v. Alabama, etc. R. R.*, 31 Fed. Rep. 585 (1887). Re-

interest,¹ but, as already stated, a strong case is required to justify this.² Receiver's certificates cannot be issued in a sequestration proceeding to pay interest on the bonds, but can only be issued to preserve the property as a going concern pending litigation.³

Although a bill in equity filed in the United States court turns out to have been collusive, so that the court had no jurisdiction, yet, where receiver's certificates have been issued under order of the court, the court will protect the receiver's certificates by ordering the sale of enough property to pay them, and the court may also retain jurisdiction of intervening petitions.⁴ A claim for a right of way

ceiver's certificates are not negotiable, and if they are issued below par without the authority of the court the holder or purchaser can enforce them only to the extent of the money for which they were issued. *Central Nat. Bank v. Hazard*, 30 Fed. Rep. 484 (1887). Receiver's certificates sold at ninety cents on the dollar are a lien on the property to that extent where the property was sold subject to liens. *Swann v. Clark*, 110 U. S. 602 (1884). Interest on the receiver's certificates was refused in *Calhoun v. St. Louis*, etc. R. R., 9 Biss. 330 (1880). In *Farmers' L. & T. Co. v. Kansas City*, etc. R. R., 53 Fed. Rep. 182, 191 (1892), the court said in regard to receiver's certificates: "In compliance with the order of the court, the creditors have presented their claims, and they have been allowed, and proper certificates of indebtedness issued, which have in most cases been assigned to persons who purchased them in good faith, relying upon the order of the court. The creditors and the public had a right to rely upon the court's order." The purchaser of receiver's certificates may enforce them, although the receiver has misappropriated the money. *Mercantile Trust Co. v. Kanawha*, etc. Ry., 50 Fed. Rep. 874 (1892). A form of receiver's certificates, and of the order appointing the receivers and authorizing the issue, is given in full in *Kennedy v. St. Paul*, etc. R. R., 2 Dill. 454 (1873); s. c., 14 Fed. Cas. 323. Another form

is given in *Bank of Montreal v. Chicago*, etc. R. R., 48 Iowa, 520 (1878). Persons loaning money to the receiver on his certificates are not bound to see that he properly applies the proceeds. *Union Trust Co. v. Illinois Mid. Ry.*, 117 U. S. 434 (1886).

¹ Where the holders of prior mortgage bonds, divisional mortgage bonds, past due, are willing to extend the time of payment thereof for ten years, if receiver's certificates for semi-annual interest are given them, in order to save the trouble of sending in the bonds every six months to collect the interest, the court will allow the issue, even against the wishes of the trustee of such divisional mortgages. *Skiddy v. Atlantic*, etc. R. R., 3 Hughes, 320, 341 (1877); s. c., 22 Fed. Cas. 274. See also § 872, *supra*.

² See p. 3108, *supra*.

³ *Townsend v. Oneonta*, etc. R. R., 88 N. Y. App. Div. 208 (1903).

⁴ *Electrical*, etc. Co. v. *Put-in-Bay*, etc. Ry., 84 Fed. Rep. 740 (1898). Where a federal court authorizes the issue of receiver's certificates, and it is afterwards decided that the court had no jurisdiction of the case, a state court which then takes possession of the property need not recognize such certificates. *Crosby v. Morristown*, etc. R. R., 42 S. W. Rep. 507 (Tenn. 1897). Receiver's certificates may be valid as against a mortgagee who is a party to litigation, even though the court finally decides that it had no jurisdiction in that case. *Illinois*, etc. Bank

may have priority over receiver's certificates.¹ Persons advancing money to keep a street railway in operation, and for taxes, after it has become insolvent have no preference over the mortgage, the trustee not having taken possession, and there having been no diversion of income to the bondholders, but money so advanced at the request of the trustee after the trustee takes possession may have priority over the mortgage.²

D. LIABILITY, COMPENSATION, ACCOUNTS, AND DISCHARGE OF RECEIVERS.

§ 878. *A receiver is not personally liable or responsible for any debts legally incurred or contracts legally made or damages done by him as receiver, or by his subordinates and employees—He is liable for personal misconduct or neglect.*—These are well-established rules. Were they not so it would be impossible to induce a responsible person to act as receiver. It often happens that some of the receiver's debts or liabilities are never paid, the assets or income being insufficient for that purpose. A receiver is not liable personally on debts, contracts, and liabilities incurred by him as receiver.³ A few cases hold

v. Pacific Ry., 115 Cal. 285 (1896). Receiver's certificates are not invalidated by the fact that a demurrer would have been good as against the bill in equity under which the receiver was appointed. *Farmers', etc. Co. v. Centralia, etc. Co.*, 96 Fed. Rep. 636 (1899). Although the bonds are held to be invalid, yet the foreclosure suit being started, and receiver's certificates being out, and all the property in the receiver's hands, the court will sell and administer the property, all parties consenting. The phrase all property "intended to be used," in the mortgage, covers material for construction, such as rails, etc. If the receiver has notes belonging to the company the court will administer them also. *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 49 Fed. Rep. 188 (1892). Even though a suit in which a receiver of a railroad is appointed is finally dismissed on the ground that the court had no jurisdiction, yet, if receiver's certificates for the completion of the road are issued, with the consent of the directors

of the railroad, it is liable therefor. *Denison, etc. Ry. v. Ranney, etc. Co.*, 53 S. W. Rep. 496 (Indian Ter. 1899).

¹ See § 856, *supra*.

² *Mersick v. Hartford, etc. Co.*, 76 Conn. 11 (1903).

³ "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." *Texas, etc. Ry. v. Cox*, 145 U. S. 593 (1892); *McNulta v. Lochridge*, 141 U. S. 327 (1891). A receiver is not personally liable in damages to a stockholder for delay in performing his duty, there being no personal misconduct. *Knowles v. Scott*, L. R. [1891] 1 Ch. 717. A receiver "is under no personal liability to respond except for his own personal neglect." *Davenport v. Alabama, etc. R. R.*, 2 Woods, 519 (1875); s. c., 7 Fed. Cas. 8. A receiver in sequestration proceedings cannot be authorized

to the contrary,¹ but the settled rule is that the receiver, being only

by the court to take a fund which by contract had been placed by the company in a trustee's hands for a specific purpose, but where the receiver has paid out the money by order of the court he will not be held personally liable to pay it back, even if the court revokes its former order. *Re Home Assoc.*, 129 N. Y. 288 (1891). The receiver is not personally liable on an agreement made pending a suit by a claimant, that in case such suit was successful the claimant should be paid in a manner set forth in the agreement. *Vilas v. Page*, 106 N. Y. 439 (1887). A judgment for taxes should be against the receivers as receivers and not against them personally. *Commonwealth v. Runk*, 26 Pa. St. 235 (1856). The receiver is not liable personally. *Hopkins v. Connel*, 2 Tenn. Ch. 323 (1875).

"No receiver could be made individually liable in a personal action upon a contract made in his official capacity or for torts committed by his subordinates. If receivers could be exposed

to such individual responsibility, no prudent man would accept such trusts in cases where vast numbers of subordinates must needs be employed, exposing him to the hazard of ruinous liabilities for their misconduct." *Farmers' L. & T. Co. v. Central R. R.*, 7 Fed. Rep. 537 (1881). A judgment against a receiver must be against him as receiver and not personally, and must be made payable out of funds held by him in that capacity. *Woodruff v. Jewett*, 37 Hun, 205 (1885). Compare *Woodruff v. Jewett*, 115 N. Y. 267 (1889). A receiver is not personally liable for an accident on the railroad where he was not personally negligent in employing the operating force. *Cardot v. Barney*, 63 N. Y. 281 (1875). Even though money earned before the appointment of a receiver does not belong to the receiver, yet, if he collects it and distributes it among the bondholders in accordance with the orders of the court, the general creditors cannot hold him personally liable for so doing. The remedy is by

1 A receiver has power to incur expenses and charges for the preservation and use of property which comes to his hands in virtue of the receivership, and he is personally liable therefor if the funds in his hands are insufficient. *Rogers v. Wendell*, 54 Hun, 540 (1889). A receiver is liable personally for an injury occurring on a road leased to him as receiver, even though the court appointing him assented to the lease, where the receiver was appointed in one state, and the leased road was in another state. *Kain v. Smith*, 80 N. Y. 458 (1880). It seems that the receiver may be sued and held liable personally, where it is alleged and proved that he knew of material defects in the machinery and equipment and yet ran the train which caused the injury. *Erwin v. Davenport*, 9 Heisk. (Tenn.) 44 (1871). If

a receiver is sued personally and does not object, he is deemed to have waived the objection that he is liable only as receiver. *Camp v. Barney*, 4 Hun, 373 (1875). In *Blumenthal v. Brainerd*, 38 Vt. 402 (1866), the court sustained the right to hold the receivers liable personally, but said that a receiver could always protect himself by applying to the court which appointed him for an injunction. Receivers who are sued personally for loss of freight are liable personally unless they "invoke the aid of the court of chancery." *Newell v. Smith*, 49 Vt. 255 (1877). Although the order appointing a receiver has been rescinded, yet he is liable for turning back to the company an engine for which a possessory warrant has been granted against him. *Peacock v. Pittsburg, etc. Works*, 52 Ga. 417 (1874).

an agent of the court, is no more liable than the court itself.¹ Where of course the receiver is guilty of misconduct he is personally liable.² Where it is charged that a receiver has misappropriated the funds the court may hold him liable in the suit already pending, or may

motion or appeal and not by a collateral action. *Platt v. New York, etc. Ry.*, 170 N. Y. 451 (1902). An assignee for the benefit of creditors of a corporation is not personally liable for failure to collect subscriptions until after the statute of limitations has barred recovery, where he delayed action by advice of counsel that it was first necessary to exhaust other corporate assets and it was supposed that the debts could be paid from such assets. *In re Sewickley, etc. Co.*, 47 Atl. Rep. 944 (Pa. 1901). Where a receiver is authorized to carry on and continue the business, he is not personally liable for purchases which he makes as receiver. *Olpherts v. Smith*, 54 N. Y. App. Div. 514 (1900). A receiver is not personally liable for conversion of property which he takes from third persons under an order of court. *Fallon v. Egberts, etc. Co.*, 56 N. Y. App. Div. 585 (1900). A receiver cannot be held personally liable for injuries to a passenger carried on the railroad, the receiver not being personally negligent. He may apply to the court to enjoin the action. The suit should be against him as receiver and leave obtained to sue him. *Camp v. Barney*, 4 Hun, 373 (1875). A receiver is not liable personally for acts done under order of the court. *Schmidt v. Gayner*, 59 Minn. 303 (1895); *Remington, etc. Co. v. Watson*, 49 La. Ann. 1296 (1897). A receiver is not personally liable for taxes. *State v. Red River, etc. Co.*, 69 Minn. 131 (1897). The receivers are liable as receivers only. *Davis v. Duncan*, 19 Fed. Rep. 477 (1884); *Murphy v. Holbrook*, 20 Ohio St. 137 (1870); *Thompson v. Scott*, 4 Dill. 508 (1876); s. c., 23 Fed. Cas. 1088. The receiver is not personally liable on contracts for supplies which he makes

as receiver. *Vanderbilt v. Central R. R.*, 43 N. J. Eq. 669 (1887). The receiver is not liable personally. Being liable as receiver only, the court of chancery which appointed may refuse to allow him to be sued. *Kennedy v. Indianapolis, etc. R. R.*, 3 Fed. Rep. 97 (1880). In *Davis v. Duncan*, 19 Fed. Rep. 477 (1884), the court said: "A receiver, as such, upon principle and authority is not personally liable for the torts of his employees. Were he so liable few men would take the responsibility of such a trust; it is only when he himself commits the wrong that he is held personally liable. The proceeding against him as receiver for the wrongs of his employees is in the nature of a proceeding *in rem*, and renders the property in his hands, as such, liable for compensation for such injuries." The complaint may be amended so as to be against the receivers "as" receivers. *Eddy v. Powell*, 49 Fed. Rep. 814 (1892). A receiver is not personally liable for selling receiver's certificates at a less price than that authorized by the court, where the court refuses to enforce the certificates for anything more than the price at which the court authorized their issue. *Stanton v. Alabama, etc. R. R.*, 2 Woods, 506 (1875); s. c., 22 Fed. Cas. 1065. The receiver is not personally liable. *Little v. Dusenberry*, 46 N. J. L. 614, 638 (1884). The pledgee of stock cannot claim title to it on the ground that the pledgor was a receiver and purchased the stock at a receiver's sale. *Groeltz v. Cole*, 103 N. W. Rep. 977 (Iowa, 1905).

¹ Quoted and approved in *Sager, etc. Co. v. Smith*, 45 N. Y. App. Div. 358 (1899).

² See cases *supra*, and §§ 880, 882, *infra*.

authorize an independent suit.¹ A suit at law does not lie against a receiver at the instance of a bondholder to hold the former liable for fraud in managing the property so that it brought a small price at foreclosure sale, even though such a suit might lie in equity.² Creditors of the receiver are paid through allowances to the receiver and not by a judgment in favor of such creditors.³ The receiver may be liable where he acts in important matters without an express order from the court.⁴ Thus where the receiver incurs debts without being expressly authorized so to do by the court, the court will dispose of them equitably, and if the assets are insufficient the receiver's compensation will be paid only proportionately with such debts.⁵ Thus where the receivers are authorized by order of the court to continue business for six months, but actually do continue the business for twelve months, with disastrous results, the wages due for the last six months may be paid out of the estate, but the receiver may be liable to the estate for the losses during those six months.⁶ Receivers who carry on the business at a loss, but without knowing that they are incurring a loss, may be held personally liable for such part of the debts as might have been prevented by proper care, it being their duty to make no payments under such circumstances except *pro rata*, and hence they will be personally liable for full payments made after the business was conducted at a loss.⁷

¹ *Harrigan v. Gilchrist*, 99 N. W. Rep. 909 (Wis. 1904).

² *Fletcher v. Burt*, 126 Fed. Rep. 619 (1903). Where commissioners, appointed according to the charter, have liquidated the affairs of the corporation, a stockholder cannot maintain a suit to have a receiver appointed for such purpose, even though the commissioners have misused the property and funds entrusted to them, inasmuch as he may maintain a suit against them in his own name. *Russell v. Citizens' Ice Co.*, 43 S. Rep. 44 (La. 1907).

³ *Hendrie, etc. Co. v. Parry*, 86 Pac. Rep. 113 Col. (1906).

⁴ A receiver who sells property without express authority and loses the money in the business may be held liable for the fair value of the property so sold. He has no inherent power to undertake new work nor to expend more than the court authorizes in completing unfinished work. If he continues operations when he was or-

dered merely to preserve the property, he is personally liable for the loss. A receiver of a manufacturing corporation who continues its operation without express authority is personally liable for any loss, and where the property is being consumed by expenses he should apply to the court for permission to sell it. *State, etc. Bank v. Fanning, etc. Co.*, 92 N. W. Rep. 712 (Iowa, 1902).

⁵ *Nessler v. Industrial, etc. Co.*, 56 Atl. Rep. 711 (N. J. 1903). See § 876.

⁶ *Gillespie v. Blair Glass Co.*, 189 Pa. St. 50 (1899).

⁷ *Gutterson & Gould v. Lebanon, etc. Co.*, 151 Fed. Rep. 72 (1907), holding also that where receivers represent to the court that they have money in hand to pay certain debts of the company, and can do so without detriment to the business, whereas in fact they are conducting the business at a loss and contracting debts which they have no means of paying, they may be held personally liable for the money paid out,

Again, even though the same receiver is appointed in two circuits, yet he has no right to turn over the assets in the one circuit to himself as receiver in the other circuit, without order of the court, and if he does so he and his bondsmen are personally liable.¹ A receiver may be personally liable where he disposes of assets without consent of the court, leaving debts unpaid.² Although a receiver is authorized to purchase material, yet he is not authorized to issue notes therefor, and hence is personally liable on such notes.³ A receiver will be held responsible for failure to collect assessments which he might have collected if he had brought suit.⁴ A receiver may, of course, assume personal liability. The question of whether a receiver has assumed personal liability for debts incurred by him "is one to be determined from the facts and circumstances of the case."⁵ A misrepresentation by the receiver in making a sale may not release the purchaser, but he may hold the receiver responsible either personally or officially.⁶ In England a receiver is personally liable on contracts made by him unless there is an agreement to the contrary.⁷

§ 879. *Compensation of receivers and the foreclosing trustees, and allowances to them and to bondholders and stockholders who have instituted the suit, for disbursements for counsel, etc.*—A receiver will be allowed a reasonable compensation for his services. In the case of a railroad receiver more than ordinary ability and responsibility are involved, and the court recognizes this fact in fixing the compensation. Each case, however, turns on its own facts. The former tendency of the courts to allow very high compensation has

even though the court authorized the payment on their *ex parte* application. Where the receiver has stated that the assets are sufficient to pay all debts, but he disobeys the orders of the court and delays for two years in settling his accounts, he may be required to pay the debts himself if the assets are insufficient. *Lyle v. Sarvey*, 104 Va. 229 (1905).

¹ *Kirker v. Owings*, 98 Fed. Rep. 499 (1899). As to bondsmen see § 880, *infra*.

² *Kirker v. Owings*, 98 Fed. Rep. 499 (1899).

³ *Peoria, etc. v. Hickey*, 110 Iowa, 276 (1900). In the case of *Ficener v. Bott*, 47 S. W. Rep. 251 (Ky. 1898), a receiver was held liable for money deposited by him in a bank without

authority, where the money was lost by the failure of the bank. Where a receiver checks out and uses for his own purposes money held by him as receiver, in violation of an order that the money should be checked out only on the joint order of the receiver and the court, the court may commit the receiver to jail for contempt. *Tindall v. Westcott*, 113 Ga. 1114 (1901).

⁴ *In re Angell*, 91 N. W. Rep. 611 (Mich. 1902).

⁵ *Cake v. Mohun*, 164 U. S. 311 (1896).

⁶ If he elects to do the latter, his judgment has no preference over other claims against the receiver. *Coe v. Patterson*, 122 N. Y. App. Div. 76 (1907).

⁷ *Burt v. Bull*, [1894] 1 Q. B. 276.

been rebuked by the supreme court of the United States, but this does not limit the power of the court to pay sufficient compensation to enable it to obtain a competent receiver.¹ Although a receiver has pos-

1 In *Williams v. Morgan*, 111 U. S. 684 (1884), the court reduced the receiver's fees from about \$130,000 to \$75,000 for five years' service. See also *Trustees v. Greenough*, 105 U. S. 527 (1881). The compensation of the receiver should be determined by the master. But the court will do so if he does not. Five per cent. of receipts and also disbursements is generally allowed, unless the amount is large. But the court will consider the character of the work. Ten thousand dollars a year was allowed in this case.

An order fixing the receiver's compensation and directing him to turn over the assets is appealable, but the receiver's claim that he should be allowed \$3,200, instead of \$1,200, for handling property worth \$38,000, will not be sustained. *Union, etc. Bank v. Mills*, 103 Wis. 39 (1899). A receiver cannot be held liable as receiver by the president of a corporation for services rendered to the receiver where it appears that the receiver should have rendered those services himself. *Joost v. Bennett*, 123 Cal. 424 (1899). In an estate of \$25,000 the trustee was allowed \$1,200 and the attorney \$1,000 in *Wright v. Knoxville, etc. Co.*, 59 S. W. Rep. 677 (Tenn. 1900). Where no exceptions are filed to an auditor's report allowing a receiver's disbursements for taxes, and such report is confirmed, it is an adjudication, and exceptions cannot afterwards be filed. *National, etc. Bank v. Heller*, 94 Md. 213 (1901). Ten per cent. on the disbursements was allowed to a receiver of a medical association in *Culver v. H. R. Allen, etc. Ass'n*, 206 Ill. 40 (1903). A receiver is not entitled to fees on collections made by the trustee of a mortgage, the collections being less than the claims of the security holders. *Girard T. Co. v. McKinley, etc. Co.*, 143

Fed. Rep. 355 (1906). The compensation of the receiver should turn on the value of the property, the benefits from the receivership, the time, labor and skill involved and the character of his work. *Hickey v. Parrot, etc. Co.*, 79 Pac. Rep. 698 (Mont. 1905). Three and a half per cent. was allowed to the receiver in *Silvers v. Merchants', etc. Ass'n*, 56 Atl. Rep. 294 (N. J. 1903), where the amounts handled were large and most of the work had been done by counsel. Four per cent. on the amount administered was allowed to the receiver and his counsel in the case *Lembeck v. Jarvis, etc. Co.*, 59 Atl. Rep. 565 (N. J. 1904), where a storage plant was operated and skill was required in making the sale. The elements making up the basis of a receiver's compensation and the legal assets were considered in *Harrigan v. Gilchrist*, 99 N. W. Rep. 909 (Wis. 1904), the amount allowed for legal assistance being based on results. Where a receiver has been negligent and has committed fraud in his work, he will not be allowed any compensation. *Dalliba v. Riggs*, 82 Pac. Rep. 107 (Idaho, 1905). A receiver has no right to agree with the purchaser at the sale that the latter should pay the receiver's fees. That is for the court to pass upon. *Hall v. Stulb*, 126 Ga. 521 (1906). \$750 was allowed to a receiver who sold the property for about \$5,000 and paid out in expenses, etc., about \$2,500. *Goodman v. Wilder*, 84 N. E. Rep. 1025 (Ill. 1908). Where the appointment of a receiver is revoked as erroneous, the corporate assets are not liable for his expenses except such as would have been incurred if he had not been appointed. *Ogden City v. Bear Lake, etc. Co.*, 18 Utah, 279 (1898). In England, where the bondholders are fully paid and there is

session, and assignees in bankruptcy never took possession, yet they and their counsel may nevertheless be entitled to compensation out

a surplus with the receiver, it is held that the court cannot fix the compensation of the receiver, except that he may interpose it as an offset to an action by the corporation to recover the balance of the funds. *Re Vimbos Limited*, [1900] 1 Ch. 470.

The fact that the receiver has made mistakes should not deprive him of his pay if he acted in good faith. *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660. The compensation, etc., of a federal receiver will not be fixed by a state court. *Central Trust Co. v. Thurman*, 94 Ga. 735 (1894). In *Montgomery v. Petersburg, etc. Ins. Co.*, 70 Fed. Rep. 746 (1895), \$5,000 was allowed the receiver for operating a thirteen-mile street railway for three and a half years, and \$2,500 to his counsel. If the appointment was unauthorized a receiver may not be entitled to pay. *St. Louis, etc. R. R. v. Wear*, 135 Mo. 230 (1896). Where the receiver handles about \$95,000, and most of the work is done in six months through clerks, his compensation was fixed at \$3,000 the first year, and \$1,000 subsequently. *Prouty v. Prouty, etc. Co.*, 155 Pa. St. 112 (1893). The basis for determining the amount is the responsibility, skill and labor involved, and the pay usually allowed for such work. In this case the receiver of a savings bank was allowed at the end of the first year \$7,500 for his services for that year, he having paid out about \$1,400,000, but he was not allowed disbursements given away to policemen as a gratuity for attendance during a "run" on the bank. He was also allowed to retain commissions earned by him as a broker for placing mortgage loans from the insolvent bank with other parties. *Special Bank Com'rs v. Franklin Inst.*, 11 R. I. 557 (1877). In *McArthur v. Montclair Ry.*, 27 N. J. Eq. 77 (1876), where

three receivers acted jointly for two years until the road was sold, one was allowed \$1,400 and the other two \$3,000 each. Concerning the compensation of a receiver of a ship, see *Jones v. Keen*, 115 Mass. 170 (1874), allowing also for counsel. See also *Corey v. Long*, 12 Abb. Pr. (N. S.) 427 (1872), a partnership receivership case, not allowing for counsel. The compensation of receivers will be the same as of guardians, trustees, etc., so far as is practicable. Where second mortgagees foreclose, and the first mortgagee intervenes and becomes a party and files a cross-bill to foreclose, and sale is made subject to the first mortgage, and the receiver, who was appointed at the instance of the second mortgagees, is entitled to more pay than the proceeds of such sale, he may recover the deficiency from the complainants personally, but not from the defendant first mortgagees. *Tome v. King*, 64 Md. 166 (1885).

A receiver's compensation is in the discretion of the court, but will be fixed only after a hearing and notice to all parties. *Attorney-General v. North American, etc. Ins. Co.*, 26 Hun, 294 (1882). As to a receiver's compensation, see also *Attorney-General v. North, etc. Ins. Co.*, 89 N. Y. 94 (1882). Receivers allowed \$4,500 a year, trustee allowed \$500; and the various counsel for the trust companies and others, \$100,000. *Easton v. Houston, etc. Ry.*, 40 Fed. Rep. 189 (1889). As to the receiver's compensation in general, see *Greeley v. Provident Sav. Bank*, 103 Mo. 212 (1891). In New York the court determines the amount of the receiver's compensation in a foreclosure case, and the statute relative to receiver's fees applies to receivers in bankruptcy. *U. S. Trust Co. v. New York, etc. R. R.*, 101 N. Y. 478 (1886). As to compensation of receivers, see *Central Trust*

of the property.¹ A receiver who resides at a distance and does not take an active part in the management is not entitled to the same pay that a regular railroad president would be.² Partial allowances may be made to the receiver prior to the close of the receivership.³ The receiver will also be given an allowance for the payment of fees of his counsel,⁴ and also the receiver's own reasonable disbursements.⁵ The traveling expense of the receiver is a proper allowance.⁶

Co. v. Wabash, etc. Ry., 32 Fed. Rep. 187 (1887). The court may allow the receiver extra compensation beyond that fixed by the order appointing him, where there is good reason for so doing. *Farmers' L. & T. Co. v. Central R. R.*, 8 Fed. Rep. 60 (1881).

¹ *Meddaugh v. Wilson*, 151 U. S. 333 (1894), holding also that the decree of foreclosure need not settle that question.

² Twenty-five hundred dollars a year was allowed. *Central Trust Co. v. Cincinnati, etc. Ry.*, 58 Fed. Rep. 500 (1892). The court in *Braman v. Farmers', etc. Co.*, 114 Fed. Rep. 18 (1902), refused to allow a receiver of a railroad more than \$12,000 for two years' services, the road being only sixty miles in length and the business small, and the road being operated part of the time by a lessee, the receiver being a resident of Massachusetts, while the road was in Kansas, even though the receiver negotiated receiver's certificates. The court refused to allow the rent of an office in New York by the receiver, the same not having been authorized in advance.

³ *Maxwell v. Wilmington, etc. Co.*, 82 Fed. Rep. 214 (1897); *Special Bank Com'rs v. Franklin Inst.*, 11 R. I. 557 (1877). The court cannot fix the final compensation of the receiver until his

work is finished but may grant allowances from time to time. The receiver may agree with the stockholders to waive his statutory fees and take such pay as the court may allow. *Riordan v. Horton*, 94 Pac. Rep. 448 (Wyoming, 1908). The court may allow payments to the receiver at stated intervals during the receivership. *Battery, etc. Bank v. Western, etc. Bank*, 126 N. C. 531 (1900). An order of the court refusing to a receiver a second allowance will not be disturbed on appeal unless there has been a clear mistake of fact or plain error of law; in other words, a manifest disregard of right and reason, and if the receiver has retained money pending an appeal taken by him he will be obliged to pay interest on the same. *Wilkinson v. Washington T. Co.*, 102 Fed. Rep. 28 (1900). Fees to counsel will be allowed during the progress of the case, but these partial allowances will be small in amount. *Central Trust Co. v. Wabash, etc. Ry.*, 23 Fed. Rep. 675 (1885).

⁴ The court may allow reasonable fees to the receiver for the payment of his counsel. *Stuart v. Boulware*, 133 U. S. 78 (1890); *Bronson v. La Crosse, etc. R. R.*, 2 Wall. 283 (1863). A receiver will be allowed his legal expenses in contesting claims of creditors against particular goods. *Speiser*

⁵ As to what disbursements will be allowed, see § 872, *supra*, notes. Receivers "are entitled to repayment of their reasonable expenses and charges, in preference to all other claims upon the property, of whatever nature." *Ellis v. Boston, etc. R. R.*, 107 Mass.

1, 28 (1871). In England a receiver is not allowed disbursements for the expense of giving his bond. *Harris v. Sleep*, [1897] 2 Ch. 80.

⁶ *Northern, etc. Ry. v. Hopkins*, 87 Fed. Rep. 505 (1898).

The trustee of the mortgage and his attorney, or a bondholder who brings suit, or counsel to a stockholder, who sues to remedy a wrong

v. Merchants' Exchange Bank, 110 Wis. 506 (1901). The allowance to counsel must be reasonable, and contracts in regard to allowances are not binding on the court. Twenty thousand dollars in the aggregate was allowed to three counsel in the case of *Phinizy v. Augusta, etc. R. R.*, 98 Fed. Rep. 776 (1896), nothing being allowed to counsel for intervenors who did not succeed. The court may order the fees of the receiver's attorney to be paid by the purchaser. *Louisville, etc. R. R. v. Wilson*, 138 U. S. 501 (1891), holding also that the fees of the attorney for the railroad in its effort to hold the system together need not be so paid where such efforts were fruitless. As to the amount of counsel fees to be allowed, see *Walker v. Quincy, etc. Ry.*, 28 Fed. Rep. 734 (1886). A receiver may be allowed counsel fees in another state. *Strauss v. Casey, etc. Co.*, 66 Atl. Rep. 958 (N. J. 1907). A receiver and his counsel may be paid out of the assets, even though the suit was by the stockholder and a general creditor, where it appears that the mortgagee was a party and the suit was practically a foreclosure suit. *Lembeck v. Jarvis, etc. Co.*, 59 Atl. Rep. 565 (N. J. 1904). Where the amount still due on unpaid stock is sufficient the judgment against the stockholders may include the claims proved and allowed with interest; also fees for creditors in winding up the company and in the suit to recover from the stockholders; also counsel fees and compensation to the receiver and expenses incurred in enforcing the decree. See *v. Heppenheimer*, 61 Atl. Rep. 843 (N. J. 1905). A receiver may ordinarily employ counsel, but the necessity of such employment and the compensation are to be determined by the court. *Hickey v. Parrot, etc.*, 79 Pac. Rep. 698 (Mont. 1905). Compensation to the receiver

for carrying on an appeal will not be taxed as costs in the upper court. *McKenzie v. Coslett*, 80 Pac. Rep. 1070 (Nev. 1905). A receiver will not be allowed the fees of his attorney when there was no occasion for him to employ an attorney. *Dalliba v. Riggs*, 82 Pac. Rep. 107 (Idaho, 1905). Where the receiver, even under the order of the court, has paid exorbitant fees to his counsel and for his own services, a creditor may apply to be made a party to the suit in order to have the orders set aside. *Schenck v. Ingraham*, 4 Hun, 67 (1875). Counsel fees will not be ordered paid in preference to a contractor's statutory lien. *Newcastle, etc. Ry. v. Simpson*, 26 Fed. Rep. 133 (1886). The receiver should be allowed for counsel fees paid by him; also cost of litigation and expenses incurred in protecting, repairing, and caring for the property. *McLane v. Placerville, etc. R. R.*, 66 Cal. 606 (1885). The receiver will be allowed sums paid by him to his counsel in opposing a motion for his removal, where he was not removed. *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660, where \$5,000 a year was allowed if it should appear that he had actually paid that amount to counsel. Compensation to counsel after the appointment of a receiver is in the discretion of the court. *Beneville v. Whalen*, 2 N. Y. Supp. 20 (1888). In the case of *Williams v. Morgan*, 111 U. S. 684 (1884), no objection was made to an allowance of \$31,000 to counsel for five years' service. Where the receiver's attorney settles his bill with the purchaser of the road and gives credit, a mortgage by the purchaser is prior to such attorney's claim. *Bound v. South Carolina Ry.*, 51 Fed. Rep. 58 (1892). An allowance to a receiver for his counsel's fees is made to him and not to

done to the corporation, may also be entitled to an allowance. That subject is closely related to the law on similar allowances to the receiver, and hence is considered in this connection.

The trustee, who is complainant in the suit to foreclose, is entitled to a reasonable compensation for actual services rendered by him and also for his disbursements reasonably incurred, including his counsel's fees.¹

the counsel. *First Nat. Bank, etc. v. Oregon Paper Co.*, 71 Pac. Rep. 144 (Oreg. 1903). Where a receiver has acted in good faith in prosecuting an action, it is proper that he should be allowed the costs and expenses of its prosecution. *Re Merry*, 11 N. Y. App. Div. 597 (1896). In *Boston, etc. Trust Co. v. Chamberlain*, 66 Fed. Rep. 847 (1895), the receiver's counsel was allowed \$3,000 a year. In *Walters v. Western, etc. R. R.*, 69 Fed. Rep. 706 (1895), counsel for the receiver and for complainant was given \$20,000. In *Saulsbury v. Lady Ensley, etc. R. R.*, 110 Ala. 585 (1896), the court was very strict in limiting the allowance to the receiver for his attorney for doing work which was not authorized, or which the receiver should have done himself. Even though the receiver is a lawyer he may be justified in employing counsel and paying for the same. *Olson v. State Bank*, 67 Minn. 267 (1898). See also cases in note 1, p. 3150. In New York a statute regulates the fees of counsel to receivers. *People v. Brooklyn Bank*, 125 N. Y. App. Div. 354 (1908).

¹ See 2 Perry, Trusts, §§ 916-919. An allowance of \$5,000 on account was made to a trust company during the litigation, and an allowance to the mortgagor was refused, in *Mercantile T. Co. v. Missouri, etc. Ry.*, 41 Fed. Rep. 8 (1889). As to the compensation of trustees of a railroad mortgage under the New York law, see *Dow v. Memphis, etc. R. R.*, 32 Fed. Rep. 185 (1885). Where, in a foreclosure suit by a mortgagee of a whole system of railroads, counsel fees and compensation to the trustees of first mortgages

on various parts of the system were allowed, similar compensation and fees will be allowed to one of those trustees up to the time when he instituted a separate suit of foreclosure on another division and had receivers appointed. *Central T. Co. v. Wabash, etc. Ry.*, 36 Fed. Rep. 622 (1888). In *Williams v. Morgan*, 111 U. S. 684 (1884), \$75,000 were allowed to the trustees; and \$30,000 for services and counsel fees were allowed in *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887). A trustee was allowed two per cent. in *In re Waterloo, etc. Co.*, 147 Fed. Rep. 814 (1906), where it foreclosed and bought in the property for the bondholders and resold it for them. Where a trustee takes a lease of the railroad upon his agreeing to pay the principal and interest of the bonds, and he sublets the same to another railroad company on the same terms, and the latter company defaults and foreclosure is had, and the trustee succeeds in making the latter company pay a large sum of interest, he is entitled to reasonable compensation and attorneys' fees out of the property, even twenty-five per cent. of the amount recovered, he having done all things for the benefit of the property and the bondholders. *Woodruff v. New York, etc. R. R.*, 129 N. Y. 27 (1891), the compensation being computed on the same basis as that for executors. Compensation to the trustee and his counsel and his successor in the trust was allowed in *Newport, etc. Bridge Co. v. Douglass*, 12 Bush. (Ky.), 673, 721 (1877). In *Coe v. Columbus, etc. R. R.*, 10 Ohio St. 372, 408 (1859), the court held that the trustees were not

If the court allows the trustee a compensation larger than the bondholders think reasonable they may contest the same¹ and appeal from the decision of the court.² If the trustee has performed no services, or has refused to act, he cannot claim compensation for

entitled to compensation out of the fund for their services and the services of their counsel, any more than any mortgagee is entitled thereto. Where the statutes of the state prescribe that trustees making a sale shall have two per cent. of the gross proceeds as their compensation for services of administration, the court will apply this rule to trustees selling a railroad on foreclosure, but will deduct the fee of the master who actually made the sale. *Duncan v. Atlantic, etc. R. R.*, 88 Fed. Rep. 840 (1880) (for form of decree see *id.*, p. 852). A trustee appointed by a corporation to carry on its business during financial difficulties is entitled to a reasonable compensation. *State v. McFarland*, 35 S. W. Rep. 1007 (Tenn. 1895). In *Central Trust Co. v. Benedict*, 78 Fed. Rep. 198 (1897), the trustees of a second mortgage were allowed compensation out of cash in the treasury of the company, it not being shown that the first mortgage covered the fund.

The trustee is entitled to payment of his disbursements out of the trust fund, and, if that is insufficient, to require payment thereof from the bondholders. He has a lien on the property therefor and for compensation for himself and his attorney. *Rensselaer, etc. R. R. v. Miller*, 47 Vt. 146 (1874). The trustee is entitled to have deducted from the trust fund any rent which has become due on

the property of the company while in his possession and for which he is liable. *Re Exhall, etc. Co.*, 35 Beav. 449 (1866). In *Patterson v. Hempfield R. R.*, 1 W. N. Cas. 127 (Pa. 1874), where the trustee took possession and proceeded to complete the road by laying down rails and buying iron, and doing a large amount of work, the court allowed claims therefor to come in ahead of bonds. The mortgage authorized him to preserve, repair, and maintain the property. In *Gilman v. Des Moines, etc. R. R.*, 41 Iowa, 22 (1875), the mortgage provided for a commission of two per cent. on bonds which were paid off by the sale of the mortgaged land by the trustees. If the sales of the land in such a case are to be made by the mortgagor and the proceeds paid to the trustee, the mortgagor is entitled to reimbursement of reasonable expenses. *Nickerson v. Atchison, etc. R. R.*, 17 Fed. Rep. 408 (1881). The trustee, who is also receiver, has a lien on the property ahead of the bondholders for his reasonable expenses, including compensation to his counsel. *McLane v. Placerville, etc. R. R.*, 66 Cal. 606 (1885); *Cowdrey v. Galveston, etc. R. R.*, 93 U. S. 352 (1876), where the attorney was allowed \$2,500. The solicitor for the trustee in a foreclosure suit is not absolutely entitled to his fees from the fund, and the court will exercise its discretion in allowing or refusing payment.

¹ A bondholder or a purchaser at foreclosure sale who has agreed to pay the trustee's expense may contest the amount of that expense and may appeal. *Williams v. Morgan*, 111 U. S. 684 (1884). A bondholder may intervene to contest extravagant compensation to the receiver and others,

where the trustee has joined in a reorganization scheme of the majority of the bondholders. *De Betz's Petition*, 9 Abb. N. Cas. 246 (1878).

² *Cowdrey v. Galveston, etc. R. R.*, 93 U. S. 352 (1876); *Trustees v. Greenough*, 105 U. S. 527 (1881).

services.¹ A trustee will not be allowed anything for himself or his counsel where there was no occasion for foreclosing, and no bondholder cared to have him foreclose, and the suit was abandoned; and where, on the foreclosure of the second mortgage, the trustee of the first mortgage has little to do, he will be given little pay.²

The trustee cannot claim reimbursement for any expenses except

Robinson v. Alabama, etc. Co., 51 Fed. Rep. 268 (1892). The attorneys for second-mortgage bondholders who first applied for and obtained a receiver were allowed \$6,000 on account in *Bound v. South Carolina Ry.*, 43 Fed. Rep. 404 (1890). An allowance of \$15,000 for the trustee's counsel fees in a railroad foreclosure was made in *Southern California, etc. Co. v. Union L. & T. Co.*, 64 Fed. Rep. 450 (1894), the mortgage providing for compensation to counsel, such provision being a usual covenant in such mortgages. An allowance was made to the solicitor for the foreclosing trustee in *Farmers' L. & T. Co. v. McClure*, 78 Fed. Rep. 209 (1897). In *Seibert v. Minneapolis, etc. Ry.*, 58 Minn. 65 (1894), \$50,000 attorney's fees were allowed to the trustee's attorneys, the court holding also that a statute as to fees in foreclosure suits did not apply to railroad foreclosures.

In the case of *Read v. Memphis, etc. Co.*, 64 S. W. Rep. 769 (Tenn. 1901), the trustee filed a bill against the mortgagor and the purchaser of the equity of the property to determine his compensation for defending the mortgage and also to be reimbursed for lawyer's fees, the defense being made that he had not brought any funds to the trust and had no right to a lien on the property for such charges. The court sustained the bill. In Kentucky a provision in a mortgage that the attorney for the trustee shall be paid a fee in case of foreclosure is not enforceable. *Ky. T. Co. v. Third Nat. Bank*, 50 S. W. Rep. 43 (Ky. 1899). A mortgagee who comes into possession of funds belonging to a lessee of the property

from the receiver is not entitled to attorney's fees for defending against a suit by such lessee. *Western Union Tel. Co. v. Boston, etc. Co.*, 112 Fed. Rep. 37 (1901). The trustee is entitled to compensation, especially where he has had to do active work, such as paying taxes, insurance, etc. He has a prior lien on the property for such services. On a \$50,000 mortgage he was allowed \$800. *Premier Steel Co. v. Yandes*, 139 Ind. 307 (1894).

¹ If the trustee refused to act, and was made a party defendant, an allowance to his counsel may be refused. *Investment Co. v. Ohio, etc. R. R.*, 46 Fed. Rep. 696 (1891). Where a trustee is removed because of absence from the country (*Farmers' L. & T. Co. v. Hughes*, 11 Hun, 130—1877) he cannot collect compensation for his services. *Hughes v. Chicago, etc. Ry.*, 47 N. Y. Super. Ct. 531 (1881). The allowance to the trustees will depend upon the amount of work actually done, and where they practically do nothing but employ counsel, the allowance to them will be small. *Phinzy v. Augusta, etc. R. R.*, 98 Fed. Rep. 776 (1896).

² *Bound v. South Carolina R. R.*, 62 Fed. Rep. 536 (1894). Trustees will not be allowed any substantial compensation or disbursements where the mortgage was proved in a suit instituted by a judgment creditor to distribute the assets of the insolvent corporation, but such judgment creditor may be allowed his expenses out of the fund, although the mortgage is not fully paid. *Tompkins Co. v. Chester Mills*, 90 Fed. Rep. 37 (1898).

those incurred in preserving the property or in foreclosing, unless the additional expense is authorized by the court.¹ These disbursements, when large and when made in connection with a railroad, are generally met by the issue of receiver's certificates.² The trustee's claim for services is not barred by the statute of limitations if the mortgage still exists.³ The trustee may, under certain circumstances, pay off a prior lien on the property, and he will then be subrogated to that lien and be entitled to repayment out of the property which he holds as trustee.⁴ A receiver need not turn his fees over to the trust company that caused him to be appointed, even though he is president of the trust company and received a salary.⁵ A trustee holding stock is entitled to have his charges paid before delivering it up.⁶ Compensation to the receiver and his counsel has a preference over receiver's certificates, but compensation to the trustee and his counsel does not.⁷

1 *Cowdrey v. Galveston, etc. R. R.*, 93 U. S. 352 (1876). In *Bound v. South Carolina Ry.*, 59 Fed. Rep. 509, 511 (1894), the court said: "There can be no doubt that trustees, and all others technically or actually occupying a representative character, are entitled to be reimbursed for all charges properly incurred in the discharge of the duties devolving upon them, out of the fund over which they have charge, and in which their constituents have an interest." See also § 872, *supra*.

2 See § 876, *supra*.

3 Although a trustee's claim for services is barred by the statute of limitations, yet the mortgage security for the bonds secured him also, and that is not barred except after the period raising a presumption of payment. He is entitled to pay, and is paid before the bonds are paid. *Smith v. Washington, etc. R. R.*, 33 Gratt. (Va.) 617 (1880).

4 *Memphis, etc. R. R. v. Dow*, 120 U. S. 287 (1887).

5 *Citizens', etc. Co. v. Tompkins*, 54 Atl. Rep. 617 (Md. 1903).

6 *Uehling v. Lyon*, 134 Fed. Rep. 703 (1905).

7 *Petersburg, etc. Ins. Co. v. Dellatorre*, 70 Fed. Rep. 643 (1895). The

receiver's expenses and counsel fees may be paid out of the body of the property. *Central Trust Co. v. Thurman*, 94 Ga. 735 (1894). The pay for the attorney of the receiver is a prior charge against the property. *Penn. Co. etc. v. Jacksonville, etc. Ry.*, 93 Fed. Rep. 60 (1899). The attorney's fees have priority over the receiver's remuneration. *Re Sanitary, etc. Assoc.*, [1900] 2 Ch. 289. Where a receiver is ordered to turn over the assets to a trustee in bankruptcy, the court may allow him to first deduct his compensation for his services. *Mauran v. Crown, etc. Co.*, 23 R. I. 324 (1901). The expenses of a receivership are paid before preferred claims are paid. *Lyle v. Staten Island, etc. Co.*, 48 Atl. Rep. 783 (N. J. 1901). A franchise tax levied during a receivership does not have preference over the receiver's allowance and the expenses of winding up the business. *Chesapeake, etc. Ry. v. Atlantic, etc. Co.*, 48 Atl. Rep. 997 (N. J. 1901). A receiver's costs and expenses must be paid prior to receiver's certificates. *English, etc. Co. v. Glasdir, etc. Mines, Ltd.*, 94 L. T. Rep. 8 (1905). The attorneys for the receiver are not entitled to pay in preference to judgment creditors for serv-

If a receiver is improperly appointed the plaintiff must pay the receiver's expenses.¹ If the assets are insufficient to pay a receiver the court has power to require payment by the parties who brought about the receivership.² But where the trustee of the mortgage of a canal and irrigation company institutes foreclosure suit at the request of the company itself and of the bondholders, and causes a receiver to be appointed and with the consent of all the parties the court orders the

ices rendered in defeating a mortgage as fraudulent, where the judgment creditors were parties defendant and their attorneys aided in the result. *North Side Bank v. Good, etc. Co.*, 97 N. Y. App. Div. 79 (1904).

¹ *Hendrie, etc. Co. v. Parry*, 86 Pac. Rep. 113 (Col. 1906). A receiver will not be allowed fees for time during which he was unlawfully kept in office. *Forrester v. Boston, etc. Co.*, 76 Pac. Rep. 2 (Mont. 1904). If the receiver is improperly appointed the party obtaining his appointment is liable for his pay. *Hickey v. Parrot, etc. Co.*, 79 Pac. Rep. 698 (Mont. 1905). A receiver legally appointed is entitled to his compensation for services, although the order of appointment is vacated or reversed. *Hickey v. Parrot, etc. Co.*, 79 Pac. Rep. 698 (Mont. 1905). Even though a receivership at the instance of the corporation itself is void, yet the corporation is liable for the services and expenditures of the receiver. *Tabor v. Bank of Leadville*, 83 Pac. Rep. 1060 (Colo. 1905). A liquidator appointed illegally by a court cannot recover for his services as liquidator, but may recover for services so far as they were beneficial to the company and were accepted by the company irrespective of the legal proceedings. *Re Allison, etc. Ltd.*, 91 L. T. Rep. 66 (1904). Where the receiver of a bank was illegally appointed at the instance of the state and served only seven days, an allowance to him of \$3,150 is sufficient, even though \$1,000,000 passed through his hands. Such allowance may be taxed as costs in the case. *State v.*

People's, etc. Bank, 95 S. W. Rep. 867 (Mo. 1906).

² *Farmers' Nat. Bank v. Backus*, 74 Minn. 264 (1898). A trust company that has instituted a suit to foreclose a mortgage and caused a receiver to be appointed may be required to pay the debts of the receiver and the expenses, in excess of the amount realized on the foreclosure sale. *Chapman v. Atlantic T. Co.*, 119 Fed. Rep. 257 (1902), the court refusing to follow *Farmers' L. & T. Co. v. Oregon, etc. R. R.*, 31 Oreg. 237 (1897). The complainant is not to be charged with the expenses of the receiver unless he is given an opportunity to be heard. *Wills Valley, etc. Co. v. Galloway*, 139 La. 276 (1904). Persons who have furnished supplies to a receiver may hold liable therefor the party who had the receiver appointed. *German Nat. Bank v. J. D. Best & Co.*, 75 Pac. Rep. 398 (Col. 1904). A receiver appointed by the debenture-holders as authorized by the terms thereof is their agent, and they are liable for his contracts and acts and sale of assets. *Robinson, etc. Co. Ltd. v. Chic, Ltd.*, 93 L. T. Rep. 262 (1905). The expenses of a receiver appointed at the instance of a pledgee of pig iron may be prorated between the insolvent company and the pledgee. *American, etc. Co. v. German*, 126 Ala. 194 (1900). The party causing a receiver to be appointed may be responsible for his fees and expenditures where the estate was lost by foreclosure. *Ephraim v. Pacific Bank*, 129 Cal. 589 (1900). But where a receiver agreed to look to the property alone for his compensation he cannot hold one of

property to be operated by the receiver, the mere fact that the price realized on foreclosure sale was sufficient only to pay the receiver's fees and a small part of the receiver's certificates which he had issued, does not render the trustee as complainant liable for the deficiency.¹ An agreement of bondholders to hold a trustee harmless from all costs, counsel fees, and other expenses of litigation does not render the bondholders liable for counsel fees, the trustee not having been adjudged liable to pay such counsel fees.²

The rules as to bondholders are somewhat different. A bondholder who brings suit to protect the property, or to foreclose upon failure or refusal of the trustee to do so, is not allowed pay for his personal services or personal expenses, but is allowed payment for counsel fees, costs, and necessary expenses in the litigation.³ Even though an intervening security-holder causes the appointment of a co-trustee, yet his counsel is not entitled to an allowance from the fund unless a benefit to the fund is shown, especially where all the questions raised by him would have arisen naturally in the course of the litigation.⁴

the parties liable therefor. *Ephraim v. Pacific Bank*, 136 Cal. 646 (1902).

¹ *Atlantic Trust Co. v. Chapman*, 208 U. S. 360 (1908), rev'g *Chapman v. Atlantic Trust Co.*, 119 Fed. Rep. 257, and 145 Fed. Rep. 820.

² *Central, etc. Co. v. Louisville, etc. Co.*, 100 Fed. Rep. 545 (1900).

³ *Trustees v. Greenough*, 105 U. S. 527 (1881); *Central R. R. etc. Co. v. Pettus*, 113 U. S. 116 (1885), where the counsel for the creditor was held to have a lien on the property, even though the client had compromised the case. Where a bondholder carries on the foreclosure suit, and prior mortgagees are made parties, and the proceedings go to a sale, the counsel fees of each party must be paid from the fund going to that party. Where part of the bondholders contest the action of the trustees in declaring the principal due, such bondholders must pay their own counsel fees. *Bound v. South Carolina Ry.*, 59 Fed. Rep. 509 (1894). Where bondholders intervene and carry on litigation for the protection of the property in a way which the trustee might have done, and for which the trustee might have

been allowed expenses, the court will allow such expenses to such bondholders. *Seibert v. Minneapolis, etc. Ry.*, 58 Minn. 58 (1894). The bondholders requesting the trustee to foreclose may be liable for the costs and legal expense for which the trustee is liable, where they, in accordance with the terms of the mortgage, agreed to indemnify the trustee. *Central Trust Co. v. Louisville Trust Co.*, 87 Fed. Rep. 23 (1898). A debenture-holder who brings suit and realizes for the benefit of all is entitled to his legal costs to be paid from the funds. *Re New Zealand, etc. Ry.*, [1901] 2 Ch. 357. In a suit by a debenture-holder in behalf of himself and others to enforce the security, only statutory costs will be paid to the plaintiff and no extra allowances. *Re Queen's Hotel*, [1900] 1 Ch. 792.

⁴ *Weed v. Central, etc. Ry.*, 100 Fed. Rep. 162 (1900). The fees of attorneys who successfully and in behalf of creditors resist the payment of improper claims by the receiver cannot be paid out of the funds in the receiver's hands. *Attorney-General v. North America L. Ins. Co.*, 91 N. Y.

Similar rules prevail as to a stockholder who institutes suit to remedy a wrong which has been done to the corporation. Inasmuch as the suit is for the benefit of all the stockholders, and inasmuch as the results of the suit belong and go to the corporation, it is right that the expense of counsel fees and other disbursements of the suit should be paid by the corporation, provided the suit so instituted is successful.¹ A person suing for the benefit of himself

57 (1883); *People v. Knickerbocker*, etc. Ins. Co., 31 Hun, 622 (1884); *Attorney-General v. Continental*, etc. Ins. Co., 27 Hun, 195 (1882).

¹ A proper allowance will be made to the counsel of the successful stockholder. *Fox v. Hale*, etc. Co., 108 Cal. 475 (1895); *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48 (1883); *Trustees v. Greenough*, 105 U. S. 527 (1881); *Central R. R. v. Pettus*, 113 U. S. 116 (1885), also holding that the attorney may have certain costs from parties benefiting thereby. Where minority stockholders succeed in collecting a large sum of money in behalf of the corporation, which the directors refuse to sue for, they are entitled to their counsel fees. *Louisville, etc. Co. v. Dodd*, 85 S. W. Rep. 683 (Ky. 1905). Where a stockholder charges various frauds and establishes but one, the court may allow him a reasonable amount for counsel fees, but not necessarily all of his counsel's fees and disbursements. *Lillard v. Oil*, etc. Co., 58 Atl. Rep. 188 (N. J. 1904). The costs and expenses of a stockholder, who caused to be set aside a sale of all the property to another corporation, will be allowed by the court as a part of the costs of the suit. *Forrester v. Boston*, etc. Co., 74 Pac. Rep. 1088 (Mont. 1904), the court in this case allowing an attorney's fee of fifty thousand dollars. Where a stockholder brings suit in behalf of himself and other stockholders to compel directors to pay back the dividends declared in violation of a statute, and pending the suit the directors make voluntary payment to the corporation the court has

no power to allow counsel fees, the fund not having come into its possession. *Matter of Meighan*, 106 N. Y. App. Div. 599 (1905). An attorney suing for a stockholder in behalf of all stockholders may, under the New York statute, have a lien for his services on the compromised amount paid to the corporation. *Meighan v. American*, etc. Co., 154 Fed. Rep. 346 (1907). When the majority enters into litigation with the minority, costs are not to be paid by the majority out of the corporate funds. *Pickering v. Stephenson*, L. R. 14 Eq. 322 (1872). The case of *Hubbard v. Camperdown Mills*, 25 S. C. 496 (1886), holds that the attorney for stockholders restraining the corporation from a fraud and having a receiver appointed cannot collect his fees from the corporate assets, but that the fees of the attorney defending the corporation should be paid from the fund. *Cf. Re Attorney-General v. North*, etc. Ins. Co., 91 N. Y. 57 (1883). As to the compensation and reimbursement to complaining stockholders, see also *Woodruff v. New York*, etc. R. R., 129 N. Y. 27 (1891). If a stockholder fails in his bill and has charged fraud, he will be compelled to pay costs. *Barr v. Pittsburgh Plate Glass Co.*, 57 Fed. Rep. 86 (1893). The attorney of a stockholder who brings suit to set aside an illegal corporate contract will not be allowed any compensation until the suit is completed. *Jacksonville, etc. Ry. v. American Const. Co.*, 57 Fed. Rep. 66 (1893). Where a part of the stockholders agree to give a contingent fee, and thereby a large recovery is had, the court may order

and others is entitled to reimbursement if he succeeds, but to no contribution if he fails in the suit.¹ The proceeds of a stockholder's suit belong to the corporation, less a reasonable allowance to the plaintiff for his costs, disbursements, and attorney's fees.² Costs payable by the complaining stockholders are payable by them *per capita* and not *pro rata*, according to the amount of stock held by each.³

that the fee be paid out of the amount recovered. *Crumlish v. Shenandoah Valley R. R.*, 40 W. Va. 627 (1895). A stockholder bringing a suit in behalf of the corporation cannot bind the company by agreeing to a contingent fee with his attorney, but if the suit is successful the court will allow the attorney a fair fee; in this case \$2,500 out of \$9,000 recovered. *Graham v. Dubuque, etc. Works*, 114 N. W. Rep. 619 (Iowa, 1908). In the case *McMillan v. Northport, etc. Co.*, 94 Pac. Rep. 761 (Wash. 1908), \$1,000 was allowed to the attorney for a complaining stockholder, who enjoined the removal of corporate property and saved \$250,000, it appearing, however, that a preliminary injunction was as far as the case went. The proceeds of the suit belong to the corporation. An agreement that the attorneys shall have a contingent fee is good where all the stockholders stood by and allowed the work to go on. *Davis v. Gemmell*, 73 Md. 530 (1891). A successful complaining stockholder is entitled to a reasonable fee for his attorney to be paid by the corporation, but such fee is determined by the evidence and not by the value of the services rendered. *Decatur, etc. Co. v. Palm*, 113 Ala. 531 (1896). The successful stockholder is entitled to have his reasonable disbursements and attorney's fees paid by the corporation, and has a lien therefor on the property recovered. *Grant v. Lookout Mountain Co.*, 93 Tenn. 691 (1894). Where two groups of stockholders are contesting for control, the expenses of the litigation should not be borne by the company. *Wickersham v. Crittenden*, 106 Cal. 329 (1895). As to the mode of paying

plaintiff's attorneys, see *Wickersham v. Crittenden*, 103 Cal. 582 (1894). In Georgia it is held that even though a minority stockholder succeeds in enjoining an *ultra vires* act, yet the court cannot make the corporation pay his attorney's fees, inasmuch as he neither brings property into the corporate treasury nor brings about the distribution of any fund. *Alexander v. Atlanta, etc. R. R.*, 113 Ga. 193 (1901). In the case of *Read v. Memphis, etc. Co.*, 64 S. W. Rep. 769 (Tenn. 1901), the trustee filed a bill against the mortgagor and the purchaser of the equity of the property to determine his compensation for defending the mortgage and also to be reimbursed for lawyer's fees, the defense being made that he had not brought any funds to the trust and had no right to a lien on the property for such charges. The court sustained the bill. See 47 S. Rep. 286 (Ala. 1908).

¹ *Hobbs v. McLean*, 117 U. S. 567 (1886). Where a receiver has been appointed at the instance of a creditor, and a stockholder files a bill alleging fraud, and does not prove it, the mere fact that his attorney takes part in the proceedings does not entitle the latter to payment of his fees from the fund where nothing was added to the fund by his efforts. *Lamar v. Hall, etc.*, 129 Fed. Rep. 79 (1904), rev'g *William Firth Co. v. Millen, etc. Mills*, 129 Fed. Rep. 141 (1903).

² *Chetwood v. California Nat. Bank*, 113 Cal. 649 (1896). See also § 734, *supra*.

³ *Edwards v. Bay State, etc. Co.*, 130 Fed. Rep. 242 (1904).

A creditor who causes a receiver to be appointed, and carries on other litigation for the benefit of the property, may be given an allowance.¹

The allowance to the master who sells must be reasonable.² The charges of an expert accountant employed by a few of the creditors will be allowed out of the fund where the result of the investigation is the realization of a large sum of money.³

The insolvent mortgagor and its counsel are not entitled to pay out of the receiver's funds.⁴ But where at the time a suit is pending

1 *Burden, etc. Co. v. Ferris, etc. Co.*, 87 Fed. Rep. 810 (1898). Fees of the mortgagor in a foreclosure suit cannot be allowed unless the bondholders are paid in full, but the fees of counsel who file a bill under which an insolvent corporation is wound up may be paid from the proceeds of the property. *Trust & Deposit Co. etc. v. Spartanburg, etc. Co.*, 97 Fed. Rep. 409 (1899). Where an insolvent corporation has assigned for the benefit of its creditors, and then one of the creditors files a bill to wind up the company and for distribution, his attorneys will not be given an allowance, inasmuch as no new assets were disclosed and no beneficial effect shown. *Parkhurst, etc. Co. v. Wilkinson Co.*, 54 S. W. Rep. 58 (Tenn. 1899). An attorney who causes a receiver to be appointed and also acts as attorney for the receiver is entitled to pay for all the services, and such pay should not be reduced by reason of the fact that creditors will not realize much. *Stone v. Omaha, etc. Co.*, 61 Neb. 834 (1901). A creditor who causes a receiver to be appointed cannot have his attorney's fees paid out of the fund derived from property which is foreclosed. *Kelly v. Mountain City Club*, 101 Tenn. 286 (1898). The costs of the party who obtains the receivership are not paid out of the fund. *Re Anglo-Austrian, etc. Union*, [1895] 2 Ch. 891. A receiver appointed in second-mortgage foreclosure proceedings cannot collect his fees out of the first-mortgage interests. *Tome v. King*, 64 Md. 166

(1885). The attorney for a creditor of an insolvent corporation who causes it to be wound up in accordance with the statutes may be allowed a reasonable fee for services actually performed. *Bradshaw, etc. v. Bank of Little Rock*, 89 S. W. Rep. 316 (Ark. 1905). A court may allow counsel fees incurred by a corporation in resisting a receivership. *Assets, etc. Co. v. Defrees, etc.*, 80 N. E. Rep. 263 (Ill. 1907).

2 An allowance of \$4,000 to the master in chancery for selling a road for \$250,000 was reduced by the courts to \$2,500, in *Finance Committee v. Warren*, 82 Fed. Rep. 525 (1897). The court also held that it was illegal for the parties in interest to arrange in advance with the master as to his fees. As to allowances to the master who sells the property, see *Brown v. King*, 62 Fed. Rep. 529 (1894). As to the master's compensation, see *Pleasants v. Southern Ry.*, 93 Fed. Rep. 93 (1899).

3 *Sands v. Greeley & Co.*, 83 Fed. Rep. 772 (1897).

4 A lawyer employed by the company before the foreclosure has no lien ahead of the bonds, but if he is employed on a salary he may be paid like other employees for ninety days' time prior to foreclosure. *Finance Co. etc. v. Charleston, etc. R. R.*, 52 Fed. Rep. 526 (1892). Legal services rendered two years prior to the receivership will not be paid in preference to bonds. *Finance Co. etc. v. Charleston, etc. R. R.*, 52 Fed. Rep. 678 (1892). The attorneys for a rail-

against a railroad company for the construction price thereof, an order is made authorizing the company to continue to defend the proceedings, the attorney's fees in making such defense for the company, after the receivership, will be paid before the bondholders are paid, the suit having been successfully defended.¹ Where the first mortgagee forecloses and the proceeds are insufficient to pay his debt, a second mortgagee who is made a party defendant is not entitled to costs.² The fees of an attorney, who is collecting a claim for a bank at the time that it passes into the hands of a receiver, and who succeeds, will be allowed from the assets.³ A lessor collecting moneys from the receiver will not be allowed counsel fees.⁴ The directors are entitled to reasonable pay for winding up the affairs of the corporation.⁵ But where an illegal sale of the property of a dissolved

road company which is resisting foreclosure on the ground that the bonds are invalid will not be allowed compensation out of the receiver's funds. *Union L. & T. Co. v. Southern, etc. Co.*, 51 Fed. Rep. 106 (1892). The attorney for the insolvent company is not entitled to pay out of the funds for resisting the fee asked for by the attorney for the complainant. *Talbot v. Mason*, 125 Fed. Rep. 101 (1903). Unless the attorney obtains decree or judgment, or succeeds in bringing a fund into court, he has no lien, and the court cannot order payment to him. *Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567, 602 (1879). The attorney of an insolvent trust company is not entitled to preference in the payment of his bill. *People, etc. v. American, etc. Co.*, 70 N. Y. App. Div. 579 (1902). A claim for legal services has no preference. *Gregg v. Mercantile T. Co.*, 109 Fed. Rep. 220 (1901). An attorney does not come within the six months' rule. *Ten Eyck v. Pontiac, etc. R. R.*, 114 Mich. 494 (1897). In dissolution and winding-up proceedings a former attorney of the company will not be allowed any claim for professional services where he was a party to a scheme to wreck the corporation. *Baxter v. Lowe*, 93 Fed. Rep. 358 (1899). Counsel of the company prior to the receivership will be allowed pay as a "labor claim."

Bayliss v. Lafayette, etc. R. R., 9 Biss. 90 (1879); s. c., 2 Fed. Cas. 1080. An attorney cannot claim payment from the income of the receiver on a bill due to such attorney a year and a half prior to the receivership. But an attorney whose salary came due a short time prior to the receivership may obtain payment from the receiver. *Blair v. St. Louis, etc. R. R.*, 23 Fed. Rep. 523 (1885). As to the fees of attorneys who are defending a suit for the railroad before a receiver was appointed, the receiver continuing the defense thereafter, see *Blair v. St. Louis, etc. R. R.*, 20 Fed. Rep. 348 (1884). As to the attorney's fees, compare s. c., 20 Fed. Rep. 351 (1884). An attorney who represents a claim with a contingent interest therein is entitled to his interest, even though his client has made assignments to other parties. *Central Trust Co. v. Richmond, etc. R. R.*, 105 Fed. Rep. 803 (1900).

1 *Re Wrexham, etc. Ry.*, [1900] 1 Ch. 261.

2 *Re Clayton, etc. Co.*, 90 L. T. Rep. 283 (1904).

3 *Sowles v. National Union Bank*, 82 Fed. Rep. 139 (1897).¹

4 *Central Trust Co. v. Valley Ry.*, 55 Fed. Rep. 903 (1893).

5 *Gund v. Ballard*, 114 N. W. Rep. 420 (Neb. 1907).

corporation is set aside, the counsel for the directors cannot have an allowance out of the assets; neither can the president have a salary.¹ The chairman of the bondholders' committee cannot claim compensation for his services out of the proceeds of the foreclosure sale. He must collect from the bondholders whom he represented.² A reorganization committee may, after their work is completed, maintain a bill in equity to have their accounts allowed and the securities distributed and their compensation fixed and a discharge from the trust decreed.³ The receiver should not select his counsel from either side.⁴

§ 880. *Accounts and accounting by receiver—Control over his acts.*—The receiver should render frequent accounts to the master during the receivership. The master's confirmation of such accounts goes a great way towards securing the approval of the court.⁵

¹ *Mason v. Pewabic Min. Co.*, 66 Fed. Rep. 391 (1894).

² *Trust & Deposit Co. etc. v. Spartanburg, etc. Co.*, 97 Fed. Rep. 409 (1899).

³ *Mills v. Potter*, 189 Mass. 238 (1905). Where the mortgage prescribes that the trustee shall take possession and operate or sell the road upon default, and as a matter of fact possession is taken by a reorganization committee, which holds practically all the bonds and stock, and a friendly foreclosure is had and a reorganization carried out, expenses incurred by the committee in operating the road must be paid prior to the mortgage, the foreclosure decree having a provision that debts prior in equity to the mortgage and entitled to payment from the *corpus* shall be paid by the purchasers. *Queen Anne's, etc. Co. v. Queen Anne's R. R.*, 148 Fed. Rep. 41 (1906).

⁴ The receiver should not appoint as his counsel his brother, who has come into the circuit for the purpose of obtaining the receivership business, and who was attorney for the bondholders before the receiver was appointed. *Blair v. St. Louis, etc. R. R.*, 20 Fed. Rep. 348 (1884). A receiver will not be permitted to employ as counsel one whose interests personally or as attorney are hostile to the interests represented by and

the duties of such receiver. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522 (1896). The court will not appoint as counsel for the receiver the counsel for the party who obtained the receivership. *Emmons v. Davis, etc. Co.*, 16 Atl. Rep. 157 (N. J. 1888). A receiver should not employ "as attorneys men who are interested in one side of the litigation and who could not advise him impartially." *Speiser v. Merchants' Exchange Bank*, 110 Wis. 506 (1901). The court will not approve the appointment of counsel to the receiver of a person who resigned from the deputy attorney-generalship for that purpose. *People v. Brooklyn Bank*, 125 N. Y. App. Div. 354 (1908).

⁵ The receiver should account to the master frequently. The master's allowance or disallowance of the account and items binds the court, unless the items are extraordinary. *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660. Where a receiver's accounts have already been passed upon, the court will restrain the master from making another report on them. The remedy for mistakes, fraud, etc., is by a direct proceeding only. *Farmers' L. & T. Co. v. Central R. R.*, 2 Fed. Rep. 751 (1880). If there are several accounts the accounting of one does not necessarily involve the accounting by

There are no formal rules governing the method by which the court refers and passes upon receiver's accounts.¹ But before a receiver is paid he should file sworn vouchers and should state whether any corporate debts are unpaid, or any more assets are available.² The receiver can be made to account only in the court that appointed him.³ The court which appointed him is also the only court that has power to control and give orders to the receiver.⁴ The validity of a sale by him must be contested in the court which appointed him and authorized the sale.⁵ A state court cannot enjoin a federal receiver of a telephone company from charging higher rates than is permitted by a

all. *Farmers' L. & T. Co. v. Central R. R.*, 2 Fed. Rep. 751 (1880). The practice relative to the receiver and the master in chancery is stated in *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660, where Mr. Justice Bradley said that exceptions in regard to the receiver's accounts must be made before the master, otherwise they will not be considered by the court. The court will, however, direct a change where manifest errors or improper charges have been made. The master, in passing on the accounts, acts in a judicial and not a mere ministerial capacity. For errors by him the remedy is by petition to the court, and not by exceptions. The court will then consider the principle and rules adopted by the master, but will not go into the details of the account. If the receiver dies before his discharge, his executor may be called to account in the matter. *Re Columbian Ins. Co.*, 30 Hun, 342 (1883). A receiver will be charged interest on such of the funds as he uses in his private business. *Hinckley v. Railroad Co.*, 100 U. S. 153 (1879). The receiver may appeal from the decree rendered on his accounts. *Hinckley v. Gilman, etc. R. R.*, 94 U. S. 467 (1876).

¹ *Harrigan v. Gilchrist*, 99 N. W. Rep. 909 (Wis. 1904).

² *Strauss v. Casey, etc. Co.*, 60 Atl. Rep. 402 (N. J. 1905).

³ A receiver cannot be called on to account before any court but that

which appointed him; hence the federal court will not compel a state receiver to appoint in the federal court on a bill filed for that purpose. *Conkling v. Butler*, 4 Biss. 22 (1865); s. c., 6 Fed. Cas. 279; *Massachusetts, etc. Ins. Co. v. Chicago, etc. R. R.*, 13 Fed. Rep. 857 (1882). Concerning a suit upon the bond given by a receiver, and who may enforce it, see *Thomson v. McGregor*, 45 N. Y. Super. Ct. 197 (1879), involving a partnership receivership. If there is a main suit and also an auxiliary one, the receiver should be brought to account in the main suit, and applications for allowance for damages should be made there. *Central T. Co. v. East Tennessee, etc. R. R.*, 30 Fed. Rep. 895 (1886). See also § 865, *supra*.

⁴ The supreme court will not order a receiver appointed by the lower court to operate the road. *People v. McLane*, 62 Cal. 616 (1882). The supreme court of the state will refuse to *mandamus* a receiver to operate the road, the receiver having been ordered by the lower court not to operate it. *State v. Marietta, etc. R. R.*, 35 Ohio St. 154 (1878). See also § 863, *supra*, concerning the validity of the appointment of the receiver.

⁵ The validity of a receiver's sale of property in his hands cannot be questioned in another court, the receiver having been discharged. *Bradley v. Marine, etc. Co.*, 3 Hughes, 26 (1879); s. c., 3 Fed. Cas. 1172.

city ordinance.¹ The court may inquire into the propriety of its receiver substituting a new attorney.² The accounts of a deceased receiver should not be settled except upon bringing in his personal representatives.³ Where a receiver has been appointed at the instance of stockholders and afterwards the property is returned to the corporation, the corporation may file a bill to compel the receiver to account.⁴ The bondsman for a receiver is liable for his embezzlements, even though the receivership was illegal for want of jurisdiction.⁵ In insolvency proceedings under the Connecticut statute, a judgment appointing a receiver does not terminate the jurisdiction of the court.⁶

§ 881. *Distribution by the receiver.*—Most of the principles of law which arise under this heading have been discussed in other sections of this chapter. In a suit for the foreclosure of a mortgage securing an issue of bonds, it is not necessary that the bonds should be produced before the court or a master before the entry of a decree of sale.⁷ But the referee in a mortgage foreclosure suit should take evidence in regard to each and every bond, so as to pass upon the actual indebtedness irrespective of what the corporation or its directors may admit.⁸ Mortgage bondholders may file their claims as general creditors in addition to realizing what they can from their mortgage. A pledgee of mortgage bonds from the corporation itself, after realizing what he can from bonds, may file a claim as a general creditor, not as a bondholder, but on his original claim.⁹

The question of the ownership of bonds as between a pledgor and pledgee and subsequent holders cannot be contested in the foreclosure of the mortgage securing the same, prior to the decree, but on the distribution of the proceeds of the foreclosure sale that question can then be litigated.¹⁰ The interest a corporate creditor

¹ *Rogers v. Chippewa, etc.*, 97 N. W. Rep. 154 (Mich. 1903).

² *People v. Bank of Staten Island*, 112 N. Y. App. Div. 791 (1906).

³ *Overholt v. Old, etc. Co.*, 98 Va. 654 (1900).

⁴ *Hamm v. Stone, etc. Co.*, 18 Tex. Civ. App. 241 (1898).

⁵ *Baltimore, etc. Assoc. v. Alderson*, 99 Fed. Rep. 489 (1900). The bond of a surety for a receiver can be enforced only in a suit at law. *Kirker v. Owings*, 98 Fed. Rep. 499 (1899).

⁶ *Barber v. International Co.*, 51 Atl. Rep. 857 (Conn. 1902).

⁷ *Dickerman v. Northern Trust Co.*,

80 Fed. Rep. 450 (1897), *aff'g* *Northern Trust Co. v. Columbia, etc.*, 75 Fed. Rep. 936 (1896); *Toler v. East Tennessee, etc. Ry.*, 67 Fed. Rep. 168 (1894). See also § 847, *supra*.

⁸ *Cochran v. Anglo-American, etc. Co.*, 69 Hun, 168 (1893).

⁹ *Pattberg v. Lewis, etc. Bros.*, 55 N. J. Eq. 604 (1897). See also § 763, *supra*.

¹⁰ *Sioux City, etc. Ry. v. Manhattan T. Co.*, 92 Fed. Rep. 428 (1899). The court in the foreclosure decree may reserve the question of the amount due on the bonds and as to who owns them, the decree providing for the

has in the assets, after a receiver has been appointed and before a decree of distribution, cannot be reached by one of his creditors by petition of intervention.¹ Where the trustee of a mortgage loans money to the mortgagor and takes part of the bonds as security, and then at the request of the mortgagor sells the bonds at public sale and buys them in, it cannot enforce the bonds for their full amount, but only to the extent of the debt secured, and upon payment must deliver up the bonds for cancellation.² In the distribution of the assets the unissued bonds of the corporation are not considered.³ In general, all the bonds share equally in the proceeds of a foreclosure sale; but where the corporation agreed with the first purchasers to issue only a certain amount of bonds per mile, although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers of bonds have been paid.⁴ The general rule, however, is that all creditors of the same class are entitled to payment proportionately.⁵

In the distribution of the assets of an insolvent corporation citizens of other states cannot be discriminated against.⁶ Even though money earned before the appointment of a receiver does not belong to the receiver, yet if he collects it and distributes it among the bondholders in accordance with the orders of the court, the general creditors cannot hold him personally liable for so doing. The remedy is by motion or appeal and not by a collateral action.⁷

bondholders coming in and proving the same. *Western, etc. Co. v. United States, etc. Co.*, 92 S. W. Rep. 986 (Tex. 1906).

1 *Williston Seminary v. Easthampton, etc. Co.*, 186 Mass. 484 (1904). A court will not stay payment of the sum due to one of the creditors on distribution, in order that one of his creditors may institute suit to levy on the same. *Spence v. Solomons Co.*, 58 S. E. Rep. 463 (Ga. 1907).

2 *Knickerbocker, etc. Co. v. Penacook, etc. Co.*, 100 Fed. Rep. 814 (1900).

3 *Badger v. Sutton*, 30 N. Y. App. Div. 294 (1898).

4 *McMurray v. Moran*, 134 U. S. 150 (1890).

5 A receiver is bound to pay all proportionately, although some of the creditors have already received part payment in another state and present

a claim for the balance. *People v. Universal, etc. Ins. Co.*, 42 Hun, 616 (1886). *Cf.* § 865, *supra*. Where all the parties entitled to participate in the proceeds of the sale consent that a certain liability shall be paid, this is a waiver of their rights to that extent, and they cannot compel the purchaser to pay in sufficient cash in lieu of bonds to make up the amount of the claim so allowed. *Central Trust Co. v. Cincinnati, etc. Ry.*, 58 Fed. Rep. 500 (1892). As to the rights of coupon-holders, see § 772, *supra*; and as to bondholders, see § 762, *supra*.

6 *Blake v. McClung*, 176 U. S. 59 (1900).

7 *Platt v. N. Y. etc. Ry.*, 170 N. Y. 451 (1902). Earnings received by a receiver appointed at the instance of a general creditor are distributed the same as the proceeds of a foreclosure

Profits made during the receivership by operation by a third party belong to the mortgagee, even though he opposed such operation. A deficiency judgment is not necessary to entitle the mortgagee to such.¹ Where mortgaged property runs into different states and consists of a lease and of rolling-stock and there are prior liens in some of the states, the court may apportion the proceeds according to mileage in the different states.² A general creditor may intervene to participate in the distribution of a surplus remaining after foreclosure.³ In distribution simple creditors share *pro rata* with judgment creditors.⁴

On a foreclosure sale the court may order a distribution of any surplus remaining after the payment of the mortgage debt, and the court need not turn over such surplus to the insolvent corporation, but may decree that the surplus be divided among the preferred and common stockholders after paying all general creditors who present their claims within a fixed time.⁵ A judgment against the company held by the receiver may be presented and passed upon by the court.⁶ General debts incurred by the corporation after such appointment may not participate in the assets.⁷ It is illegal to use a portion of the funds realized on the foreclosure sale to pay a part of the expense of reorganization, where some of the old security-holders do not enter into the reorganization.⁸ Even though valid claims exist against directors for misconduct, and even though in proceedings to wind up the corporation they have filed claims as creditors, yet it is not the proper procedure to allow the receiver to file an answer and set-off in that suit, especially where no process is issued against the directors requiring them to answer. An order might have been entered withholding any distribution of assets to them until the claim against them had been litigated.⁹

sale. *Thomas v. Cincinnati, etc. Ry.*, 91 Fed. Rep. 202 (1898).

¹ *Boyce v. Continental Wire Co.*, 125 Fed. Rep. 740 (1903).

² *Thomas v. Cincinnati, etc. Ry.*, 91 Fed. Rep. 195 (1898).

³ *Savings & T. Co. etc. v. Bear Valley, etc. Co.*, 93 Fed. Rep. 339 (1899).

⁴ *In re Lord, etc. Co.*, 7 Del. Ch. Rep. 248 (1895).

⁵ *Toledo, etc. R. R. v. Continental Trust Co.*, 95 Fed. Rep. 497 (1899).

An assignment by a corporation for the benefit of creditors cannot legally provide that any surplus shall be divided among the stockholders, inasmuch as the corporation is entitled

to such surplus. *State v. Mitchell*, 58 S. W. Rep. 365 (Tenn. 1899).

Where the trustee of the mortgage in foreclosing knows that the corporation is entitled to the surplus but pays the same to a pledgee of the corporation the trustee is personally liable. *Brinkerhoff, etc. Co. v. Boyd*, 91 S. W. Rep. 523 (Mo. 1905).

⁶ *Barber v. International Co.*, 51 Atl. Rep. 857 (Conn. 1902).

⁷ *Jones v. Arena Pub. Co.*, 171 Mass. 22 (1898).

⁸ *Re Canning, etc. Co.*, [1900] 1 Ch. 708.

⁹ *Youtsey v. Hoffman*, 108 Fed. Rep. 693 (1901).

Where, by the charter, the stockholders are liable for all debts, and they buy some of the company's bonds, the remaining bonds will be paid first out of the proceeds of foreclosure.¹ A stockholder's liability on stock may be offset against bonds held by the stockholder, even though he has transferred them to another, who, however, had knowledge of the facts.² A promoter's possible liability and the liability of stockholders on unpaid stock will not be adjusted and offset in the distribution among bondholders after foreclosure sale, even though the bondholders were promoters and stockholders. Independent suits must be instituted for that purpose, especially as general creditors are interested.³ Where the court authorizes the receiver to sue promoters for secret profits, the proceeds of the suit to belong to the creditors who agree to pay the expenses, costs, etc., a creditor who delays taking part until it is evident that a large sum will be recovered, will not be allowed to come into such suit.⁴ Where after a bank was placed in a receiver's hands there was a voluntary reorganization under the same charter and the reorganization failed, the claims of those who were parties to it are subject to the payment first of claims of those who were not.⁵ A stipulation of a corporate creditor that he will not enforce his claim if the property is not sold by the receiver for more than a person offers to buy it at sheriff's sale will be enforced.⁶ Even though a corporate creditor has realized a part of his debt under stockholders' statutory liability, yet he may participate in the assets of the corporation as though no part of his debt had been paid.⁷ Interest is allowed in certain cases.⁸ After a

1 *Shaw v. Saranac Horse Nail Co.*, 78 Hun, 7 (1894); *aff'd* on another point in 144 N. Y. 220. A stockholder who has paid his statutory liability is not subrogated to the claims so paid, and hence cannot participate in any dividends from the corporate assets. *Sacramento Bank v. Pac. Bank*, 124 Cal. 147 (1899).

2 *Hynes v. Illinois, etc. Bank*, 226 Ill. 95 (1907). In the case *Gillett v. Chicago Title & T. Co.*, 82 N. E. Rep. 891 (Ill. 1907), it seems that where bonds were sold with a bonus of stock, and the purchasers were held liable on the stock, they were held to be entitled to participate as bondholders in the fund which the court compelled them to pay in on their stock.

3 *Land, etc. Co. v. Tathall*, 132 Fed. Rep. 305 (1904).

4 *McEwan v. Harriman, etc. Co.*, 138 Fed. Rep. 797 (1905).

5 *Rumble v. Tyus*, 123 Ga. 295 (1905).

6 *Gibson v. Standard, etc. Co.*, 134 Fed. Rep. 799 (1905).

7 *Sacramento Bank v. Pac. Bank*, 124 Cal. 147 (1899).

8 When a receiver defers payment of a dividend to a creditor until it is first determined whether certain collateral securities shall first be applied to the debt, the creditor is entitled to interest on the dividend. *People v. Remington*, 59 Hun, 307 (1891); *aff'd*, 126 N. Y. 679. Interest on claims is allowed up to the time of the appointment of the receiver. *New York Security, etc. Co. v. Lombard Inv. Co.*, 73 Fed. Rep. 537 (1896).

See also § 850, *supra*. Even though

receiver is appointed interest ceases as between the creditors, but continues as against the corporation and its stockholders.¹ The agreed rate of interest continues to the date when the receiver takes possession, and then, until the principal and interest are paid, interest at the legal rate is allowed before anything is paid to stockholders.² The question of distribution by an auxiliary receiver in one state where the main receivership is in another state is considered elsewhere.³ Where, in a litigation by the receiver to collect a claim, the receiver is defeated, the costs of the defendant must be paid before any distribution of assets among general creditors.⁴ If a surplus remains after paying one class of liens the next class take such surplus.⁵ A stockholder in a national bank may bring suit in a state court to have the liquidating agent of the bank distribute the remaining assets, the creditors having been paid, even though such agent was appointed by the comptroller of the currency.⁶ A creditor may prove his claim before the master instead of filing an original bill, even though he claims a preference.⁷ A lessee of the mortgagor may be entitled to the surplus remaining after the mortgage has

interest on preferred claims is allowed improperly by the referee and is confirmed by the court, yet if only a portion of the creditors filed exceptions and prosecuted the appeal, the creditors not appealing are not entitled to the benefits of the appeal. *People, etc. v. American, etc. Co.*, 70 N. Y. App. Div. 579 (1902).

¹ *People v. American, etc. Co.*, 172 N. Y. 371 (1902). Claims do not bear interest after the appointment of a receiver. *Solomons v. American, etc. Assoc.*, 116 Fed. Rep. 676 (1902). Creditors are entitled to interest after liquidation has commenced as well as before, as against stockholders. *Bank Com'rs v. New Hampshire, etc. Co.*, 67 Atl. Rep. 583 (N. H. 1907).

² *People v. Merchants' Trust Co.*, 187 N. Y. 293 (1907). The rule as to interest is different where the corporation finally pays all debts as compared with where it does not. Various phases of the method of figuring interest on deposits, etc., in an insolvent bank were considered in *People v. Merchants' Trust Co.*, 116 N. Y. App. Div. 41 (1906). On the winding up, creditors are entitled to

interest on their claims from the date of the commencement of the winding up. *Re Duncan & Co.*, 92 L. T. Rep. 108 (1905).

³ See § 865, *supra*.

⁴ *Re London Metallurgical Co.*, [1895] 1 Ch. 758. Costs in a suit instituted during a receivership should be paid as a preferred claim. *Ephraim v. Pacific Bank*, 136 Cal. 646 (1902). As to the receiver's liability for costs, see p. 3081, *supra*.

⁵ Where a receiver is appointed and the estate sells for enough to pay the first mortgage, the second mortgagee may reach the fund in the receiver's hands. *Keogh v. McManus*, 34 Hun, 521 (1885).

⁶ *Ingold v. Gilmore*, 118 N. Y. App. Div. 727 (1907).

⁷ *Central, etc. Co. v. Farmers', etc. Co.*, 116 Fed. Rep. 700 (1901), holding also that where one railroad is custodian of the sinking fund of another railroad, and both become insolvent, the bondholders of the latter have a claim prior in right to deficiency judgments in foreclosure against the former; *aff'd*, 114 Fed. Rep. 263.

been foreclosed and paid.¹ Sometimes, by a decree of foreclosure, the purchaser at the sale is bound to pay the receiver's obligations.² In a judgment creditor's suit it is proper to have the master advertise for claims.³ Judgment entered by default after the receiver is appointed is not sufficient proof of the claim.⁴ Where, under decree of the federal court, the property has been sold, and the court has ordered claims against the receiver to be filed, the court will enjoin the prosecution of claims against the receiver in a state court.⁵ A creditor may apply to participate, even after partial dividends have been made.⁶ By order of the court no claimant may be allowed to participate in the assets in the hands of the receiver unless he proves his claim before a master.⁷ Where a claim is filed with a receiver, but, by reason of negotiations for a settlement, is not pressed to a hearing until after the time limited by the court, the court may extend the time.⁸ An order of the court limiting the time within which claims must be presented may be a bar to claims not presented within that time.⁹ Where property is sold on foreclosure and dis-

¹ *Gray v. Massachusetts Cent. R. R.*, 171 Mass. 116 (1898).

² See § 890, *infra*. Where a person having a claim against the old corporation intervenes in the distribution proceedings and claims that the new corporation is liable therefor, and a full hearing is had, the court will not throw the claim out on the ground that an independent bill should have been filed. *Central of Georgia Ry. v. Paul*, 93 Fed. Rep. 878 (1899).

³ *Continental Trust Co. v. Toledo*, etc. R. R., 82 Fed. Rep. 642 (1897).

⁴ *Danforth v. National C. Co.*, 68 Minn. 308 (1897). But see § 870, *supra*.

⁵ *Central Trust Co. v. St. Louis*, etc. Ry., 59 Fed. Rep. 385 (1893).

⁶ Plaintiff in a suit pending against a corporation at the time it goes into a receiver's hands may apply to participate in the funds, even after the time for presenting claims has elapsed and two dividends have been paid, but he cannot obtain past dividends. *Smith v. Manhattan Ins. Co.*, 4 Hun, 127 (1875). A court has power to allow a claim, even though the time within which claims must be pre-

sented, as fixed by an order of the court, has expired. *Park v. New York*, etc. R. R., 140 Fed. Rep. 799 (1905). The court may let a creditor in, even though the time has expired. *Straw*, etc. Co. v. *Kilbourne*, etc. Co., 100 N. W. Rep. 100 (Minn. 1904).

⁷ *Pennsylvania Steel Co. v. N. Y. City Ry.*, 161 Fed. Rep. 786 (1908), holding also that a judgment in another court may be proof, and that the claimant, if he prefers, may proceed with his litigation in another court rather than file his claim in the receivership.

⁸ *Wall v. Young*, 54 N. J. Eq. 24 (1895).

⁹ *Abraham v. Mercantile T. & D. Co.*, 86 Md. 254 (1897). After full opportunity for the presentation of claims has been given and the master's report filed, further claims will not be allowed. *Sands v. Greeley & Co.*, 83 Fed. Rep. 772 (1897). As to distribution in another state, see s. c., 88 Fed. Rep. 130, and § 865, *supra*. The order of distribution fixing the time within which claims must be filed may cut off claims not filed within that time so far as concerns the assets then in the hands of the court,

tribution ordered, and some of the money is unclaimed for over ten years, the court may order that money distributed among the other bondholders who have not been paid in full; otherwise to the general creditors; otherwise to the stockholders.¹ A decree ordering distribution among bondholders implies that the bonds still have the coupons attached, and if not attached that the holders of the coupons shall participate.² The decree confirming a master's report as to dis-

but does not prevent a personal suit later against the company nor against outside assets. *Metropolitan, etc. Co. v. Place*, 147 Fed. Rep. 90 (1906). As against a liability on stock issued on property at an overvaluation a stockholder cannot set off bonds which he holds but which had not been filed as a claim against the corporation and which have been barred by the decree barring creditors. See *v. Heppenheimer*, 61 Atl. Rep. 843 (N. J. 1905). A provision in a decree confirming a foreclosure sale that the purchaser shall pay claims against the receiver does not exclude claims in litigation, even though a subsequent order fixed the time when all claims must be presented and that time had elapsed, the court having retained jurisdiction of the case for the enforcement of its decree. *Southern Ry. v. Townsend*, 161 Fed. Rep. 310 (1908). Where the time for filing claims has passed a creditor will not be allowed to file a new claim, if the result would be long delay and protracted litigation in winding up. *Blake v. Domestic, etc. Co.*, 41 Atl. Rep. 376 (N. J. 1898). A claimant who for four years litigates his claim and does not file any claim in insolvency proceedings cannot compel the distributees to repay anything. *Bickford v. McComb*, 88 Fed. Rep. 428 (1898). Even though a corporation is put into a receiver's hands, under a statute relative to insolvent corporations, and notice for the presentation of claims is given, and, in accordance with the statute, all claims not presented within four months are barred and the property is then sold, yet a non-resident cred-

itor who has no actual notice may attack the proceedings on the ground that they were fraudulent and for the purpose of reorganizing the company in fraud of creditors. *Dobson v. Peck Bros. & Co.*, 103 Fed. Rep. 904 (1900). In appointing a receiver of an insolvent corporation to collect the assets and distribute them, the court may limit to four months the time within which creditors may present their claims and may allow the creditors to come into the suit. *Barber v. International Co.*, 74 Conn. 652 (1901). A provision in a foreclosure decree for filing of claims within a specified time should direct publication of notice to creditors having prior claims against the property or having claims against the receiver. The purchasers at the sale, however, are bound, even though the notice is not published. *Anderson v. Condict*, 93 Fed. Rep. 349 (1899), holding also that a claimant who files his claim, but does not bring the same to the attention of the court, is bound by the decree of distribution, even though his claim is not allowed. Although a receiver in distribution of the assets pays to one creditor what should have been paid to another, yet if the latter merely filed his claim without proving the same, the receiver is not bound to know that he was entitled to the money. *Meding v. Todd*, 56 N. J. Eq. 820 (1898).

¹ *American Loan & T. Co. v. Grand Rivers Co.*, 159 Fed. Rep. 775 (1908).

² *Burke v. Short*, 79 Fed. Rep. 6 (1897). The court will not order accrued earnings to be applied to the payment of coupons before the fore-

tribution is final and cannot be disturbed after the close of the term,¹ unless the right to modify was reserved.² If a person damaged fails to present his claim until after the receiver has been discharged, the court generally has power still to aid him, but sometimes cannot do so.³ A receiver of an electric light company who is operating the same under the orders of the court, is liable for damages to one of his employees on account of negligence, and if the receiver pays out all his receipts without making provision for such damages, he is

closure sale where the funds are insufficient to pay all of such coupons. Louisville, etc. R. R. *v.* Schmidt, 52 S. W. Rep. 835 (Ky. 1899). The interest has no priority over the principal in the distribution upon foreclosure, even though the interest on some bonds had been paid while the interest on others had not been. *M'Tighe v. Keystone, etc. Co.*, 99 Fed. Rep. 134 (1900).

¹ Petersburg, etc. Ins. Co. *v.* Dellatorre, 70 Fed. Rep. 643 (1895). The decree of foreclosure is a final decree, and when it provides for the payment of accrued interest before the principal, the decree of distribution cannot modify it. Where the decree of confirmation of sale allows a certain credit to the purchaser, the decree of distribution cannot change it. *Cutting v. Tavares, etc. R. R.*, 61 Fed. Rep. 150 (1894). In *Railroad Co. v. Bradleys*, 7 Wall. 575 (1868), the court held that a decree directing a sale according to the deed of trust and the bringing of the proceeds into court was a final decree. It will be noticed that this was not a suit of foreclosure in equity.

² See § 849, *supra*.

³ Although the court has ordered that all claims must be presented within six months, and the property has been sold subject to such claims, nevertheless the court may extend the time so as to let in a claim for damages for negligence. *Olcott v. Headrick*, 141 U. S. 543 (1891). If a claim is not presented until after the receiver distributes the funds, he cannot be made liable therefor. *Owen*

v. Kellogg, 56 Hun, 455 (1890). After the property has been sold and transferred, and the receiver discharged, he cannot be made liable on causes of action that arose during the course of the receivership. The property itself may be pursued if the court has reserved jurisdiction over it for this purpose. *Farmers' L. & T. Co. v. Central R. R.*, 7 Fed. Rep. 537 (1880). A claim for damages incurred during the receivership is an equitable lien on the earnings received by the receiver, and, if the receiver is discharged before an opportunity is given to present the claim, a bill in equity against the company, to which the property has been returned, will lie. *Mobile, etc. R. R. v. Davis*, 62 Miss. 271 (1884), holding also that where the receiver is discharged and the suit discontinued, the exclusive jurisdiction of the court to entertain claims for damages while the receiver was acting ends also. Where a person claiming damages for a personal injury received from the operation of a railroad while in the hands of a receiver does not present his claim until after the receiver has turned over the property by order of the court, there being no reservation in the order charging the property with such claims, the person injured is without remedy. *Davis v. Duncan*, 19 Fed. Rep. 477 (1884), holding also that the court cannot modify its order after the adjournment of the term at which the order was made. The purchasing company at foreclosure sale is not liable for injuries to an employee of the receiver, and the receiver himself

liable personally therefor.¹ The jurisdiction of the court continues until the receiver's expenses are entirely paid.² The statute of limitations does not run as against the estate of a dissolved corporation.³

Where a receiver's account has been passed upon by an auditor and confirmed by the court and no exception taken, it is binding on all parties.⁴ On an appeal from the decree of distribution the insolvent corporation is not a necessary party, neither are the holders of receiver's certificates, if the receiver himself is a party.⁵

§ 882. *Removal, resignation, and discharge of receivers.*—If a receiver is guilty of misconduct in his receivership, the court will discharge him and appoint another in his place.⁶ If no successor is

is not personally liable if he has been discharged. Moreover, even though by the deed to the company it assumed the obligations of the receiver, the employee, being a third party, cannot claim payment under such deed, and the word "liability" in such deed does not apply to such an unliquidated claim for damages. Moreover, a state court has no jurisdiction of such a case, the receiver having been appointed by the federal court. *Tobin v. Central, etc. Ry.*, 185 Mass. 337 (1904). After the time for presenting claims against the receiver, as fixed by the court, has expired, it is too late to present a claim for discrimination by the receiver in violation of the interstate commerce act, the receiver having been discharged. *Western, etc. R. R. v. Penn. etc. Co.*, 137 Fed. Rep. 343 (1905). The discharge of a receiver is a bar to any suit against him for liability incurred as receiver, and a state act to the contrary does not apply to a receiver appointed by a federal court. *For-dyce v. Beecher*, 2 Tex. Civ. App. 29 (1892). After a receiver has been discharged he cannot be sued for damages for negligence occurring during his receivership. *Archambeau v. Platt*, 173 Mass. 249 (1899). The statute of limitations runs against a liability of a receiver. *Nash v. Ingalls*, 101 Fed. Rep. 645 (1900). For the form of a decree discharging re-

ceivers see *Duncan v. Atlantic, etc. R. R.*, 88 Fed. Rep. 840 (1880).

¹ *Robinson v. New York, etc. Co.*, 99 N. Y. App. Div. 509 (1904). See also § 878, *supra*.

² *La Junta, etc. Co. v. Hess*, 71 Pac. Rep. 415 (Colo. 1903).

³ *Ludington v. Thompson*, 153 N. Y. 499 (1897). In the case *Downer v. Union Land Co.*, 115 N. W. Rep. 207 (Minn. 1908), bonds were held to be barred by the six years' statute of limitations, and it was also held that a judgment creditor's suit to sequester the corporate property did not stop the running of the statute as to other creditors.

⁴ *Rogers v. Citizens', etc. Bank*, 93 Md. 613 (1901).

⁵ *Galveston, etc. Ry. v. House*, 102 Fed. Rep. 112 (1900).

⁶ A receiver will be removed who, at the time of his appointment, had sold fifteen thousand shares of the company's stock "short" on the market. *Olmstead v. Distilling, etc. Co.*, 67 Fed. Rep. 24 (1895). A receiver who has an interest in a lease of property of the corporation will be removed, a conflict of interests being involved. *Etowah Min. Co. v. Wills Valley, etc. Co.*, 106 Ala. 492 (1895). Officers of a corporation appointed its receivers because its business was complicated, intricate, and widely extended, with millions of dollars invested upon small mortgages scat-

appointed, all suits and proceedings against him fall at once.¹ But if another receiver is appointed the suits may be continued against

tered through several states, will not be removed from the receivership because of former imprudent investments, and other mismanagement of the business of the corporation as its officers, no fraudulent practices which would disqualify them being shown. *Fowler v. Jarvis, etc. Co.*, 66 Fed. Rep. 14 (1894). A receiver will not be removed because he aids a fair reorganization scheme; nor because his reports are misleading, the system of reports being the same as when he took charge; nor because his agent defrauded the corporation, the receiver having discharged such agent as soon as he discovered it; nor because he reduced rates on a special article, such article not being capable of a higher rate; nor because unprofitable contracts have been made, such contracts having been made in

good faith and with reasonable judgment; nor because a competing line has broken a traffic agreement. The receiver should not buy from another company in which the officers and superintendent of his company are interested. *Clarke v. Central R. R. etc. Co.*, 66 Fed. Rep. 16 (1893). A creditor of an insolvent mutual insurance company that is in the hands of a receiver may file a bill in behalf of himself and other creditors for the removal of the receiver for incompetency and for the purpose of holding the directors personally liable for malfeasance in office. *Powell v. Hinkley*, 93 N. Y. App. Div. 138 (1904). Where a receiver appointed at the instance of a stockholder has wound up the estate and creditors do not complain, he will not be removed for mismanagement and loss, no bad faith being

¹ The court may discharge the receiver at any time, and outstanding proceedings against him as receiver fall with his discharge. *New York, etc. Tel. Co. v. Jewett*, 115 N. Y. 166 (1889), aff'g 43 Hun, 565. But if at the time of such discharge judgment against him for a claim has been obtained, and he then had funds to pay it, and was directed so to do, he is liable for turning over the funds without paying the judgment. *Woodruff v. Jewett*, 115 N. Y. 267 (1889), modifying 37 Hun, 205. Where a person sues a receiver for work, labor, and services, his suit falls if the receiver has been discharged; but he may amend and pursue the company that succeeded to the property. *Abbott v. Jewett*, 25 Hun, 603 (1881). The receiver's liability ends with his receivership, and a pending suit stops. *Bond v. State*, 68 Miss. 648 (1891). Where the judgment upon which the receiver was appointed is opened the receivership falls with it. *Rodbourn*

v. Utica, etc. R. R., 28 Hun, 369 (1882). Upon the receiver being discharged, actions against him should be discontinued. *Boggs v. Brown*, 82 Tex. 41 (1891). A judgment against the receiver after he has been discharged is void. *Texas, etc. Ry. v. Watson*, 13 Tex. Civ. App. 555 (1896). Where final distribution is made and the receiver discharged, a cause of action, which the receiver had been authorized by the court to enforce, but which he did not enforce, cannot be enforced by a creditor who participated in the distribution. *Diamond, etc. Co. v. Rarig Co.*, 93 Va. 595 (1896). A discharge of a receiver by the federal court which appointed him is no defense to a suit pending in the state court against such receiver. *Dougherty v. King*, 41 N. Y. App. Div. 1 (1899). An appeal from an order discharging a receiver does not continue the receivership. *State v. Superior Court*, 71 Pac. Rep. 1095 (Wash. 1903).

him and new suits instituted for acts of his predecessor.¹ The

shown. *Jordan v. Electrical, etc. Co.*, 105 N. W. Rep. 160 (Iowa, 1905). The court will remove a receiver who has been guilty of malfeasance as one of the directors of the company of which he was appointed receiver. *Wilson v. Barney*, 5 Hun, 257 (1875). The court will consider charges of maladministration on the part of its receivers, even though the charges are presented irregularly by petition of some of the bondholders. *Coe v. New Jersey Mid. Ry.*, 28 N. J. Eq. 31 (1877). A receiver may be discharged by the court without notice to a party who has made a contract with the receiver as a common carrier. *Corsier v. Russell*, 20 Abb. N. Cas. 316 (1887). The court may at any time discharge a receiver who was appointed at the instance of creditors, and there can be no appeal from its decision. *Washington, etc. R. R. v. Southern Maryland R. R.*, 55 Md. 153 (1880). In *Cowdrey v. Railroad Co.*, 1 Woods, 331 (1870); s. c., 6 Fed. Cas. 660, the court refused to remove a receiver on a vague charge of bad faith and intent to run the road for the benefit of hostile interests. As to the procedure in obtaining the re-

moval of a receiver for cause, see *Farmers' L. & T. Co. v. Northern Pac. R. R.*, 61 Fed. Rep. 546 (1894). As regards the procedure for removing the receiver in New York under the statutes, see *Attrill v. Rockaway, etc. Co.*, 25 Hun, 376, 509 (1881). A judge at chambers may discharge a receiver. *Walters v. Anglo, etc. Co.*, 50 Fed. Rep. 316 (1892). Stockholders are not the proper parties to apply for a change of receiver. The board of directors may do so. Where a receiver is put in by the collusion of the corporation, the court will revoke its order restraining any execution by creditors against the corporate property. *Fifth Nat. Bank v. Pittsburg, etc. R. R.*, 1 Fed. Rep. 190 (1880). Courts of equity will protect the interests of the minority holders of mortgage bonds of a railroad company as against the majority, and will remove receivers appointed at the instigation of the majority, where it appears that the receivers are incompetent, and that part of them have interests in other corporations adverse to the interests of the minority bondholders, and are using their influence and powers as receivers in advancing such

1 A suit instituted by a receiver may be carried on by his successor in the name of the first receiver. *Hegewisch v. Silver*, 140 N. Y. 414 (1893). The contract of a receiver to pay rebates does not bind his successor. *Kansas Pac. Ry. v. Bayles*, 19 Colo. 348 (1894). A subsequent receiver may recover on claims due to a prior receiver. *Phinizz v. Augusta, etc. R. R.*, 62 Fed. Rep. 771 (1894). A change of receivership does not affect the rights of claims arising under the receivership. *Ex parte Brown*, 15 S. C. 518 (1880). A receiver appointed to take the place of a receiver who has been removed may maintain contempt proceedings for interference with the possession of the former receiver. *Mc-*

Kinnon-Young Co. v. Stockton, 46 S. Rep. 87 (Fla. 1908). After judgment it is too late to object that during the pendency of the suit another receiver was appointed. No change of parties was necessary any way. *Fordyce v. Dixon*, 70 Tex. 694 (1888). A receiver may be sued for acts committed by his predecessor. *McNulta v. Lochridge*, 141 U. S. 327 (1891). Where a mortgagee has caused a receiver to be appointed, such receiver will not be discharged, although the company is subsequently dissolved and a receiver appointed in the dissolution proceedings. *Barney v. Joshua Stubbs, Limited*, [1891] 1 Ch. 187; aff'd, 64 L. T. 306.

court where an ancillary bill was filed, and which appointed the same receiver, will not remove him, even for cause, but will refer the matter to the other court, and may issue an injunction in the meantime.¹ A receiver cannot appeal from an order removing him.²

corporation at the expense of the railroad. Receivers should be impartial between the parties in interest; and stockholders and directors of an insolvent railroad company should not be appointed receivers unless the case is exceptional and urgent, and then only on the consent of parties whose interests are to be intrusted to their charge. *Atkins v. Wabash, etc. Ry.*, 29 Fed. Rep. 161 (1886). A receiver who gives an illegal rebate to shippers will be removed. *Handy v. Cleveland, etc. R. R.*, 31 Fed. Rep. 689 (1887). A stockholder and bondholder will not be allowed to intervene in a suit against an insolvent corporation to distribute its effects, even though he claims that the receivers in charge will not properly administer the estate. His remedy is to wait until the receivers are guilty of fraud or negligence and then to apply to the court. *Land, etc. Co. v. Asphalt Co.*, 114 Fed. Rep. 484 (1902). A receiver will not be removed merely because he took part in the organization of the company, and a large amount of stock was issued and it may become necessary for the receiver to enforce the stockholders' liability thereon or the liability of the promoters. *Land, etc. Co. v. Asphalt Co.*, 120 Fed. Rep. 996 (1902). A receiver cannot appeal from an order which discharges him. *Witherbee v. Witherbee*, 55 N. Y. App. Div. 151 (1900). Under the Ohio Code an order vacating the appointment of a receiver is appealable. *Cincinnati, etc. R. R. v. Sloan*, 31 Ohio St. 1 (1876). A receiver will not be removed although he has removed the treasurer, and increased the expense of that office, and general charges as to extravagance, etc., are made. *Farmers' L. & T. Co. v. Cape Fear, etc. R. R.*, 62 Fed. Rep. 675 (1894). Where a receiver has

been appointed at the instance of a minority stockholder on the ground of fraud in the management, the court will not remove the receiver and appoint another at the instance of the controlling stockholders who are charged with fraud, where the receiver's management has been able and impartial. *Street v. Maryland Cent. Ry.*, 59 Fed. Rep. 47 (1893). As to the procedure in Connecticut for the removal of a receiver, see *Re Premier C. Mfg. Co.*, 70 Conn. 473 (1898). A receiver is personally liable for loss due to his negligence in wasting the assets and selling the property at an inadequate price, especially where he was interested in the purchase, and the sale was not at public sale, but on offer accepted by the court, and in such a case the receiver will not be allowed any commissions. *Pangburn v. American Vault, etc. Co.*, 54 Atl. Rep. 504 (Pa. 1903). See also § 878, *supra*.

¹ *Chattanooga Terminal Ry. v. Felton*, 69 Fed. Rep. 273 (1895). Where the receiver in one jurisdiction has received an ancillary appointment from another jurisdiction through which the property runs, the court in the latter jurisdiction will not remove him at the instance of another corporation that has leased its road to the insolvent corporation, on general charges of fraud and collusion and hostility to the lease. *New York, Pa. etc. R. R. v. New York, Lake Erie, etc. R. R.*, 58 Fed. Rep. 268 (1893). A receiver need not be made a party to a bill in equity which asks that he be removed and another receiver appointed in behalf of the complainant. *Phinizz v. Augusta, etc. R. R.*, 56 Fed. Rep. 273 (1893).

² *State v. Interstate, etc. Co.*, 78 Pac. Rep. 202 (Wash. 1904).

Upon the resignation of a receiver the court may appoint his successor without notice to an intervenor in the foreclosure suit.¹

A forfeiture of a charter by a state court does not affect the status of a receiver appointed by the United States court. Such receiver may proceed to administer the property.² A receiver appointed at the instance of a creditor should not be discharged after such creditor's debt is paid, where there are other creditors who might be damaged thereby.³ But where a receiver has been appointed at the instance of a minority stockholder on account of the company having sold all its property to another corporation, but the transaction has been undone and canceled, the court should discharge the receiver.⁴ A receiver is the representative both of the creditors of the corporation and of its stockholders.⁵ If the interested parties delay for an unreasonable length of time in proceeding to a sale or in reorganizing, the court will discharge the receivers.⁶ A temporary receiver may be discharged and the money in his custody paid back to the corporation without notice to the general creditors.⁷ After the regular accounting and discharge of the permanent receiver, claimants against him may be without recourse.⁸ A suit in the state court against a federal receiver continues even though the receiver is discharged.⁹ Even

¹ *Fowler v. Jarvis, etc. Co.*, 66 Fed. Rep. 14 (1894). Where the receiver resigns his successor may be appointed *ex parte* without notice. *Nichol v. Murphy*, 108 N. W. Rep. 704 (Mich. 1906).

² *City, etc. Co. v. State*, 88 Tex. 600 (1895).

³ *Lenoir v. Linville Imp. Co.*, 117 N. C. 471 (1895). Even though stockholders intervene and tender the amount claimed by a creditor who has caused a receiver to be appointed, and demand that the receiver be discharged, yet if in the meantime other creditors come in the receiver will not be discharged. *Matlock v. Smith*, 71 S. W. Rep. 956 (Tex. 1903). A debenture-holder who brings suit in behalf of himself and other debenture-holders for a receiver may discontinue at his pleasure, even after a decree and the appointment of a receiver, no other debenture-holder having come into the case, such decree being different from an administration decree which directs inquiries as to debts

and also directs that the assets be applied "in a due course of administration." *Re Alpha Co. Ltd.*, 87 L. T. Rep. 646 (1903). See also §§ 748, 848 (*h*), *supra*, and note 3, p. 3179.

⁴ *Forrester v. Boston, etc. Co.*, 22 Mont. 430 (1899).

⁵ *Farwell v. Great Western Tel. Co.*, 161 Ill. 522 (1896); *Hood v. McNaughton*, 54 N. J. L. 425 (1892). See also § 869, *supra*.

⁶ *Platt v. Philadelphia, etc. R. R.*, 65 Fed. Rep. 872 (1894). See also § 863, *supra*. Where a receiver of an insolvent corporation is appointed at the instance of a stockholder and no effort is made to bring about the payment of the debts, the court will allow creditors to enforce their liens on the property. *Cohen v. Gold Creek, etc. Co.*, 95 Fed. Rep. 580 (1899).

⁷ *Rockwell v. Portland Sav. Bank*, 31 Oreg. 431 (1897).

⁸ See § 881, *supra*.

⁹ *Baer v. McCullough*, 176 N. Y. 97 (1903).

though the receiver is discharged, yet a bond given to him in a litigation may continue.¹ In a suit under the New York statutes, by a creditor to recover back money misappropriated by directors, judgment need not first be obtained against the company if it has been dissolved, but the receiver is a necessary party defendant, even though he has been discharged.²

If all parties consent to vacate a receivership the receiver cannot prevent it;³ and if the mortgagor offers to pay the debt upon which the foreclosure is based, the court is bound to discharge the receiver.⁴

The prolonged litigation in Vermont over the question whether a receiver who was continued under a reorganization scheme was still a receiver, or only an agent, was finally decided to the effect that he continued as receiver.⁵ Bankruptcy proceedings displaces a state receiver, but the state court should be allowed to pass upon the receiver's accounts.⁶

¹ American Surety Co. v. Campbell, etc. Co., 138 Fed. Rep. 531 (1905). instance of the complainant of record. Johnson v. Miller, 96 Fed. Rep. 271 (1899). See also note 3, p. 3178, *supra*.

² Lillenthal v. Betz, 108 N. Y. App. Div. 222 (1905).

³ Where the parties to the suit consent to vacate the receivership, the receiver cannot object. He has nothing to do with it. He is then interested only in the adjustment of his accounts. L'Engle v. Florida, etc. R. R., 14 Fla. 266 (1873). The discharge may be made at chambers. Walters v. Anglo, etc. Co., 50 Fed. Rep. 316 (1892). After a receiver of an insolvent corporation has been appointed at the instance of a creditor, and under an order of the court other creditors have proved their claims in such suit, the court has power to refuse to discontinue the suit at the

⁴ Milwaukee, etc. R. R. v. Soutter, 2 Wall. 510 (1864).

⁵ Langdon v. Vermont, etc. R. R., 54 Vt. 593, 603 (1882), holding also that the debts incurred by such receiver must be paid; practically overruling Vermont, etc. R. R. v. Vermont, etc. R. R., 50 Vt. 500 (1877). Until a receiver is regularly discharged no one will be allowed to set up that his functions as receiver ceased, and that his later acts were those of agent or trustee merely. Langdon v. Vermont, etc. R. R., 53 Vt. 228 (1880.)

⁶ Loveless v. Southern, etc. Co., 159 Fed. Rep. 415 (1908).

CHAPTER LII.

PURCHASES AND REORGANIZATIONS.

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| <p>§ 883. What are reorganizations?—Voluntary reorganization by scaling down the securities.</p> <p>884. Reorganization by disposing of the assets without a foreclosure.</p> <p>885. The trustee of the mortgage deed of trust may, and should in certain cases, purchase the property at foreclosure sale for the benefit of all the bondholders—Bondholders may then participate in the property—Trustee is disqualified from purchasing, when?</p> <p>886. The bondholders themselves, or a part of them, or through a committee acting for them, may purchase the property at foreclosure sale for the purpose of reorganizing—Such a purchase is legal—Stockholders may be allowed to participate.</p> <p>887. The court may allow the purchasing bondholders to turn in their bonds at a proper value in payment—Bondhold-</p> | <p>ers not participating must be paid in cash.</p> <p>§ 888. Limiting the time within which bondholders may come into the reorganization—Applications during that time—Powers, duties, and liabilities of the committee—Varying the reorganization agreement—Trustees' temporary certificates.</p> <p>889. Reorganization in accordance with and under a statute—English reorganizations.</p> <p>890. Status of a purchaser of the property at foreclosure sale—He takes the property free from claims of unsecured creditors, and the contracts and liabilities of the old company—His duty as to completing and operating the road—He may operate the road, but does not succeed to the corporate existence—Exemptions from taxation—The purchaser takes with notice of certain claims.</p> |
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§ 883. *What are reorganizations?—Voluntary reorganization by scaling down the securities.*—A reorganization of a corporation is a business arrangement whereby the stock and bonds of the company are readjusted as to amount, income or priority, or the property is sold to a new corporation for new stock and bonds, or the property is sold by foreclosure of a mortgage upon it, and the purchaser buys for himself and such of the old stockholders and bondholders as he associates with him.¹ An agreement of the kind first named, to scale down the securities, cannot be enforced as against any stockholder or bondholder who objects. Various schemes of this kind are referred to in the notes below.² This mode of reor-

¹ For an article on reorganizations—bondholders and stockholders or by a foreclosure. If any bondholder objects he may enforce the mortgage.

² Reorganization can be effected only by unanimous consent of the (1889). Even though nearly all of

ganization is but a recapitalization. It is a voluntary agreement of all stockholders and creditors to change and increase or decrease the

the bondholders assent, yet a reorganization without foreclosure does not bind those bondholders who do not come in. *Bill v. New Albany, etc. Ry.*, 2 Biss. 390 (1870); s. c., 3 Fed. Cas. 379. Where foreclosure is commenced in the federal court, and then by agreement of nearly all the bondholders a plan of reorganization is adopted and approved by the court and is acted on by nearly all the parties, the suit not being formally discontinued, but apparently abandoned, the suit continues nevertheless, and a subsequent foreclosure by the trustee in a state court gives no rights to a purchaser at the foreclosure sale as against a bondholder who did not take part in the reorganization. He may revive and proceed with the case in the federal court. *Bill v. New Albany, etc. Ry.*, 2 Biss. 390 (1870); s. c., 3 Fed. Cas. 379. But see § 839, *supra*. Where the mortgage bondholders agree to waive their lien and take new second-mortgage bonds, and the trustee does discharge the mortgage, a failure of the company to issue the new second-mortgage bonds in accordance with the contract does not entitle the old bondholders to be restored to their position as first-mortgage bondholders. They may, however, have their bonds allowed as second-mortgage bonds upon foreclosure. *Fidelity, etc. Co. v. Shenandoah, etc. R. R.*, 33 W. Va. 761 (1890).

A reorganization agreement whereby the bondholders agreed to take bonds in a new company will be specifically enforced, a receiver's sale having been had and the property sold subject to the mortgages and the road completed. *Dexter v. Ross*, 85 Mich. 370 (1891). The consent of a bondholder to a reorganization scheme, which he voted against as a director, is not implied by his silence when the plan is published and circulated.

Philadelphia, etc. R. R. v. Love, 125 Pa. St. 488 (1889). A voluntary reorganization agreement extending the time of payment, and making the interest payable in gold instead of currency, cannot be enforced, even by the decree or confirmation of the courts, as against dissenting bondholders. *Taylor v. Atlantic, etc. Ry.*, 55 How. Pr. 275 (1877), and *Reinach v. Meyer*, 55 How. Pr. 283 (1877), where such reorganization was enjoined. A purchaser of stock which voted in favor of a reorganization scheme cannot object to the scheme as being *ultra vires*, there being nothing illegal, *per se*, in it. *Hollins v. St. Paul, etc. R. R.*, 9 N. Y. Supp. 909 (1889). An agreement to assign property, etc. for the purposes of a reorganization may be too vague for specific performance. *Ballou v. March*, 133 Pa. St. 64 (1890). Concerning promoters' contracts, see § 705, *supra*. Where a director and stockholder, the owners of a judgment against a corporation, allow it to go into the statement of a reorganization scheme as a smaller amount and be acted upon, their assignee cannot collect the full amount. *Jacoby v. Stephenson, etc. Co.*, 6 N. Y. Supp. 370 (1889). An agreement between various bondholders not to enforce payment of their coupons for ten years is no defense to a foreclosure by the trustee, the agreement never having been considered alive by any of the parties to it. *Farmers' L. & T. Co. v. Rockaway Valley R. R.*, 69 Fed. Rep. 9 (1895). Where, during the receivership granted to enforce a judgment, the parties, or most of them, agree upon a reorganization without completing the foreclosure, and the receiver by such agreement is directed to continue in control and management, large debts incurred by him thereafter in the management are receiver's debts. See § 882,

capitalization or debts, or both. No foreclosure takes place.¹ Where a part of mortgage bonds, which are in default, are, under a reorganization agreement, returned to the corporation and placed under a new mortgage securing bonds which are issued to the persons who

supra. In *State v. Farmers' L. & T. Co.*, 81 Tex. 530 (1891), it seems that a reorganization was effected by a foreclosure sale, and a conveyance by the purchaser to the old corporation subject to purchase-money mortgages. This coupled with a reorganization agreement, whereby the old bondholders gave up their bonds and took the new ones, completed the reorganization. The other debts of the company, however, continued to exist, of course, as before. In *Pollitz v. Farmers' L. & T. Co.*, 53 Fed. Rep. 210 (1892), a reorganization was effected without foreclosure, and the court directed that a bond be given for the payment of those bondholders in full who did not wish to go into the reorganization. A bondholder who declined to go into the reorganization and also declined to take his pay was compelled by the court to surrender his bonds. *Cf.* §§ 816, 823, 835, *supra*. The holders of full-paid stock cannot be assessed on such stock, even under a reorganization agreement of the majority of the stockholders. Where, however, for four years the stockholder does not object, and then applies for a transfer of his stock, a court of equity may refuse to grant the transfer, and may give him damages for the value of his stock at the time of the demand of transfer, together with interest. *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52 (1893). Where an insolvent corporation which has never issued any certificates of stock resolves by a vote of its stockholders to apply its assets to the extent of their value to the payment of the debts, and that new stock be issued to the stockholders upon their paying therefor in full, and one stockholder sells his interest in the original stock and the purchaser for seven years

does not complain, he cannot after the corporation has become prosperous claim that he is entitled to the old stock or any interest in the corporation. *Stoddard v. Decatur, etc. Co.*, 184 Ill. 53 (1900). Where a preference by an insolvent corporation is invalid the agreement of all creditors that an insolvent bank may borrow money and pledge its securities as collateral is not valid and such pledge is illegal. *Burrell v. Bennett*, 20 Wash. 644 (1899). But such pledge is legal as against creditors assenting thereto. *Bank of California v. Puget Sound, etc. Co.*, 20 Wash. 636 (1899).

¹ For instances, see *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114 (1885); *Gilfillan v. Union Canal Co.*, 109 U. S. 401 (1883); *Canada Southern Ry. v. Gebhard*, 109 U. S. 527 (1883). See also cases in the last note; also § 880, *infra*. Reconstruction of a company means carrying on substantially the same business by substantially the same persons without all the assets and liabilities necessarily passing to the new company. Amalgamation means the blending of two concerns into one, either by transferring both to a new company or transferring one to the other. *Re South Africa, etc. Co.* [1904] 2 Ch. 268. Where in the issue of preferred shares it is provided that the rights therein given might be modified as provided in the by-laws, the preferred shares of £5 each may be changed into five times that number of shares of £1 each, and thereafter the preferred shares may be reduced to thirteen shillings each by canceling the remaining seven shillings, and thereafter the preferred shares may be converted into partly preferred and partly common. *Re Welsbach, etc. Co., Ltd.*, 89 L. T. Rep. 645 (1903).

so turned in the first-mentioned bonds, the holders of the remaining old bonds cannot claim that the bonds so turned in have been canceled, thereby reducing the first-mortgage issue by that amount.¹ A corporation which is financially embarrassed cannot sustain a bill to compel minority stockholders to scale their bonds to seventy-five per cent. of their face.²

§ 884. *Reorganization by disposing of the assets without a foreclosure.*—A second mode of reorganizing a corporation is where the directors or the stockholders turn over the assets of the corporation to a new corporation. This is done in various ways. It may be by a consolidation with another company, or by a sale or lease of the whole corporate property to that other corporation. The validity of such acts as against the dissent of a stockholder has been treated elsewhere.³ The validity of such sales of the corporate property is generally determined by ascertaining whether the sale is *ultra vires* or not.⁴ Sometimes, however, an element of fraud is involved and will suffice to set aside the transaction. Thus, it is illegal and fraudulent for the majority of the stockholders to purchase the property of the corporation at a private sale authorized by themselves.⁵ Such a purchase by the majority may be set aside in the same way and to the same extent that a purchase of corporate property by a director may be set aside.⁶ This is the rule, even though the majority purchase and proceed to a reorganization of the corporation, and offer to allow all the stockholders to become members of the new corporation.⁷ That a purchase by a corpora-

¹ Mowry v. Farmers' L. & T. Co., 76 Fed. Rep. 38 (1896). In the case of Maxwell, etc. Co. v. Henderson, 12 Colo. App. 425 (1899), where the lessee of land had issued bonds based on such lease, and most of the holders thereof had transferred their bonds to a mortgagee of the lessor in exchange for bonds of the lessor, the court held that these bonds of the lessee which had been so exchanged could not participate in the proceeds from the foreclosure of the mortgage given by the lessee. Cf. § 765, *supra*. Where after a bank was placed in a receiver's hands there was a voluntary reorganization under the same charter and the reorganization failed, the claims of those who were parties to it were subject to the payment first of claims of those who were not. Rumble v. Tyus, 123 Ga. 295 (1905).

² Lake, etc. R. R. v. Ziegler, 99 Fed. Rep. 114 (1900), the court saying: "It was broadly suggested at the bar that upon the facts disclosed the time was ripe and the occasion fit for a court of equity to take a step in advance, and to declare that it could rightly determine the propriety of a scheme of reorganization, and compel recalcitrant bondholders to comply with it. This is certainly a startling proposition, suggesting a wide departure from precedent, and a great enlargement of equity power."

³ See ch. XL, *supra*.

⁴ See §§ 669-674, *supra*.

⁵ See § 662, *supra*.

⁶ See § 662, *supra*.

⁷ See §§ 662, 671, *supra*. Even though eighty-three per cent. of the stockholders of an insolvent bank desire the assets to be sold at public

tion director at such a sale is voidable is well established.¹ It is also fraudulent and illegal for the majority to dissolve the old corporation, form a new one, and sell the property of the old one to the new corporation at a valuation placed upon the property by the majority themselves.² Even though the charter authorizes the corporation to sell all its assets, it cannot sell the same to another corporation for partly paid stock to be distributed among its members, members not accepting the shares to lose all their interest in the concern. This is an attempt to force the shareholders to provide more capital on pain of forfeiting their shares.³

Where without foreclosure the bondholders purchase the property at an assignee's sale subject to the mortgage, and pay the price by turning in bonds, the bonds cannot be enforced against the stockholders of the mortgagor company.⁴ The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders where such contract is a fair one, even though some of the stockholders dissent.⁵ But a court has no power as against the dissent of minority stockholders and bondholders, however small their holdings, to reorganize the company by authorizing the receivers to lease the property for a long period of time and allow the lessee to place a large mortgage on the property, even though the proceeds of the mortgage are to be used for rebuilding the property, especially where the rebuilding is not subject to the orders of the court or the wishes of the security-holders. The court has no such power, even though the system is made up of a great many different street railways with different franchises, some of which have lapsed, and there is danger that the entire property will be lost if the offer of

sale after the court has fixed an upset price thereon in order that the bank may be reorganized and thereby avoid the losses incident to liquidation, yet the court will not order such sale. The minority would have no means of protecting themselves, inasmuch as the court would have no accurate means of ascertaining a proper upset price. *Re Murray Hill Bank*, N. Y. L. J., Feb. 5, 1897. *Cf.* §§ 869, 872, *supra*.

¹ See § 653, *supra*.

² See § 662, *supra*.

³ *Manners v. St. David's, etc. Mines, Ltd.*, [1904] 2 Ch. 593; *Bisgood v. Nile, etc. Co. Ltd.*, [1906] 1 Ch. 747.

⁴ *Cock v. Bailey*, 146 Pa. St. 328 (1892).

⁵ *People v. Anglo-American, etc. Assoc.*, 66 N. Y. App. Div. 9 (1901). It is not legal for a receiver, even under an order of the court, to sell nearly all the property of the company to another corporation in exchange for stock of the latter to be given to stockholders of the former, with a provision that dissenting stockholders should be paid on a certain basis which is different from stock of the former corporation acquired by the latter corporation. *People v. Anglo-American, etc. Assoc.*, 60 N. Y. App. Div. 389 (1901). The validity of

the city to grant a new franchise on certain terms is not accepted.¹ A national bank which is a creditor of an insolvent manufacturing company has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails the bank is not liable as a stockholder on a statutory double liability attaching to such stock.² Where a holding company increases the capital stock of one of its subsidiary companies and then causes it to purchase the common stock of the holding company, thereby creating a conflict of interest between the preferred stockholders of the holding company and the subsidiary company, which by the plan would control the holding company itself, minority stockholders may enjoin such a reorganization, it being a part of the plan that the holding company shall sell its various stocks to such subsidiary company.³

Under the English statute prohibiting commissions for underwriting, a plan by which a company sells its property to an individual and he agrees to organize a new company to take over the property and pay him a profit, is illegal.⁴

The third mode of reorganization, that of foreclosure and sale, is the subject of the remainder of this chapter.

§ 885. *The trustee of the mortgage deed of trust may, and should in certain cases, purchase the property at foreclosure sale for the benefit of all the bondholders—Bondholders may then participate in the property—Trustee is disqualified from purchasing, when?—*It seems that a trustee has implied power at the foreclosure sale to bid for the property, in behalf of the bondholders, up to a figure equal to the principal and interest due upon the mortgage debt. A trustee is not bound, however, to purchase at the sale where there is no request from the bondholders; neither is the trustee called upon to aid or promote any plan of reorganization.⁵ The bondholders

a judicial sale of the assets of an insolvent corporation by a receiver cannot be impeached in a collateral action. *Anderson v. Chicago, etc. T. Co.*, 101 Wis. 385 (1898). See also §§ 869, 872, *supra*.

¹ *Merchants', etc. Co. v. Chicago Rys.*, 158 Fed. Rep. 923 (1907), *rev'g Guaranty T. Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 913 (1907). Thereupon the trustees in their foreclosure suits applied for decrees of foreclosure and petitioned the court in the meantime to have the

company operated by the reorganized company, and the court so ordered. *Guaranty Trust Co. v. Chicago Union Traction Co.*, 158 Fed. Rep. 1015 (1908).

² *First National Bank v. Converse*, 200 U. S. 425 (1906).

³ *Robinson v. Holbrook*, 148 Fed. Rep. 107 (1906).

⁴ *Booth v. New Afrikander, etc. Co.*, 87 L. T. Rep. 509 (1902).

⁵ *Frismuth v. Farmers' L. & T. Co.*, 95 Fed. Rep. 5 (1899).

may authorize the trustee to bid for the property the full amount of the debt and interest and costs, and a provision in the mortgage authorizing the trustees to make such purchase for the benefit of the bondholders is valid.¹

The court in its decree may authorize and direct the trustee to bid for the property at the sale the amount of principal and interest due.²

Where several bondholders agree among themselves to buy the property at foreclosure sale, the purchase to be for the benefit of the bondholders, and the price to be the expense of the foreclosure, and the trustee of the mortgage makes the sale on that understanding, the trustee may compel the purchaser to take a deed for the benefit of all the bondholders. The court stated also that it would have been a breach of trust for the trustee to have made such a sale except for

1 *Etna, etc. Co. v. Marting, etc. Co.* 127 Fed. Rep. 32 (1904).

2 The court may authorize and direct the trustee to bid the amount of principal and interest due to him. The reorganization clause in the mortgage was construed to enable the majority of bondholders, in case the trustee purchased, to formulate the plan of reorganization and compel the minority to accept it. *Sage v. Central R. R.*, 99 U. S. 334 (1878). That the court may authorize the trustee to bid, see also *Rogers v. Wheeler*, 43 N. Y. 598 (1871). Where the trustee of the mortgage buys in the property as trustee for the bondholders, a bondholder who assents to a transfer by the trustee to a new corporation cannot afterwards complain. *Butterfield v. Cowing*, 112 N. Y. 486 (1889). Where railroad property is, by agreement of the bondholders, bought in at foreclosure sale for a small sum by a trustee for their benefit, and is afterwards sold by the trustee to a new company formed by him and one of the bondholders, the profits of the sale going to such bondholder, another bondholder who has, as far as requested, advanced his share of the expenses of the foreclosure sale, can compel the trustee and the first-named bondholder to account to him for his share of the property. The right of such bondholder to his share

in the sale cannot be affected by the neglect of some of the other bondholders to advance their share of the expenses, or by their withdrawal from the agreement. *Cushman v. Bonfield*, 139 Ill. 219 (1891). In a reorganization scheme, a bondholder who goes into it may hold the trustees personally responsible for his agreed interest in the new company. *Riker v. Alsop*, 27 Fed. Rep. 251 (1886); rev'd on the ground of laches in *Alsop v. Riker*, 155 U. S. 448 (1894). *Of. Stanton v. Missouri, etc. Ry.*, 15 N. Y. Civ. Proc. Rep. 296 (1888). If the bondholders do not respond to the trustee's call for payments on the mortgaged property which he has bought in for them, he should apply to the court for a resale. *Cushman v. Bonfield*, 139 Ill. 219 (1891). In *Sanxey v. Iowa City Glass Co.*, 63 Iowa, 707 (1883), a bondholder objected to a provision in the foreclosure decree allowing the trustee to bid in the property for the bondholder, on the ground that he was a guaranteed bondholder, and the court sustained him. In *Duncan v. Mobile, etc. R. R.*, 3 Woods, 597 (1879); s. c., 8 Fed. Cas. 25, Mr. Justice Bradley said: "A sale for the benefit of all is attended with the difficulty of determining who shall make the bid. The court has sometimes authorized the trustees of the mortgage to bid for the bondholders. In

the benefit of all the bondholders.¹ Where the mortgage authorized the trustee to bid in the property on foreclosure sale, and the trustee does so for the benefit of the bondholders, and then transfers the property to a new corporation without the consent of all the bondholders, a bondholder who did not consent may file a bill in equity to compel the trustee to account and pay to the bondholder his share of the proceeds of the sale, or the value of the property, the bondholder offering to pay his share of the expenses.² It has been held that a trustee is disqualified from purchasing the mortgaged property at a foreclosure sale, unless the decree of the court or a statute provides otherwise, inasmuch as the trustee represents the company as well as the bondholders, and should not be under temptation to pur-

this case it is obvious that one class or the other of the bondholders would be dissatisfied with any selection of trustees which the court might make." In *Wetmore v. St. Paul, etc. R. R.*, 3 Fed. Rep. 177 (1880), it appears that the trustees were authorized by the court to bid if the property was likely to be sold for a totally inadequate price. The court sustained the trustees in not buying, the selling price being \$1,500,000 above the upset price fixed by the court.

1 *Sullivan v. Haskin*, 70 Vt. 487 (1898).

2 A delay of ten years is not necessarily a bar, there having been no denial or repudiation of the trust. A specific sum need not be tendered in advance on account of the expenses. *Zebble v. Farmers' L. & T. Co.*, 139 N. Y. 461 (1893). It is the right of the trustee in his discretion, upon the foreclosure sale of the property, to bid up to the par value of the debt which he represents, where the mortgage authorizes him to do so. The fact that a majority of the bondholders designate a lower figure does not oblige him to stop at that figure. He purchases for the benefit of all. He has no right to sell, but if so provided in the mortgage he must organize a new corporation and convey to it for the sole benefit of all the bondholders. A majority of the bondholders cannot compel a sale to another

corporation instead of the reorganized corporation. The trustee acting in violation of his duty in purchasing and disposing of the property is liable to a dissenting bondholder for the real value of his bonds. *James v. Cowing*, 82 N. Y. 449 (1880), reversing 17 Hun, 256 (1879). Where the trustees of the mortgage foreclose and buy the property for the bondholders, and the trustees do not turn over to the new corporation all the property purchased by them, and they have been guilty of malfeasance in other respects, a bondholder may hold them liable by a suit in equity, even though he deposited his bonds and took stock in exchange therefor, it appearing that he did not then know of the acts complained of. The new corporation is not a necessary party defendant and a purchaser of the stock in the new corporation cannot make such a complaint, but the complaint may be by one of the bondholders, even though he has sold his stock. *Dunning v. Bates*, 186 Mass. 123 (1904). Where the trustee at the request of the parties secured buys in the property at foreclosure sale, such trustee cannot be held liable by any one of such parties for any part of the purchase price, but the property itself is held by the trustee for the benefit of the parties so secured. *Mareck v. Minneapolis T. Co.*, 74 Minn. 538 (1898).

chase the property cheaply.¹ Yet the court will not be anxious to set the sale aside on this ground, if substantial justice was done to all the parties.² The attorney of the company may purchase for the bondholders at the sale.³ The trustee is disqualified from purchasing for himself.⁴ The subject of who may purchase at the sale is considered elsewhere also.⁵

§ 886. *The bondholders themselves, or a part of them, or through a committee acting for them, may purchase the property at foreclosure sale for the purpose of reorganizing—Such a purchase is legal—Stockholders may be allowed to participate.*—The law favors such purchasers, inasmuch as they furnish a bidder at the sale, and enable the court to realize some kind of price for the property. Generally a scheme of reorganization is formulated which allows such of the old stockholders and bondholders to participate as apply to come in within a specified time. The object in allowing the old stockholders to participate is to get an assessment in cash from them and to discourage defenses in the suit of foreclosure. An ordinary foreclosure of a mortgage on land proceeds quietly to a sale of the property. But the large interests involved in a rail-

¹ The trustee who sells under the power of sale cannot be interested personally in the purchase of the property. He is trustee for the company as well as for the bondholders. *Washington, etc. R. R. v. Alexandria, etc. R. R.*, 19 Gratt. (Va.) 592 (1870). A trustee may purchase at a sale of the property brought about by other parties. *Allen v. Gillette*, 127 U. S. 589 (1888). Where the mortgagor surrenders possession to the trustee, the trustee's agent in possession and control is disqualified from purchasing at the foreclosure sale, even for the bondholders. The mortgagor may redeem. *Racine, etc. R. R. v. Farmers' L. & T. Co.*, 49 Ill. 331 (1868). Where the trustee, after taking possession of the railroad, purchases many of the bonds and makes a profit thereby, the profit belongs to the company and not to him. *Ashuelot R. R. v. Elliott*, 57 N. H. 397 (1874). Concerning the power of a party to the suit to purchase at the sale, see *Pewabic Min. Co. v. Mason*, 145 U. S. 349 (1892). *Cf.* note 2, p. 2929, *supra*.

² A sale will not be set aside, even for illegality, unless the disbursements made by a new company for improvements are provided for. *Washington, etc. R. R. v. Alexandria, etc. R. R.*, 19 Gratt. (Va.) 592, 622 (1870). If the trustees are interested in the reorganization, the sale is voidable at the instance of the company, but not void, and laches is fatal to setting it aside. *Kitchen v. St. Louis, etc. Ry.*, 69 Mo. 224, 260 (1878). In Wisconsin a statute allows the trustee to purchase. *Barnes v. Chicago, etc. R. R.*, 8 Biss. 514 (1879); s. c., 2 Fed. Cas. 862; and even if the statute did not allow it, the trustee himself could not raise the objection. *Barnes v. Chicago, etc. R. R.*, 8 Biss. 514 (1879); s. c., 2 Fed. Cas. 862; *aff'd*, 122 U. S. 1 (1887). In *James v. Railroad Co.*, 6 Wall. 752 (1867), the trustee purchased. The sale was set aside, chiefly, however, on account of other frauds.

³ *Pacific R. R. v. Ketchum*, 101 U. S. 289 (1879).

⁴ See §§ 815, 850, *supra*.

⁵ See § 886, *infra*, and § 850, *supra*.

road foreclosure lead to strenuous opposition thereto. Accordingly it is found to be expedient, during or previous to a railroad foreclosure suit, for the parties interested in the property, whether they be the stockholders or bondholders or mere outsiders, to formulate and propose to the bondholders and stockholders a plan of reorganization whereby, after a foreclosure sale, the purchaser of the property will allow the bondholders, and often also the stockholders, to come into a new company which shall own the property so purchased. It has been found necessary, in most cases, to reorganize on some such plan, in order to quiet the defenses to the foreclosure, or to raise the funds required in the reorganization, or to obtain a charter from the state for the reorganized enterprise, or to preserve intact the system of railroads, branches, leases, and connections which give value to the property foreclosed. This method of effecting a reorganization is legal and valid, since it involves an ordinary foreclosure of a mortgage and an agreement of interested parties to purchase at the foreclosure sale. The foreclosure cuts off all rights of the old corporation and creditors and stockholders to the property foreclosed, and also the rights of the bondholders whose mortgage is foreclosed.¹ The only rights which any of these parties have, after the foreclosure, are the right to participate in the assets, or such rights as the plan or contract of reorganization gives them. By this plan generally the old stockholders are allowed to come into the new corporation upon the payment of a fixed sum for each share of stock held by them. The bondholders are generally allowed to exchange the old bonds for new ones in the new corporation on different terms of interest and times of payment. Plans of reorganization such as this are legal

¹ In *Fosdick v. Schall*, 99 U. S. 235 (1878), the court said: "It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation." Occasionally the holders of the first-mortgage bonds have distinguished themselves by foreclosing their mortgage and actually buying the property at the foreclosure sale without asking the permission of

stockholders, second-mortgage bondholders, or income bondholders, or other creditors. Theoretically this has always been possible if the subordinate security-holders did not provide for the prior mortgage; but practically the holders of stock and inferior liens have usually been able to make the holders of prior mortgages sacrifice something; sometimes when the stockholders sacrificed nothing themselves. Moreover the bondholders are creditors and usually have no desire to own and manage the property which is security for the money they have lent. They are apt to be widely scattered and find difficulty in acting together.

and are favored by the courts, inasmuch as a better price is obtained for the property in that way.¹

¹ "Without such previous organizations and arrangements great sacrifice and loss must attend all such sales. They are therefore to be promoted rather than discouraged by unnecessary and improper exposure of their membership." *Robinson v. Philadelphia, etc. R. R.*, 28 Fed. Rep. 340 (1886); *Gates v. Boston, etc. R. R.*, 53 Conn. 333 (1885). Reorganization agreements are legal. *Mackintosh v. Flint, etc. R. R.*, 34 Fed. Rep. 582 (1888); *Kurtz v. Phil. & Reading R. R.*, 187 Pa. St. 59 (1898); *Farmers' L. & T. Co. v. Green Bay, etc. R. R.*, 6 Fed. Rep. 100 (1881); *Kropholler v. St. Paul, etc. Ry.*, 1 McCrary, 299 (1880); *Munson v. Magee*, 22 N. Y. App Div. 333 (1897); *aff'd*, 161 N. Y. 182. An action by a stockholder to set aside a foreclosure sale, which he alleges was collusive and fraudulent in that the bondholders and part of the stockholders had arranged to have the foreclosure made for the purpose of reorganization, is demurrable unless the consenting stockholders and the trustees in the mortgages are made parties defendant. *Ribon v. Railroad Cos.*, 16 Wall. 446 (1872). See also *Harpending v. Munson*, 91 N. Y. 650 (1883), with reference to the corporation as a party to the suit. Courts will aid a reorganization and will authorize the receiver to agree to pay two and a half per cent. commission to parties who will carry maturing coupons, the commission to be paid only in case the reorganization goes through. *Platt v. Philadelphia, etc. R. R.*, 65 Fed. Rep. 872 (1894). In a suit by a receiver and general manager of a railroad against the purchasers of it at a foreclosure sale to allow him to have an interest, as had been agreed upon before the sale, the way to raise the question of the legality of the agreement is by demurrer. *Farley v. Kittson*, 120 U. S. 303 (1887). *Gates v. Boston, etc. R. R.*, 53 Conn. 333 (1885), holds that a purchase of the foreclosed road by a portion of the bondholders and a reorganization by them is legal. A bondholder who had no notice cannot set the transaction aside. A bondholder seeking to remedy a conspiracy whereby a syndicate of the bondholders foreclosed and bought the property at a small valuation cannot claim a lien on the property. His remedy is a bill to set aside the foreclosure. *Richter v. Jerome*, 123 U. S. 233 (1887); *St. Louis, etc. Co. v. Sandoval, etc. Co.*, 116 Ill. 170 (1886), holding that where the foreclosure or dissolution sale was irregular and void, but the reorganized company in good faith had expended large sums on the property, the court will protect the latter as far as possible. Especially so after seven years elapse. *Townsend v. St. Louis, etc. Co.*, 159 U. S. 21 (1895). See also *Shaw v. Railroad Co.*, 100 U. S. 605 (1879), where the legality of the ordinary method of reorganization was fully discussed and sustained, and a bill of certain bondholders attacking it was dismissed; *Matthews v. Murchison*, 15 Fed. Rep. 691 (1883); *s. c.*, 17 Fed. Rep. 760 (1883); *Bliss v. Matteson*, 45 N. Y. 22 (1871), holding that a special agreement with an influential bondholder, giving him an advantage over other similar bondholders, is void; *Child v. New York, etc. R. R.*, 129 Mass. 170 (1880), where a strict foreclosure and reorganization was provided for in the deed of trust. A combination of part of the bondholders for the purpose of purchasing the property at foreclosure sale is legal. It is legal for a party who intended to bid to refrain upon an agreement that he will be allowed to participate in the purchase by a competing bidder. On a resale a syndicate agreed not to bid, but to purchase

Stockholders are not disbarred from purchasing at the sale. Fraud or collusion whereby the property at the sale brings less than its real value will of course render the sale subject to attack. But the fraud must be clearly proved. A purchase of corporate property

from the purchaser at the price of the first sale. *Held*, that the defaulting first purchaser could not attack the resale, although such resale was at a lower figure. Bondholders may combine in their bid. *Terbell v. Lee*, 40 Fed. Rep. 40 (1889). Where the trustee, under the power to sell, sells the property at public auction, the bondholders or their representative may purchase. *Easton v. German-American Bank*, 127 U. S. 532 (1888). If an exchange of old for new bonds is set aside by one bondholder, it must be set aside as to all. *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (1885). On a reorganization it is legal for a bank owning some of the bonds to take part in such reorganization and accept stock in the new company. *Deposit Bank v. Barrett*, 13 S. W. Rep. 337 (Ky. 1890). A national bank which is a creditor of an insolvent manufacturing company has no power to join in a reorganization plan by which it turns over its claim to a new corporation and takes stock of the new corporation in payment therefor, and hence if the new corporation fails the bank is not liable as a stockholder on a statutory double liability attaching to such stock. *First National Bank v. Converse*, 200 U. S. 425 (1906). A purchase of a railroad by a reorganization committee of the first-mortgage bondholders will not be set aside at the instance of its second-mortgage bondholders, although the trust company that was trustee in the first was also trustee in the second mortgage, where no actual fraud was alleged, no offer made to redeem, no claim made that the property was sold at a sacrifice, no attempt made by the second-mortgage bondholders to intervene in the suit, no defense to the foreclosure suit appears to have existed, and an

agreement of the purchaser to allow the second-mortgage bondholders to participate in the reorganization was without consideration, and the purchaser was not made a party to this suit. *Robinson v. Iron Ry.*, 135 U. S. 522 (1890). A stockholder cannot cause a foreclosure sale to be set aside on the ground that the purchaser made the purchase for the benefit of second-mortgage bondholders to the exclusion of subsequent creditors and stockholders, there being no proof that the property sold for less than it was worth, or that there would be any surplus for the stockholders, even though there was proof that there was another plan of reorganization which would have given something to the stockholders. *Central Trust Co. v. Peoria, etc. Ry.*, 118 Fed. Rep. 30 (1902). A reorganization agreement is stated and upheld in *Carey v. Houston, etc. Ry.*, 45 Fed. Rep. 438 (1891). A receiver will be ordered to open the books to a stockholder, even though the stockholder wishes to obtain facts to induce other stockholders not to enter a reorganization which has been agreed to by a majority of the stockholders. The receiver may properly refuse such request until ordered to open the books by the court. The receiver, however, should remain neutral as between the opposing parties. Where, however, the stockholder became such six months after the appointment of a receiver, his application to examine the books will be denied. *Chable v. Nicaragua Canal Const. Co.*, 59 Fed. Rep. 846 (1894). A reorganization agreement by bondholders is legal. *Fidelity, etc. Co. v. Roanoke, etc. Ry.*, 98 Fed. Rep. 475 (1899). A promise by a holder of receiver's certificates that he will carry out a reorganiza-

by a majority of the stockholders at a foreclosure sale, if made in good faith, is legal and valid. It is not constructive fraud. The minority stockholders may object to it only when it is *actually* fraudulent.¹ There may be a valid agreement between a railroad

tion agreement if his receiver's certificates are conceded to be valid is binding upon him, even if such promise is not reduced to writing, the certificates having been duly validated. *Cox v. Stokes*, 156 N. Y. 491 (1898). Where the bondholders purchased the property at foreclosure sale, and afterwards the decree of foreclosure is reversed on appeal and then a second foreclosure sale takes place and the bondholders purchase again and the deficiency judgment is entered, the profits realized by the bondholders between the time of the first sale and a second sale will be applied on the deficiency judgment, the bondholders having had possession during the whole time. *Huguley Mfg. Co. v. Galt-ton Cotton Mills*, 94 Fed. Rep. 269 (1899). Where a corporation owns all of its bonds, excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet, if that settlement was caused by misrepresentations as to the value of the securities, he is not bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be allowed to participate the same as the bondholder who did not turn in his bonds. *Anthony v. Campbell*, 112 Fed. Rep. 212 (1901). A creditor who does not take part in a reorganization, al-

though given an opportunity to do so, cannot afterwards complain that the property was sold to the reorganization committee at an inadequate price, the price being the upset price fixed by the decree. *McEwen v. Harriman, etc. Co.*, 138 Fed. Rep. 797 (1905).

¹ Even though one railroad company owns the majority of the stock of another railroad company and purchases the property of the latter at a foreclosure sale thereof, yet, if there was no actual fraud, the minority stockholders of the insolvent company cannot complain, especially where they waited seventeen months and allowed large expenditures to be made in reliance on the sale. *Rothchild v. Memphis, etc. R. R.*, 113 Fed. Rep. 476 (1902). Acts of the president and trustees of a corporation in promoting a plan of reorganization whereby a hostile foreclosure, which would extinguish the interest of all stockholders, is prevented, and a friendly foreclosure substituted, which preserves to the subscribing stockholder an interest in the property, are not constructively fraudulent, and give rise to no constructive trust in favor of the old organization, when there is no actual fraudulent intent, and all parties interested are consulted, and all reasonable notice given to the widely-scattered stockholders; and this is true, although a large personal profit, in the shape of a contingent fee, accrues to the president of the corporation, who is the principal promoter of the plan of reorganization. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). See *Carter v. Ford Plate Glass Co.*, 85 Ind. 180 (1882), where the offer was made to all the stockholders to come into the reorganization on equal terms. And see § 662, *supra*. A person may purchase at foreclosure

corporation, the mortgagees in trust of its road, and the bondholders, that after a sale under the mortgage the company should be so reorganized that the stockholders and *unsecured creditors* of the old company shall become stockholders in the new company.¹ But in a celebrated case, decided in 1868, a reorganization scheme, whereby the property was sold under foreclosure to a new company, the bondholders and stockholders taking bonds in certain proportions, was held to be fraudulent as to other creditors, to the extent of the bonds delivered to stockholders.² And the supreme court of the

even, though he represents the stockholders, and even though the intention may be to organize a new company to continue an illegal combination in trade. *Olmstead v. Distilling, etc. Co.*, 73 Fed. Rep. 44 (1895). Where the purchaser at foreclosure sale purchases for the benefit of stockholders who advance the money for that purpose, a subsequent sale of his stock by one of the stockholders who advanced the money carries his interest in the property so purchased. *Riordan v. Schlicher*, 41 S. Rep. 842 (Ala. 1906). Where stockholders purchase at foreclosure sale and convey the title to one of their number and subsequently consent to a decree vesting complete title in him, and he becomes bankrupt, his creditors are entitled to the property, even though from time to time he had distributed among the stockholders the proceeds of sales of parcels of the property sold by him. *In re Coffin*, 146 Fed. Rep. 181 (1906). Where the foreclosure sale is conducted as secretly as possible and advertised as quietly as possible in accordance with an agreement between the receiver and the trustee of the mortgage and third persons, for the purpose of enabling such third persons to buy the property at a low figure, the sale will be set aside in a suit brought by a bondholder for that purpose. *Atkins v. Judson*, 33 N. Y. App. Div. 42 (1898). See also § 848, *supra*. The motive of the trustee in foreclosing is immaterial, even though such motive is to close out the minority stockholders. *Guardian,*

etc. Co. v. White Cliffs, etc. Co., 109 Fed. Rep. 523 (1901). Where a majority stockholder buys the property at foreclosure sale and sells it to a new company for stock and bonds, a minority stockholder has a right to his proportion of the new stock, subject to a lien of the majority stockholder for claims owned by him against the old company which have not been paid by bonds of the new company, no actual fraud being involved. *Cutting v. Baltimore, etc. R. R.*, 35 N. Y. Misc. Rep. 616 (1901). The minority stockholders appealed from this decision, but the judgment was affirmed in 65 N. Y. App. Div. 414 (1901); appeal dismissed, 177 N. Y. 552.

¹ *Smith v. Chicago, etc. Ry.*, 18 Wis. 17 (1864). Where the reorganization agreement allows *all* unsecured creditors to come in and participate in the purchase and reorganization, the scheme is legal, even though stockholders in the old corporation were to get stock in the new without paying anything therefor. *Hancock v. Toledo, etc. R. R.*, 9 Fed. Rep. 738 (1882).

² *Railroad Co. v. Howard*, 7 Wall. 392 (1863). Where the officers of a corporation fraudulently cause mortgages on its property to be foreclosed and they buy it in and form a new corporation to take over the assets, all for the purpose of eliminating preferred stockholders and certain creditors in the old corporation, a preferred stockholder may hold the new corporation liable for the value of an equal amount of preferred stock in

United States, again and in a still more celebrated case, held in 1899 that a foreclosure which is brought about by the stockholders for the purpose of buying in the property and reorganizing the property so as to protect the mortgage bondholders and also the stockholders, and at the same time to cut off the claims of unsecured creditors, and particularly to cut off a guaranty on the bonds of another corporation, is illegal, and if such facts are proved the foreclosure sale will be set aside.¹

This rule, however, does not militate against the ordinary reorganizations in which the stockholders are allowed to participate. A

the new corporation, including dividends already paid. *Sparrow v. Bement & Sons*, 142 Mich. 441 (1905). Even though a foreclosure was in the federal court, yet an unsecured creditor of the foreclosed corporation may bring suit in the state court against the new corporation, to hold it liable for the debt on the theory that the reorganization was fraudulent in that it protected the stockholders of the old corporation at the expense of the unsecured creditors of the old corporation. *Guardian Trust Co. v. Kansas City, etc. Ry.*, 146 Fed. Rep. 337 (1906).

¹ *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 674 (1899), the court saying (p. 683), "no such proceedings can be rightfully carried to consummation which recognize and preserve an interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors; first of secured and then

of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

On a subsequent trial of this case the lower court on further proof decided that the reorganization was not fraudulent, the decision of the court being succinctly set forth in the syllabus, as follows: "A plan of reorganization made by railroad bondholders for the purpose of purchasing the property at foreclosure sale, and by which the stockholders in the old company are permitted to convert their stock into stock in the new company on payment of a stipulated difference, is not for that reason fraudulent and void as to general creditors of the old company, where it does not appear that any of the stockholders, as such, were parties to the plan; that it caused or in any manner affected the foreclosure proceedings, or deprived the general creditors of any rights, so that whatever rights, if any, are secured to the stockholders are at the expense of the bondholders, and not of the unsecured creditors." The court also held that there was no proof that the new stock going to the old stockholders was of any greater value than the cash paid for it by the old stockholders. *Farmers', etc. Co. v. Louisville, etc. Ry.*, 103 Fed. Rep. 110 (1900).

creditor does not make out a case by merely proving that fact. He must also prove that there was actual fraud and that the value of the property was greater than the mortgage debt. The court closely scrutinizes any plan by which the stockholders are given any advantage, but the court does not presume fraud.¹

¹ *Wenger v. Chicago, etc. R. R.*, 114 Fed. Rep. 34 (1902), holding also that in a suit brought by a general creditor against the reorganized company, to enforce his claim against the property, he must join the trustee of a mortgage executed by the reorganized company, and also a corporation that owns all the stock of the new company, or else show that they cannot be made defendants. In *Stewart, etc. Co.'s Appeal*, 72 Pa. St. 291 (1872), where stockholders, by arrangement made *after* the foreclosure sale, were allowed to come in without paying anything, the court held that creditors could not complain, distinguishing *Railroad Co. v. Howard*, 7 Wall. 392 (1868), on the ground that in the latter case sixteen per cent. of the proceeds of the sale belonged either to the stockholders or the creditors, and that the latter were of course entitled to such fund. In the case of *Central Georgia Ry. v. Paul*, 93 Fed. Rep. 878 (1899), a general creditor of an insolvent railroad which had been foreclosed was held to have a valid claim against the reorganized company, it being shown that the stockholders of the old company received in exchange for their stock the stock of the new company. The general creditor in this case was the unregistered holder of the stock of another company, dividends upon which had been guaranteed by the insolvent company and had not been paid. It also appears in this case that a portion of the property of the insolvent corporation was not covered by the mortgage, but was included in the property that was turned over to the reorganized company. In this same litigation another stockholder, who had already become

a party to a reorganization and had deposited his stock thereunder, was held to have waived his right to accrued and unpaid back dividends on the stock so turned in by him. *Farmers' L. & T. Co. v. Central, etc. Ry.*, 120 Fed. Rep. 1006 (1903), the court saying: "He therefore became a party to the reorganization plan, by means of which his equity against the assets of the old company became merged into the assets of the new company. The intervener here cannot be permitted to blow hot and cold, and, having entered into the reorganization, he must be held to be bound by his action."

A reorganization agreement whereby the bondholders are to receive new bonds and the stockholders new stock, to the exclusion of general creditors of the old corporation, is illegal and may be set aside at the instance of creditors of the old corporation, it being shown that the principal owners of the bonds were also the principal owners of the stock, and hence that in the foreclosure the rights of creditors were not protected and that the stockholders paid nothing for the new stock. The court held that the creditor had an equitable lien on the property subject only to the new mortgage. *St. Louis T. Co. v. Des Moines, etc. Ry.*, 101 Fed. Rep. 632 (1900). Where the directors are interested in a reorganized company to which the property of an insolvent corporation is sold after a foreclosure sale, a creditor of the old corporation may, by showing that the property was worth more than the mortgages upon it, subject the excess of value to his claim. *Goddard v. Fishel, etc. Co.*, 9 Colo. App. 306 (1897). See § 672, *supra*.

Again, a reorganization is not fraudulent, although stockholders in the old corporation are given stock in the new corporation, where they pay for such stock a price which is greater than the market value of the stock. Such reorganization is legal, although the general creditors are not given an opportunity to come in.¹

The rule, however, is different where the purchaser at the foreclosure sale was a director of the old corporation. Such a purchase is fraudulent and voidable as a matter of law, even though made in good faith and a full price paid for the property.² It is fraudulent for the trustee to enter into an agreement with a part only of the bondholders to get control of the property to the injury of the other bondholders.³ The fact that the foreclosure is begun by the trustee at the instance of a reorganization committee representing bondholders and stockholders is not proof of fraud.⁴ It has been held that where a part of the bondholders have formulated a plan for purchasing and reorganizing the company, the other bondholders may apply to the court to be allowed to participate in such plan, and the court will grant the application if it is made before the sale takes place.⁵ A bondholder who buys prior liens on the

¹ *Paton v. Northern Pac. R. R.*, 85 Fed. Rep. 838 (1896), distinguishing *Railroad Co. v. Howard*, 7 Wall. 392 (1868), and holding also that the court has no power to change the contract so as to allow general creditors to come in, and especially so where the general creditors did not agree to be bound by such change. Even though the reorganized company sells its common stock to the old stockholders at ten cents on the dollar, this sum so realized does not belong to a creditor of the old corporation, the property of which has been foreclosed, there being no proof that the new stock is worth more than that. *Ferguson v. Ann Arbor R. R.*, 17 N. Y. App. Div. 336 (1897).

² See § 653, *supra*. A sale of the assets of a bank at public auction with the consent of the stockholders will not be set aside when the price was a fair one and there was no fraud, even though the liquidators were directors in the company that purchased. *In re Liquidation, etc.*, 43 S. Rep. 270 (La. 1907).

³ A sale may be set aside where the

trustee of the mortgage entered into a combination with part of the bondholders to purchase at the sale at a small price and reorganize at a sacrifice to minority bondholders. *Sahlgard v. Kennedy*, 2 Fed. Rep. 295 (1880). See also § 816, *supra*.

⁴ *Land Title, etc. Co. v. Asphalt Co.*, 127 Fed. Rep. 1 (1903). A bondholder will not be allowed to intervene in order to litigate questions with a reorganization committee, the committee not being parties to the suit. *Land, etc. Co. v. Asphalt Co.*, 121 Fed. Rep. 587 (1902).

⁵ In *Duncan v. Mobile, etc. R. R.*, 3 Woods, 597 (1879); s. c., 8 Fed. Cas. 25, the minority bondholders, prior to the sale, applied to the court to order the majority bondholders, who intended to purchase the property at the sale, to let the minority participate if the latter applied to do so before the sale. The court so ordered. Where the corporation is insolvent, and a stockholder and bondholder places his bonds in the hands of the others to use in keeping the corporation afloat, and the latter allow a foreclosure to

property does so for the benefit of other bondholders, who, within a reasonable time after they know of such purchase, offer to contribute such part of the sum paid by him as the par value of the bonds held by the contributing bondholder bears towards all the bonds.¹

Parties who object to such a purchase on the ground that it is unfair, illegal, or fraudulent must apply for relief promptly, or their objections will be overruled.² Thus a bondholder cannot sus-

take place and bid the property in at a fair valuation, the former may have an accounting for his bonds, but he cannot necessarily participate in the reorganization, the chief object of his parting with his bonds being to avoid personal liability on debts he had guaranteed for the company. *Huston's Appeal*, 127 Pa. St. 620 (1889). As an instance of a reorganization where the decree of foreclosure provides for allowing the old stockholders, etc., to come in, see *Wood v. Dubuque*, etc. R. R., 28 Fed. Rep. 910 (1886). Under the Kentucky statutes all bondholders must be allowed to participate in a pool of the bondholders to buy the property at foreclosure sale. *Reed v. Schmidt*, 72 S. W. Rep. 367 (Ky. 1903).

1 *Booker v. Crocker*, 132 Fed. Rep. 7 (1904).

2 Bondholders who do not come into the reorganization, nor bid at the sale, nor become parties to the suit, cannot, long after the reorganization is completed and new bonds issued, cause the sale to be set aside for fraud in the reorganization. *Wetmore v. St. Paul*, etc. R. R., 3 Fed. Rep. 177 (1880). A reorganization agreement cannot be successfully attacked by stockholders two years after it was made, especially where the stockholders do not offer to pay the debt due, nor the expenses of foreclosure, and where "the relief they ask under their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly \$25,000,000, wholly due, and bearing a high rate

of interest." *Carey v. Houston*, etc. Ry., 52 Fed. Rep. 671 (1892). In *Ashhurst's Appeal*, 60 Pa. St. 290 (1869), there had been various attempts to keep the corporation going and to avoid a foreclosure. Foreclosure took place, however, and directors participated in the purchase. The court refused to set the sale aside, more than six years having elapsed before complaint was made. See also *Foster v. Mansfield*, etc. R. R., 146 U. S. 88 (1892). The failure of the directors of a corporation to levy an assessment on the stock for the purpose of paying a mortgage, and thereby preventing a foreclosure and reorganization, and a consequent extinguishment of the interest of the non-assenting stockholders, is not such neglect of duty as will enable dissenting stockholders to overturn the reorganization after it is accomplished; it appearing that the shares, on their face, purport to be unassessable, that the directors are advised by competent attorneys that an assessment would be of doubtful legality, and that, if made, it would work injustice to many stockholders who have previously paid in money under a different plan. *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894). A person injured by a railroad and claiming damages cannot attack a reorganization on the ground that the stockholders in the old corporation received stock and bonds of the new corporation, where he does not attack the legality of such issue until after the bonds and stock have been delivered. Moreover, in such a suit it is neces-

tain a bill filed to set aside a foreclosure and reorganization on the ground that the trustee was in collusion with the bondholders' reorganization committee, where such bondholders knew of the facts during the progress of the foreclosure and made no complaint.¹ They must also show that some advantage will result from setting aside the reorganization.² Stockholders complaining of a reorganization must offer to pay their share of what may be found due if the transaction is set aside.³ And stockholders who participate in an alleged fraudulent reorganization cannot complain.⁴ In one case the court refused to interfere, where the complaining stockholder owned only ten shares and the purchasers of the property offered to pay him his full proportionate part of the actual value of the property.⁵

§ 887. *The court may allow the purchasing bondholders to turn in their bonds at a proper valuation in payment—Bondholders not participating must be paid in cash.*—This is substantially the same thing as requiring the purchasers at the sale to pay the price in

sary to join the stockholders who have received such bonds and stock. *Wenger v. Chicago, etc. R. R.*, 105 Fed. Rep. 796 (1900). See also many cases in § 848, *supra*. A bondholder who did not participate in a reorganization cannot complain thereof on the ground of fraud where the statute of limitations relative to fraud is a bar. *Griffith v. Seattle, etc. Ry.*, 36 Wash. 627 (1905). A bondholder who does not come into a reorganization agreement cannot, four years after the opportunity was offered to him to come in, attack the purchase of the property at foreclosure sale by the reorganization committee in behalf of the bondholders only who became parties thereto. *Moss v. Geddes*, 28 N. Y. Misc. Rep. 291 (1899).

1 *Cutter v. Iowa, etc. Co.*, 96 Fed. Rep. 777 (1899).

2 See § 848 (*k*), *supra*, and the preceding note.

3 *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894).

4 *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830 (1894), and ch. XLIV, *supra*. A bondholder who takes part in the reorganization waives his ob-

jections to the sale. *Crawshay v. Soutter*, 6 Wall. 739 (1867). A person who takes part in a reorganization by which stock is issued to old stockholders who pay seventy-five cents on a dollar therefor, cannot afterwards claim that the reorganization was illegal. *State v. Germania Bank*, 90 Minn. 150 (1903).

5 In the case of *Drake v. New York, etc. Co.*, 36 App. Div. 275 (1898), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

cash, and then distributing to the purchasers the proportionate part of the cash that goes to pay their holdings of bonds. The court will not require this useless form to be gone through with, especially as the tying up of a large amount of money, even for a short time, is a serious thing and would embarrass and prevent many reorganizations and thus prevent the property being sold at a fair price.¹ Allowing the purchaser to turn in bonds in payment is merely a convenience. In law he is considered as having paid cash and drawn out his part thereof by means of his bonds.² Bonds may be received in payment, only to the amount that such bonds would be entitled to money on distribution, and the right to turn in bonds should be granted to all purchasers alike.³ Parties who enter into a reorganization agreement, thereby practically cancel their bonds, the purchase having been made for them, and they have no claim

1 The court may decree that bonds may be turned in in payment of the purchase price at a valuation determined by the amount of cash which such bonds would be entitled to on the final distribution. *Easton v. German-American Bank*, 127 U. S. 532 (1888); *Duncan v. Mobile, etc. R. R.*, 3 Woods, 597 (1879); s. c., 8 Fed. Cas. 25. A decree may allow payment to be made in bonds to the extent of their *pro rata* share of the proceeds. *Rumsey v. People's Ry.*, 154 Mo. 215 (1899). The court may allow the purchasers to pay in receiver's certificates and bonds at such a figure as they would be entitled to in money. *Kropholler v. St. Paul, etc. Ry.*, 2 Fed. Rep. 302 (1880). The terms of the decree as to allowing the purchaser at the foreclosure sale to turn in bonds in payment proportionately may be worded as the court sees fit, and may be in general terms with power reserved to modify it. Provisions in the mortgage relative to this are not binding upon the court. *Farmers' L. & T. Co. v. Green Bay, etc. R. R.*, 6 Fed. Rep. 100 (1881). See *Sage v. Central R. R.*, 99 U. S. 334 (1878). The mortgage itself often provides for the bonds being turned in in payment. *Child v. New York, etc. R. R.*, 129 Mass. 170 (1880). Where the court in its decree has allowed bonds to be turned in in pay-

ment at a fixed price and this is carried out and the sale completed and the property reorganized, it is too late for other bondholders to apply for a modification. *Real Estate, etc. Co. v. Perry, etc. R. R.*, 213 Pa. St. 57 (1905). A person having an option on bonds, which the vendor is to use in foreclosing and buying in and reorganizing the property, cannot maintain a suit against the vendor for stock issued by the reorganized company to represent such bonds, where the agreement is not sufficiently explicit for specific performance. *Patterson v. Farmington, etc. Ry.*, 76 Conn. 628 (1904). A purchaser at receiver's sale may be allowed to turn in receiver's certificates in part payment. *Nisbet v. Great, etc.*, 41 Wash. 107 (1905).

2 *Moran v. Hagerman*, 64 Fed. Rep. 499 (1894). Where payment is made partially in bonds which would be entitled to participate in the proceeds, this is the same as payment in cash. *Mercantile Trust Co. v. Kanawha, etc. Ry.*, 58 Fed. Rep. 6, 16 (1893).

3 *American Waterworks Co. v. Farmers' L. & T. Co.*, 73 Fed. Rep. 956 (1896). The master in reporting a sale should specify details in regard to bonds received in partial payment. *American W. Co. etc. v. Farmers' L. & T. Co.*, 91 Fed. Rep. 562 (1899).

upon the proceeds of the sale.¹ But such bonds are not considered canceled, so far as the distribution of the purchase price is concerned among the old bondholders. Moreover, where the reorganization company issues its bonds in exchange for bonds of the old company, such bonds of the old company are not thereby canceled so as to give a junior mortgage of the old company priority over the bonds so received in exchange.² Bondholders who do not participate in the reorganization must be paid in cash to an amount ascertained by the proportion which the sum realized by the foreclosure, less the foreclosure expenses, bears to all the bonds, unless such sum exceeds the amount of bonds, in which case the latter are paid in full, principal and interest.

Even though the entire purchase price at foreclosure sale is not paid, and the court directs certain new first-mortgage bonds to be deposited as security for the balance of the purchase price, and the new company becomes insolvent and the bonds so deposited are insufficient to pay the full purchase price, yet the sale will not be set aside nor the unpaid purchase price declared a lien upon the property, all parties having acquiesced in the orders of the court.³

§ 888. *Limiting the time within which bondholders may come into the reorganization — Applications during that time — Powers, duties, and liabilities of the committee — Varying the reorganization agreement — Trustees' temporary certificates.*—The usual reorganization agreement specifies a certain time within which any stockholders or bondholders who desire to participate in the reorganization may do so by depositing their securities and signing an agreement. This provision is legal, and those stockholders or bondholders who do not come in within that time are excluded from the reorganization. They are entitled to their proportion of the money realized from the foreclosure sale, and that is all.⁴ Although a reor-

1 So also as to judgment creditors and stockholders who enter into the agreement. *Central Trust Co. v. Cincinnati, etc. Ry.*, 58 Fed. Rep. 500 (1892). Where the outstanding bondholders join in a request for a foreclosure of the mortgage bonds of the reorganized company, they may be deemed to have waived their rights in the old bonds. *First Nat. Bank v. Radford Trust Co.*, 80 Fed. Rep. 569 (1897).

2 *United States Rubber Co. v. American, etc. Co.*, 181 U. S. 434 (1901). See also § 765, *supra*.

3 *United States Rubber Co. v. American, etc. Co.*, 181 U. S. 434 (1901).

4 *Vatable v. New York, etc. R. R.*, 96 N. Y. 49 (1884). A bondholder who has an opportunity to come into the organization and does not do so, cannot claim a part of the proceeds which the committee of bondholders sell the property for after purchasing the property at the foreclosure sale. *Cutter v. Iowa Water Co.*, 128 Fed. Rep. 505 (1904). A reorganization committee is not bound to admit a stockholder who does not apply within the time fixed by the committee, even

ganization committee buy at a price which nets only fifteen cents on the dollar on the bonds, and then sells at a price which nets the reorganizing bondholders par on their bonds, yet a bondholder who had an opportunity to come in, but did not, cannot complain.¹ But where a bondholder or stockholder has applied to come into the reorganization and has complied with the requirements laid down in the offer, he may insist upon being admitted, unless he has been guilty of laches.²

though they allowed other stockholders to come in after that time. *Keane v. Moffly*, 66 Atl. Rep. 319 (Penn. 1907). Where the reorganization committee of bondholders have advertised the offer to allow bondholders to come in, and have kept the offer open until the property was actually deeded to the new corporation, a bondholder cannot subsequently claim the right to come in, even though he was ignorant of the reorganization. *Bound v. South Carolina R. R.*, 78 Fed. Rep. 49 (1897). A person who fails, even through ignorance, to avail himself of the privilege to take part in a reorganization, is barred therefrom. *Landis v. Western Pa. R. R.*, 133 Pa. St. 579 (1890). Although \$2,000,000 of the \$5,500,000 complain as to the plan of reorganization in a foreclosure case by the trustees, and petition to be allowed to come in, yet the court will refuse. *Skiddy v. Atlantic, etc. R. R.*, 3 Hughes, 320 (1879); s. c., 22 Fed. Cas. 274. A bondholder who signs the reorganization agreement, but does not deposit his bonds, is not entitled to come in. *Carpenter v. Catlin*, 44 Barb. 75 (1865). Thus where, in order to quiet opposition to a foreclosure, the bondholders offer to the stockholders a plan of reorganization whereby the foreclosure is to proceed, a sale be made, a new corporation formed to take the property, and the old stockholders to be allowed to come in if they apply within a certain time, and this plan is carried out, a stockholder who had no knowledge of the plan until after the limited time had expired cannot compel the new corpo-

ration to admit him. His remedy, if he has any, is to impeach the foreclosure. *Thornton v. Wabash Ry.*, 81 N. Y. 462 (1880). A party claiming that bonds should have been issued to him under a contract with the old company cannot share in the distribution under a reorganization plan on the basis of such claim. There being no fraud, the property was taken free of trusts. *Vose & Cowdrey*, 49 N. Y. 336 (1872). Where a member of a syndicate selling property to a corporation for stock delays applying for his part thereof until the company is reorganized, and then reorganized again, an assignee of a part of his interest cannot claim the stock. The delay is too long and the claim indefinite. *Zuccani v. Nacupai, etc. Co.*, 61 L. T. Rep. 176 (1889), reversing 60 L. T. Rep. 23 (1888). See also notes to § 889, *infra*. Where the corporation offers to exchange preferred for common stock upon the payment of an additional sum of money, a stockholder who delays for thirty years to avail himself of the privilege cannot claim the right thereto. The fact that the corporation had taken in some of the common stock on a new basis of exchange is immaterial. *Holland v. Cheshire R. R.*, 151 Mass. 231 (1890).

¹ *Bound v. South Carolina Ry.*, 71 Fed. Rep. 53 (1895).

² Where mortgage bonds are deposited with the trustee to be issued in exchange for outstanding bonds, the right of a holder of outstanding bonds to make the exchange cannot be defeated by the mortgagor after such holder has actually deposited his

On the other hand, a stockholder who signs a reorganization agreement by which he is to turn in the stock and notes held by him and

bonds and asked for the new bonds. *Wakefield, etc. Co. v. New England T. Co.*, 175 Mass. 478 (1900). On the sale of the property of an insolvent corporation the agreement of some of the stockholders with the others to divide with them any profits which may be made, does not apply to compensation to the former for work in connection with the reorganization. *Poling v. Teter*, 60 S. E. Rep. 1101 (W. Va. 1908). Where several bondholders agree among themselves to buy the property at foreclosure sale, the purchase to be for the benefit of the bondholders, and the price to be the expense of the foreclosure, and the trustee of the mortgage makes the sale on that understanding, the trustee may compel the purchaser to take a deed for the benefit of all the bondholders. The court stated also that it would have been a breach of trust for the trustee to have made such a sale except for the benefit of all the bondholders. *Sullivan v. Haskin*, 70 Vt. 487 (1898). After a bondholder has deposited his bonds and signed the agreement, he cannot be excluded from the benefit thereof. *Reed v. Schmidt*, 72 S. W. Rep. 367 (Ky. 1903). Equity will protect and enforce an agreement of the purchaser at the foreclosure sale to allow other holders of securities to participate with him in the purchase. *Cornell v. Utica, etc. R. R.*, 61 How. Pr. 184 (1881). See also *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576 (1882); *Sage v. Central R. R.*, 99 U. S. 334 (1878); *Wetmore v. St. Paul, etc. R. R.*, 5 Dill. 531 (1880); s. c., 3 Fed. Rep. 177. A full statement of the details of a plan of reorganization is given in *Riker v. Alsop*, 27 Fed. Rep. 251 (1886), holding that a bondholder who has assented to the plan and deposited part of his securities cannot afterwards be excluded. This decision was reversed on the ground of laches, in *Alsop v. Riker*, 155 U. S. 448 (1894). Although a reorganization agreement is broken and violated by the party who buys for the reorganizers, yet one of them cannot on that account have the sale set aside where he, with knowledge of the facts, delays two years in making his application and does not offer to bid for the property upon a resale any more than the price for which it was sold, and does not show that any one else would bid any more, and the property meantime has passed into the hands of a new corporation and bonds and stock issued thereon. *Farmers' L. & T. Co. v. Bankers', etc. Tel. Co.*, 119 N. Y. 15 (1890). Where, in a reorganization scheme, one of the purchasers makes payment by causing the reorganized corporation to make the payments for him, the court will interfere in behalf of other stockholders. *Huiskamp v. West*, 47 Fed. Rep. 236 (1891). But see *West v. Huiskamp*, 63 Fed. Rep. 749 (1894). A purchase of a railroad by a reorganization committee of the first-mortgage bondholders will not be set aside at the instance of its second-mortgage bondholders, although the trust company that was trustee in the first was also trustee in the second mortgage, where no actual fraud was alleged, no offer made to redeem, no claim made that the property was sold at a sacrifice, no attempt made by the second-mortgage bondholders to intervene in the suit, no defense to the foreclosure suit appears to have existed, and an agreement of the purchaser to allow the second-mortgage bondholders to participate in the reorganization was without consideration, and the purchaser was not made a party to this suit. *Robinson v. Iron Ry.*, 135 U. S. 522 (1890). Where the stockholders enter into an agreement whereby a person

receive new stock in payment cannot afterwards refuse to turn in the stock on the ground that some of the directors had secretly

is to purchase at foreclosure sale and allow them to participate, such agreement may be enforced. *Marie v. Garrison*, 83 N. Y. 14 (1880). Where the creditors of an individual agree that the property should be bought in, and a company organized and the stock distributed among them, any one of such creditors may file a bill to enforce the agreement, the property having been bought in and turned in to the corporation, and where the agreement further was that certain debts should first be paid out of the profits, the court will order the complainant's certificate to be delivered to complainant when such debts are paid. *Kennedy v. McCloskey*, 170 Pa. St. 354 (1895). Where the bondholders appoint a trustee under a trust agreement to bid in the property and resell the same, if he thinks best, and he does so, those bondholders who came into the agreement may participate in the proceeds of the resale, even if a majority of the bondholders did not come into the agreement. If the trustee sold to a corporation having notice of the agreement, the property is still subject to such bondholders' claims, and where the bondholders were to receive new mortgage bonds, and the new corporation refused to issue them, a money judgment for the actual value of the bonds will be rendered against such new corporation. Even a bondholder who has received back his bonds from the trustee and waived his rights against him may enforce the agreement as against the new corporation. A bondholder who deposited his bonds, but did not pay his part of the costs, may enforce the agreement, even though the trustee returned the bonds to him. *Indiana, etc. R. R. v. Swannell*, 157 Ill. 616 (1895). Where a bondholder gives notice to the other bondholders that he intends to purchase, and offers to let them in propor-

tionately, and some of them take part and pay their money, and he buys and takes title and manages the property for many years, and then by misrepresentation buys the interests of the others, he is not liable for having bought their interest at less than the real value, unless proof is given that he profited thereby, or that there was some fiduciary relation existing. His associates might have demanded an accounting instead of selling. *Houghton v. Butler*, 166 Mass. 547 (1896). A bondholder who has deposited his bonds under a reorganization agreement may file a bill in equity to compel the reorganization committee to carry it out, such committee having purchased the property. *Kelly v. Browning*, 113 Ala. 420 (1896). Where a judgment creditor of a company which is being foreclosed agrees with a reorganization committee that he will take bonds of a reorganization company in exchange for his judgment, and the reorganization committee uses such judgment in making the purchase at the sale, such agreement is binding. *Houston, etc. Ry. v. Keller*, 90 Tex. 214 (1896). An offer of the purchaser of corporate property upon foreclosure sale to allow stockholders to come into the reorganization does not give a cause of action to a stockholder who offered in due time to come in, but who did not satisfy the trust company acting as agent as to the genuineness of his stock, and consequently delayed until the time for coming in had elapsed. *Schorestene v. Iselin*, 69 Hun, 250 (1893). Where a reorganization agreement does not specify who shall bid, but a bondholder does bid up to the limit fixed by the agreement, and an outsider bids more and takes the property, but subsequently turns it over to the bondholder who had bid, other bondholders cannot enforce the reor-

agreed to purchase this new stock, or on the ground that he had not actually turned in the old notes.¹

A bondholder who comes into the reorganization agreement, but first detaches certain coupons and afterwards causes them to be cashed, cannot claim the new securities unless he pays over the amount so collected by him, even though the reorganization agreement did not explicitly require all coupons to be turned in with the

reorganization agreement where they had refused to pay their proportional part of the money paid by the purchasing bondholder to liquidate the expenses of the litigation and the proportional amount of money due to those bondholders who did not come in. *Fidelity, etc. Co.'s Appeal*, 106 Pa. St. 144 (1884). In the case of *Kurtz v. Philadelphia & R. R. R.*, 187 Pa. St. 59 (1898), the reorganization of the Reading Railroad was attacked by a holder of bonds which had been guaranteed by the insolvent company, there having been a default made in the interest on such bonds. The bondholder claimed that he was entitled to participate in a certain part of the reorganization fund, which had been set aside to adjust claims of various outstanding bondholders, creditors, and stockholders and of commissioners, etc. The court held that the suit would not lie.

1 *Hardy v. Swigart*, 25 Colo. 136 (1898). A reorganization plan, to be valid if assented to by all bondholders by a certain date, is void, and binds no one if all do not come in by that date. *Martin v. Somerville, etc. Co.*, 16 Fed. Cas. 903 (1856). An agreement of several parties to sell their property to a corporation in exchange for stock of the latter, the amount of stock going to each to be determined by arbitrators, will not be specifically enforced where the arbitrators have fixed the value in an illegal way. Any party may withdraw from such a contract prior to the time when it has been signed by all. *Consolidated, etc. Co. v. Nash*, 109 Wis. 490 (1901). A creditor of an insolvent bank who

signs an agreement to take deferred payments, the form of the agreement indicating that it was to be binding only in case all the creditors signed it, is not bound unless all the creditors do sign it. *Abel v. Allemania Bank*, 79 Minn. 419 (1900), the court saying that it was too obvious to require discussion that a reorganization that impairs or reduces the amount of the creditor's obligation cannot be effected so as to bind such creditor without his consent.

A syndicate operation was involved in *Hogg v. Hoag*, 107 Fed. Rep. 807 (1901), where certain stocks and property were transferred to a trustee, who issued certificates therefor to the members of the syndicate. A part of the subscribers did not pay, and the vendor of the property took the trustee's certificates of such non-paying subscribers, and on the death of the trustee a bill was filed to have the court substitute a new trustee, and one of the subscribers filed a cross-bill for an accounting. The court decreed a winding up of the syndicate and appointed a receiver. The court held that a partial payment made to the vendor of the stocks was legal, even though all the property was not conveyed to the trustee, as contemplated, and that the vendor's acceptance of the certificates of non-paying subscribers obligated him to pay therefor, although such trustee's certificates had become worthless, the transaction being in connection with the Oregon Pacific Railroad Company. The court said that the syndicate was in substance, though not technically, a joint-stock company.

bonds.¹ Even though a contract, whereby a reorganization committee sells such bonds as it holds, provides also that other bondholders shall have the right to sell their bonds to the purchaser on the same terms, such other bondholders cannot enforce the contract directly, but can enforce it only through the committee.² It seems that the court, prior to the sale, has power to compel the reorganizers to admit such bondholders as may seasonably apply to come in.³ The rights, powers, and duties of a pledgee of bonds or stock, in regard to depositing them under a reorganization agreement, are considered elsewhere.⁴ A partner or principal of a person who signed a reorganization agreement under seal cannot sue the committee for breach of the contract. The instrument being under seal, only a party to it can enforce its covenants.⁵

Where a reorganization agreement cannot be enforced on account of the property having passed into other hands and being changed in character, the parties to the agreement may be entitled to money damages.⁶

1 *Fuller v. Venable*, 108 Fed. Rep. 126 (1901). A bondholder who has turned in his bonds under a reorganization agreement, after first detaching certain coupons, may not be entitled to the new securities under the reorganization agreement until after he has returned the coupons or their value. *Fuller v. Venable*, 118 Fed. Rep. 543 (1902). Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he holds bonds to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person so named, although the certificate itself is not actually delivered until several years after its date. If such coupons have been canceled and returned to the corporation issuing the bonds and the trustee is held liable for such coupons, the trustee may hold the corporation liable. *Kelly v. Forty-second Street, etc. R. R.*, 37 N. Y. App. Div. 500 (1899).

2 *Johnson v. Morgan*, 68 N. Y. 494 (1877).

3 See § 886, *supra*. Where a stockholder of a railroad which has been foreclosed and reorganized attacks the foreclosure on the ground of fraud,

he cannot on appeal change his complaint and claim that inasmuch as the plan of reorganization allowed the majority stockholders to come in on a more favorable basis than the minority, he was entitled to come in on the same terms as the majority. *MacArde v. Olcott*, 189 N. Y. 368 (1907). The dissenting opinion to the effect that on the merits the majority stockholders should have allowed the minority stockholders to come in on the same basis as the former came into the reorganization has much force.

4 See §§ 468, 763, *supra*. After default by the pledgor the pledgee may put the bonds which he holds as collateral under a reorganization plan, and may agree that his part of the expense of foreclosure shall be a lien on the bonds, but he cannot do so where he is to receive new securities instead of cash on the reorganization. *Field v. Sibley*, 74 N. Y. App. Div. 81 (1902). See also *In re Lorillard*, 107 Fed. Rep. 677 (1901).

5 *Williams v. Magee*, 76 N. Y. App. Div. 513 (1902).

6 *Cox v. Stokes*, 156 N. Y. 491 (1898). A bondholder who has agreed to sell

Where a stockholder in an insolvent corporation turns over his stock to another person to deposit under a reorganization agreement, the latter agreeing to pay the assessment on the stock and to deliver to the stockholder the new securities upon repayment of such assessment, and he refuses so to do thereafter, he is guilty of a conversion and of a fraud upon the stockholder.¹

his bonds to a reorganizer in exchange for new bonds and stock may sue for the value of the new bonds and stock if the reorganizer refuses to perform, and the measure of damages is the highest value of the new bonds for a reasonable time after the breach of the contract. *Turner v. Jackson*, 63 S. W. Rep. 511 (Tenn. 1899). Where various properties are transferred to a coal company for stock on the further understanding that all moneys already expended on such properties should be repaid in bonds of a railway to be guaranteed by the coal company, but such distribution of bonds is never made on account of the impossibility of such a guaranty being legally made, one of the parties who turned in his property may hold the coal company liable in damages for the amount of money expended by him on the property before turning it in for stock. *Crown, etc. Co. v. Thomas*, 177 Ill. 534 (1898). Where the chairman of the reorganization committee manages, by means of numerous transfers, mortgages, and foreclosures, to acquire the property himself, the parties in the original reorganization agreement may recover an interest in the property on the original plan. *Grace v. Noel, etc. Co.*, 63 S. W. Rep. 246 (Tenn. 1901). Where, on a reorganization, a stockholder makes his deposit, but for some reason his name is overlooked in the final adjustment, he has a remedy by action against the reorganizer. *Re Hill's Waterfall, etc. Co.*, [1896] 1 Ch. 947. If two stockholders agree that the one purchasing the corporate property at a foreclosure sale thereof shall allow the other to participate in the

benefits and profits of the purchase, and the purchaser refuses to live up to the agreement, the other may collect damages at law. *Harris v. Davis*, 44 Fed. Rep. 172 (1890). Where upon a reorganization an old stockholder is wrongfully refused his stock in the new, he may recover the highest market price of the same up to the time of the insolvency of the corporation. *Reading Trust Co. v. Reading Ironworks*, 137 Pa. St. 282 (1891). *Cf. Schorestene v. Iselin*, 69 Hun, 250 (1893).

¹ *Miller v. Miles*, 58 N. Y. App. Div. 103 (1901). Where a third party holds the pledged stock and agrees with the pledgee that if the pledgee does not pay any assessments the third party may pay them and obtain repayment out of the dividends, holding the stock as security, and the third party pays the assessments without the pledgee being notified of such assessments, and the third party causes the identity of the stock to be lost, the pledgee can reclaim the stock without paying the assessment to such third party. *Moore v. Bank of British Columbia*, 125 Fed. Rep. 849 (1903). Where a stockholder agrees with corporate creditors that he will buy the property at foreclosure sale and pay a price sufficient to pay their debts they may hold him liable if he does not do so, even though it is not in writing. *Satterfield v. Kindley*, 57 S. E. Rep. 145 (N. C. 1907). Where a person turns over stock and bonds to another in order that the latter may act for the former in carrying out a reorganization, the former may file a bill against the latter for an account, and need not resort to an action at law.

Where stockholders are given the right to take stock in a new corporation which has purchased the property of the old corporation on a foreclosure sale, on condition of paying in a certain amount of money, the opportunity being open only for a limited time, and the agreement providing that for failure to pay assessments the right should be forfeited, the stockholder who pays one assessment, and not the second, loses his rights, even though he died after the first assessment, notice of the second assessment having been sent to his representatives.¹ A provision in a reorganization agreement that parties depositing bonds shall be bound by the terms of the agreement is sufficient to bind them.²

The various provisions of a reorganization agreement are strictly construed. General powers in behalf of the committee of reorganization are not implied, and express powers are not extended by construction.³ Where a reorganization is prepared by the committee it will be construed most favorably to the bondholders.⁴

Benedict v. Moore, 76 Fed. Rep. 472 (1896).

¹ *Dow v. Iowa Cent. Ry.*, 144 N. Y. 426 (1895), holding also that the fact that other stockholders have been allowed to come in subsequently, but upon a permission granted some time before, does not aid the plaintiff.

² *Central Trust Co. v. Carter*, 78 Fed. Rep. 225 (1896); *Hardy v. Swigart*, 25 Colo. 136 (1898). Where a bondholder deposits his bonds under a reorganization plan, and accepts a receipt, which states that the holder assents to the terms of the plan, he cannot afterwards attack the validity of a mortgage issued in accordance with the plan on the ground that the plan was fraudulently misrepresented to him. *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904).

³ A bondholders' committee, under the usual reorganization agreement giving the committee power to do all things necessary as fully as the bondholders could do if personally present, has no power to consent to the issue

of receiver's certificates to pay claims which are not prior in right to the bonds. *Farmers', etc. Co. v. Centralia, etc. R. R.*, 96 Fed. Rep. 636 (1899). Where a committee is authorized to modify a reorganization plan it may change the plan so that on default of the new second mortgage the stock of the corporation shall belong to the bondholders and the second mortgage shall be discharged. At least such a change is binding on a bondholder who held his bonds four years without objection, and until after the default had taken place and the stock absorbed and the mortgage discharged. *Lyman v. Kansas City, etc. R. R.*, 101 Fed. Rep. 636 (1900). The holder of reorganization certificates cannot enjoin the committee from distributing new securities and cannot bring them to an accounting where the reorganization agreement gave them complete authority and discretion in the use of the old and new securities and the acts of the committee do not constitute a breach of trust. *Venner v. Fitzgerald*, 91 Fed. Rep. 335 (1899).

⁴ *Industrial, etc. v. Tod*, 180 N. Y. 215 (1904), holding also that any covenant to protect a person who acts in bad faith is against public policy and void.

Under a reorganization agreement which includes the bondholders and not the stockholders, and which provides that the committee

Where the lessor and also the lessee of a street railway are both in financial distress, and in order to raise money a friendly readjustment of the securities is agreed to by the stockholders, and a voting trust is formed, a participating stockholder cannot object to a provision defining the compensation to be paid to the parties carrying through such reorganization, even though such provision for compensation was authorized, but not defined in the original agreement. *Cella v. Brown*, 144 Fed. Rep. 742 (1906). Where subscribers to the stock of a proposed telephone corporation authorize a committee of nine to purchase material and incorporate, and five of the committee in opposition to four do purchase and incorporate, the minority are not bound by their action. *Mt. Carmel, etc. Co. v. Mt. Carmel, etc. Co.*, 119 Ky. 461 (1905). Even though, in a suit by a reorganization committee for specific performance on the part of the purchaser at the foreclosure sale, a stockholder intervenes, yet this does not prevent the committee discontinuing the suit by a majority vote, the agreement giving the committee by a majority vote the power to dismiss suits, where such intervention was not in behalf of all the stockholders, but only in behalf of the intervener. *Bangs v. Sullivan*, 33 Tex. Civ. App. 30 (1903). Where a trust company has orally agreed to hold certain bonds for delivery in accordance with certificates issued by another company, and subsequently the trust company loans money to such other company and takes such bonds as security, the holders of the certificates may hold the trust company liable for not protecting the certificates. *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898). Where by the reorganization agreement the committee are to hold certain stocks

and bonds as security that certain underlying liens shall be paid, the reorganized company cannot compel it to give up such stocks and bonds before payment of such underlying liens. *Peoria, etc. Ry. v. Coster*, 97 Fed. Rep. 519 (1899). The reorganization committee are not personally liable for alleged breach of duty where they acted in good faith, even though they made mistakes, and, as allowed by the agreement, abandoned the first plan of reorganization after finding it to be impracticable, and devised another plan into which some of the parties to the first plan did not enter, and hence lost their interest therein, notice having been given to them that the first plan had been abandoned and they were at liberty to withdraw their bonds, and the party having neglected to come into the second plan within the time limited by the terms thereof. *Van Siclen v. Bartol*, 95 Fed. Rep. 793 (1899). Where a person has turned in securities under a plan of consolidation which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet, if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith, who had no notice of personal representations. *Jewell v. McIntyre*, 62 N. Y. App. Div. 396 (1901). In a suit by a creditor against the reorganization committee to compel the reorganized company to carry out certain details of the

upon purchasing the property and transferring it to a new company shall give to the bondholders their proportionate interest in the new company, the committee have no power to allow the old stockholders to take new common stock at ten cents on the dollar, and have no power to tie up the stock of the new company so that the same shall

reorganization agreement the reorganized company may intervene to present its own defense. *Washington, etc. Bank v. Fletcher*, 55 N. Y. App. Div. 580 (1900). Where the purchaser at the foreclosure sale is really acting as agent for an undisclosed principal, but a judgment is obtained against him personally, his principal cannot also be held liable. *Ranger v. Thalman*, 65 N. Y. App. Div. 5 (1901). A creditor cannot claim cash in connection with a reorganization where the reorganization agreement contains no provision to that effect and the claim is based merely on a disputed understanding. *Glens, etc. Co. v. Trask*, 29 N. Y. App. Div. 449 (1898). Even though the plan of reorganization which a committee formulates, under its power in the reorganization agreement to formulate a plan, provides that the securities shall be sold to a syndicate and that the stock shall be placed in the hands of trustees to be voted by them under what is known as a "voting trust," and the old stockholders are allowed to participate only by turning in their stock and buying the new stock from such syndicate upon paying a certain sum, nevertheless a stockholder who signed the original reorganization agreement, and who has not withdrawn his stock within the twenty days fixed by the agreement for withdrawal, if dissatisfied with the plan, and who has not exercised his right to purchase the new stock, cannot by a bill in equity cause the above two provisions to be declared illegal, especially where the original agreement gives such stockholder no right to participate in the benefits of the reorganization, but gives him only such rights as the

plan may confer. *Miller v. Dodge*, 28 N. Y. Misc. Rep. 640 (1899).

The provision that a majority in interest of the bondholders might alter the plan of reorganization is strictly construed, and does not authorize a change in the character of the securities to be issued. *Dutenhofer v. Adirondack Ry.*, 14 N. Y. Supp. 558 (1891). Where by the plan of reorganization assessments on the stock are to be determined by the trustee after an examination of certain accounts, etc., an assessment will be set aside if such examination by the trustee is perfunctory and not properly made. *Gernsheim v. Olcott*, N. Y. L. J., May 21, 1890. The prior phases of this case may be found in *Southern Development Co. v. Houston, etc. Ry.*, 27 Fed. Rep. 344 (1886); *Morgan's, etc. Co. v. Texas Cent. Ry.*, 32 Fed. Rep. 525 (1887); *Gernsheim v. Olcott*, 7 N. Y. Supp. 872 (1889); reversed in 10 N. Y. Supp. 438 (1890). A reorganization committee, under a clause giving it power to arrange details, may provide that bonds shall be payable on or before maturity. *Lehigh, etc. Co. v. Central R. R.*, 34 N. J. Eq. 88 (1881). Under a reorganization agreement the committee may turn out to the old bondholders \$994,000 of the whole \$2,000,000 of stock, leaving \$1,006,000 unissued stock, instead of turning out the whole \$2,000,000 of stock, where the agreement gives them final construction of its terms, there being no bad faith in the matter. *White v. Wood*, 129 N. Y. 527 (1892); s. c., 142 N. Y. 656. The subscribers to the reorganization fund may compel the committee to account for the subscriptions. Where the plan contemplated the consolida-

be voted by the committee until certain dividends shall be paid. Not even a provision in the agreement that the detailed reorganization plan shall, after a certain notice thereof, be binding on the bondholders, unless a majority of them dissent therefrom, authorizes such departures from the original agreement. A bondholder may maintain a suit to set aside the transfer of the property to the new com-

tion of two railroads, and of three if the third obtained legislative consent thereto, an advance of the reorganization funds to such third road, which never obtained such legislative consent, is a breach of trust, and the committee are liable for the funds so advanced. *Gould v. Seney*, 9 N. Y. Supp. 818 (1890). If there is a material change made in the terms of a reorganization agreement, a subscribing bondholder may withdraw. *Miller v. Rutland, etc. R. R.*, 40 Vt. 399 (1867). A bondholder cannot set aside a contract made by the reorganization committee where the committee was authorized to take action for a reorganization, and for the payment of outstanding obligations, and such committee agreed to issue to certain contractors a part of the bonds and stock of a new corporation to be organized for the purpose of purchasing the property, even though it is alleged that some of the obligations so paid were debts due to the members of the committee, and that other obligations were fictitious in whole or in part, no fraud being proved. No cause of action is shown as against the contractors. *Brooks v. Dick*, 135 N. Y. 652 (1892). Where the bondholders appoint a committee to carry on litigation, and that committee, in another litigation for the foreclosure of the mortgage, stipulates for the postponement of payment, and the court in the foreclosure suit so orders, a bondholder's remedy is an appeal. He cannot file an independent bill in the federal court. *Reinach v. Atlantic, etc. R. R.*, 58 Fed. Rep. 33 (1878). In *Central Trust Co. v. Carter*, 78 Fed. Rep. 225 (1896), the court upheld

the terms of a reorganization agreement by which the most comprehensive powers were conferred upon the committee, and the court held that a power to compromise claims included power to compromise claims that were not a lien ahead of the mortgage. In this case the court also held that where the reorganization committee, having authority so to do, compromise with lien claimants and other claimants against the property by taking an assignment of their claims and agreeing to deliver to them negotiable certificates for cash, such certificates to be secured by the bonds in the hands of the committee, the court upon foreclosure sale will apply the money going to the bonds so held by the committee to the payment of the amount which the committee agreed to pay to such claimants, even though the committee had never issued the negotiable certificates. In *Coppell v. Hollins*, 91 Hun, 570 (1895); *aff'd*, 159 N. Y. 551 (1899), the reorganization committee bought in the property as authorized and borrowed money to complete the transaction and pledged all the securities of the new company, and the trust company loaning the money sold out the securities on non-payment of the loan, including the old securities deposited with the committee, and at the sale two of the three members of the committee bought in the securities, and now filed a bill to render an account and obtain reimbursement and a decree for distribution. The court held that they were entitled to be repaid the moneys advanced by them before the securities were distributed, and that it was immaterial that one of the

pany and mortgages executed by the new company.¹ A reorganization committee has no power to modify an express provision of the reorganization agreement unless the agreement gives such power to the committee.² Where a depositor of bonds in a reorganization authorizes a sale within a certain time, and they are sold after that time, the party who purchased with notice is liable for the value of the bonds, and if he turned them in at par on a reorganization sale he is liable for their par value.³

Where the reorganization agreement required the committee to formulate a plan and notify the bondholders, with the right to the latter to withdraw their bonds if they were dissatisfied, but the com-

committee had not acted in the various transactions. Where a reorganization agreement makes no provision for interest pending the proceedings to be taken to carry out the agreement, no interest will be allowed to anybody. *Davidson v. Mexican Nat. etc. R. R.*, 58 Fed. Rep. 653 (1893). Where a promoter agrees to pay a certain compensation to a person for services to be performed by the latter in connection with a reorganization, the promoter must make such compensation, even though he changes his reorganization agreement and carries out the reorganization with other parties than those originally contemplated. *Babbitt v. Gibbs*, 150 N. Y. 281 (1896). Where a reorganization agreement contemplates the issue of bonds to the old bondholders, a subsequent resolution that nothing but stock be given to the old bondholders will not be specifically enforced by the court. *Thayer v. Wathem*, 17 Tex. Civ. App. 382 (1897). See note 2, p. 3201.

1 *United, etc. Co. v. Omaha, etc. Co.*, 164 N. Y. 41 (1900), the court saying that inasmuch as the committee had themselves invited the bondholders to come into the agreement, "it should be strictly construed as against the committee and in favor of the *cestuis que trust*." Where a bondholder's reorganization agreement provided that plans should be formulated and should be binding on all the bondholders who

signed unless a majority dissented within thirty days, and a majority does not so dissent, a single bondholder cannot object. Even though the agreement provides for an assessment for a certain amount for legal and other expenses an additional assessment may be levied to preserve the property. A provision in the agreement that bonds of a new corporation shall be issued in exchange for bonds of the old and that the stock shall be pooled until the company becomes self-supporting is legal. *Cowell v. City, etc. Co.*, 130 Iowa, 671 (1906). Where the reorganization agreement requires the committee to formulate and submit a plan of reorganization on certain lines, which plan should thereupon become operative, unless dissented to by a majority of the depositing bondholders, such plan is not binding where it is in the interest of the committee and certain stockholders, and is not on the basis laid down in the agreement, even though a majority of the depositing bondholders did not dissent therefrom. A bondholder may hold the committee liable for the value of his bonds as having been converted by the committee. *United Waterworks Co. v. Stone*, 127 Fed. Rep. 587 (1904).

2 *Cox v. Stokes*, 156 N. Y. 491 (1898).

3 *Collins v. Smith*, 158 Fed. Rep. 872 (1908).

mittee proceeded to reorganize without formulating such plan, and used the bonds to pay for the property on the foreclosure sale, a bondholder may complain, but he cannot hold the committee liable for a conversion of the bonds, inasmuch as it was merely a breach of contract; the important difference being that for breach of contract the plaintiff would have to prove that he was damaged by the change, whereas for conversion he would be entitled to the entire value of his bonds.¹

It is legal for the reorganization committee to be self-appointed.² But the reorganization committee are practically agents or trustees and hence are under a fiduciary relationship towards those who have deposited their securities. Good faith, accordingly, is required from them.³ Even though the reorganization committee have exceeded their powers and have retained possession of the stock of the reor-

1 *Industrial, etc. Co. v. Tod*, 170 N. Y. 233 (1902), rev'g 52 App. Div. 195. A minority of the court, while agreeing in the result, held that there was a conversion, but that the measure of damages was the value of the bonds as fixed by the price paid at the foreclosure sale, and not their value prior to the sale, the sale itself not being attacked, and no further actual damage having been shown. Where a reorganization agreement expressly provides that the committee shall adopt a plan of reorganization and notify the bondholders of it, so that they may withdraw if they wish, but the committee completes the reorganization without submitting such a plan before foreclosure sale, the committee are liable to any bondholder who objects thereto, and a covenant in the agreement that the trustees shall construe the same is no defense. In a bondholder's suit, the measure of damages is the value of his bonds on the day of the violation of the agreement, and he may prove such value, where they have no market value, by proving the value of the property, but not in excess of the par value of the bonds and interest. The bondholder's suit may be at law for breach of contract. *Industrial, etc. v. Tod*, 180 N. Y. 215 (1904), rev'g 93 N. Y. App. Div. 263.

2 *Cutter v. Iowa Water Co.*, 128 Fed. Rep. 505 (1904).

3 Where the reorganization committee purchase bonds at a price less than the amount finally realized on the bonds, and keep the profit, they are liable jointly and severally for the profit to the parties who have participated in the reorganization, and the fact that in organizing the new company they stated that profits made by them "from interim investments" were excluded is not a sufficient disclosure of their secret profit. *Gluckstein v. Barnes*, [1900] A. C. 240. A stockholder who with the creditors and bondholders of a company deposits his securities with a reorganization committee, under a plan by which they are to form a new corporation to take over the property, may hold them liable for bad faith, and his suit may be in behalf of himself and other depositors. *Mathwinney v. Bliss*, 117 N. Y. App. Div. 255 (1907). Where a plan of reorganization provides for the issue of bonds and such issue is made, a *bona fide* holder of such bonds is protected against the defense that the parties to the reorganization had been fraudulently induced to believe that no bonds would be issued. *Big Creek, etc. Co. v. American, etc. Co.*, 127 Fed. Rep. 625 (1904). Where a reorganiza-

ganized company longer than they should, yet if they had power to supply defects in the plan and the bondholders have acquiesced in their action, they will not be held guilty of a breach of trust.¹

Persons who have contracted with the committee, without knowledge of the fact that the committee are acting as agents only, can undoubtedly hold the committee personally liable on their contracts.²

tion has been completed, and a voting trust established and a release to the reorganization committee executed by the certificate holders, one of the certificate holders cannot hold them liable in damages on the ground that as trustees of the voting trust they controlled the board of directors and had mismanaged the new corporation, it appearing that they did not constitute a majority of the board of directors and that in managing the corporation they acted as stockholders and directors, and not as a reorganization committee. *Lawrence v. Curtis*, 191 Mass. 240 (1906). In a suit by a depositor under a reorganization agreement for an accounting, mismanagement and waste being charged, the secretary of the committee may be joined as a party defendant and also a depository which had resigned and been succeeded by another depository. *Mawhinney v. Bankers' Trust Co.*, 124 N. Y. App. Div. 609 (1908). Trustees under a reorganization who are to hold a majority of the stock and vote the same for five years, unless they decide to distribute the same before that time, are not precluded from selling stock owned by themselves individually, and the fact that they sell their own stock is no ground for compelling a distribution of the remaining stock. *Haines v. Kinderhook, etc. Ry.*, 33 N. Y. App. Div. 154 (1898). In a suit by a bondholder in behalf of himself and other bondholders against a reorganization committee to hold them liable for breach of their duty and to restrain them from carrying out a plan of reorganization, another bondholder who has not come into the

suit has no standing in court, especially where he did not deposit his bonds under the agreement. *Brown v. Bache*, 66 N. Y. App. Div. 367 (1901). In the case of *Browning v. Kelly*, 124 Ala. 645 (1899), where a party received bonds on his agreement to endeavor to reorganize the railroad company, and subsequently receiver's certificates were necessarily issued to change the grade and improve the road, with the consent of the bondholders, and the first named party was obliged to furnish the money for such receiver's certificates, and upon a sale of the property he purchased the same at a price which paid merely the receiver's certificates, he is liable on the contract for only the value in excess of the receiver's certificates, it being shown that he filed a bill in equity stating that he did not desire to purchase the property, and offering not to purchase if any one else would bid the amount of the receiver's certificates.

¹ *Mills v. Potter*, 189 Mass. 238 (1905).

² Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent,

Where a fund is set aside to pay the reorganization committee and one member is not given his fair share, he may file a bill for an accounting.¹ It is illegal to use a portion of the funds realized on the foreclosure sale to pay a part of the expense of reorganization, where some of the old security-holders do not enter into the reorganization.²

Where trustee's certificates are issued to the bondholders or stockholders in exchange for their securities, the certificate is considered the same as the stock or bonds,³ except that it is not negotiable.⁴ An

yet, the principal not being disclosed, the trustee is liable. *McClure v. Central Trust Co.*, 165 N. Y. 108 (1900). Where various corporations appoint a committee to carry on litigation, they are each liable for the attorneys' fees, the attorneys having no knowledge of the limitation of the power of the committee in the matter. *Hanford v. Washington L. Ins. Co.*, 73 Hun, 448 (1893); *aff'd*, 149 N. Y. 614. As to whether the members of the committee are liable personally, compare the liability of trustees under somewhat similar circumstances (see §§ 245, 503c, *supra*); also of promoters (see § 705, *supra*); of officers of unincorporated associations (see § 508, *supra*); and of persons who sign their names and add an official title (see § 724, *supra*). Where the chairman of a reorganized committee agrees in writing, signed by him as chairman, that he will give a party \$5,000 in bonds for withdrawing a suit, subject to ratification by the committee, and the committee does ratify the agreement and delivers the bonds to the chairman for that purpose, the chairman is individually liable for not delivering the bonds to the party entitled to them. *Gerding v. Funk*, 48 N. Y. App. Div. 603 (1900). The attorneys for the reorganization committee may have a lien on the bonds superior to that of a pledge of such bonds to secure a loan obtained by the commit-

tee. *Needles v. Smith*, 87 Fed. Rep. 316 (1898). Where the bondholders are reconstructing the property they may be personally liable, but a suit against them must be against them individually and not as "bondholders." *Standard, etc. Co. v. Muncey*, 33 Tex. Civ. App. 416 (1903).

¹ *Christian v. Smith*, 105 Fed. Rep. 466 (1900).

² *Re Canning, etc. Co.*, [1900] 1 Ch. 708. The chairman of the bondholders' committee cannot claim compensation for his services out of the proceeds of the foreclosure sale. He must collect from the bondholders whom he represented. *Trust & Deposit Co. v. Spartanburg, etc. Co.*, 97 Fed. Rep. 409 (1899).

³ Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. *Bean v. American L. & T. Co.*, 122 N. Y. 622 (1890). In *Casagne v. Marvin*, 143 N. Y. 292 (1894), a trustee's certificate representing an interest in a reorganized property was upheld and a transfer of the certificate enforced. The court held also that

⁴ *Railroad Co. v. Howard*, 7 Wall. 392 (1868). *Cf. Goodwin v. Robarts*, L. R. 1 App. Cas. 476 (1876); *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898).

attachment cannot be levied on such certificates by serving process on the trustee only.¹ A certificate issued by the reorganization committee, entitling the holder to withdraw his bonds, is not negotiable although transferable. If the holder subsequently agrees to the reorganization plan, doing away with his right to withdraw his bonds, a purchaser of the certificate cannot withdraw the bonds.² A certificate entitling a person named to bonds may be assigned, even though by its terms it can be assigned only with the assent of the corporation issuing the same.³ The court may allow antagonistic reorganization committees to intervene in the suit and become parties.⁴ Where the reorganization agreement provides that, in case any change is made in its provisions, any party may withdraw upon paying his proportion of the expense up to that time, a bondholder who had deposited his bond may bring suit to withdraw the same upon a change in the conditions, and may have an injunction *pendente lite*.⁵ Delay may bar the complaint of a party who did not receive such

a trustee issuing certificates to represent an interest in a reorganized property has no lien on a certificate for costs in a litigation over it. A holder of a temporary certificate for bonds to be delivered when engraved may maintain a suit as though the bonds had actually been delivered. *Jenkins v. John Good, etc. Co.*, 56 N. Y. App. Div. 573 (1900). Where upon reorganization the committee issue transferable certificates exchangeable into stock of the new corporation when it is formed, the new corporation is liable for allowing an exchange by a person to whom a trustee has illegally transferred the certificates issued to him. *Mobile, etc. Ry. v. Humphries*, 7 S. Rep. 522 (Miss. 1890).

¹ Where certificates of stock and other property are transferred to a trustee who issues transferable trustee's certificates therefor, of the par value of \$5,000 each, with various provisions for the sale of the property and a distribution of the proceeds, or for the transfer to a corporation and a distribution of the stock, the legal title is thereby conveyed, and hence, the holders of the certificates having only an equitable interest in the property, an attachment cannot be levied

on such trustee's certificates, under the New York statute, by serving the process on the trustee, no service having been made upon the holder of the certificates. *Montgomery v. McDermott*, 103 Fed. Rep. 801 (1900). This same transaction was also involved in *Montgomery v. Boyd*, 60 N. Y. App. Div. 133 (1901).

² *Mercantile, etc. Co. v. Low*, 87 Fed. Rep. 241 (1898). *Cf.* § 622f, *supra*.

³ *Hubbard v. Manhattan Trust Co.*, 87 Fed. Rep. 51 (1898).

⁴ *Farmers' L. & T. Co. v. Cape Fear, etc. Ry.*, 71 Fed. Rep. 38 (1895).

⁵ *Kennedy v. Kennedy*, 70 Hun, 257 (1893). Where bonds and stocks of various railroads are deposited for purposes of reorganization, and the reorganization fails, and parties entitled to a part of the securities so deposited bring suit and cause a sale of the securities to be made to pay the expenses, and bring about a distribution of the surplus, another party entitled to another part of the securities cannot maintain an action for such distribution unless all parties are brought in. *Carman v. Farmers' L. & T. Co.*, 70 Hun, 283 (1893).

securities as he bargained for.¹ A suit by one signer of a reorganization agreement to enforce it prevents laches being charged against other signers who do not commence suit until a long time subsequently.² Where the mortgage prescribes that the trustee shall take possession and operate or sell the road upon default, and as a matter of fact possession is taken by a reorganization committee, which holds practically all the bonds and stock, and a friendly foreclosure is had and a reorganization carried out, expenses incurred by the committee in operating the road must be paid prior to the mortgage, the foreclosure decree having a provision that debts prior in equity to

1 *Peninsular Iron Co. v. Eells*, 68 Fed. Rep. 24 (1895). Bondholders who have taken part in a reorganization plan by which a new first mortgage has been issued to pay certain floating debts of the old company cannot, after the new company becomes insolvent, have the transaction set aside on the ground that the new first-mortgage bonds were insufficient to pay the old debts or could not be used for that purpose, there being no fraud or concealment involved. *Columbus, ect. R. R. Appeals*, 109 Fed. Rep. 177 (1901). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. *Brehm v. Sperry*, 92 Md. 378 (1901). Even though on the consolidation of several railroads provision is made for issuing consolidated bonds to take up existing bonds of the constituent companies, yet after seven years' delay a holder of the latter bonds cannot compel the consolidated company to make the exchange, there

being no definite contract on the part of the consolidated company so to do, and there being a provision as to the consolidated bonds in case the bondholders in the constituent companies refused or neglected to exchange. *Mott v. N. Y. etc. Co.*, 29 N. Y. Misc. Rep. 39 (1899). Even though the plan of reorganization which a committee formulates, under its power in the reorganization agreement to formulate a plan, provides that the securities shall be sold to a syndicate and that the stock shall be placed in the hands of trustees to be voted by them under what is known as "voting trust," and the old stockholders are allowed to participate only by turning in their stock and buying the new stock from such syndicate upon paying a certain sum, nevertheless a stockholder who signed the original reorganization agreement and who has not withdrawn his stock within the twenty days fixed by the agreement for withdrawal, if dissatisfied with the plan, and who has not exercised his right to purchase the new stock, cannot by a bill in equity cause the above two provisions to be declared illegal, especially where the original agreement gives such stockholder no right to participate in the benefits of the reorganization, but gives him only such rights as the plan may confer. *Milner v. Dodge*, 28 N. Y. Misc. Rep. 640 (1899).

2 *Cox v. Stokes*, 156 N. Y. 491 (1898). Cf. § 163 and ch. XLIV, *supra*.

the mortgage and entitled to payment from the *corpus* shall be paid by the purchasers.¹ A reorganization committee may, after their work is completed, maintain a bill in equity to have their accounts allowed and the securities distributed and their compensation fixed and a discharge from the trust decreed.² The bondholders are liable to the trustee for his compensation and disbursements, even though the trust agreement does not so provide.³

§ 889. *Reorganization in accordance with and under a statute—English reorganizations.*—As will be shown hereafter, a new railroad corporation which purchases directly or indirectly the railroad and property of an insolvent railroad company at a foreclosure sale does not purchase and succeed to the various special powers and privileges of the old corporation.⁴ The only things that pass by the sale are the railroad, property, and right to operate the railroad. But it often happens that valuable powers and privileges exist under the old charter and that the new corporation desires to succeed to them also. Hence many of the states have passed statutes conferring on the reorganized company all the powers and privileges of the old company. These statutes also often provide that such of the bondholders and stockholders as apply to give up their holdings in the old company and take in place thereof holdings in the reorganized company shall be allowed so to do. Generally the statute prescribes the procedure to be followed in allowing the stockholders of the old corporation to become members of the new corporation. Where such a procedure is prescribed, and a newspaper advertisement is made as required by statute, limiting the time within which the old stockholder must apply for admission into the new corporation, a stockholder of the old corporation who fails to apply within the prescribed time is barred of all right to come into the new corporation, and a court of equity cannot give him any relief.⁵ Even though a reor-

¹ *Queen Anne's, etc. Co. v. Queen Anne's R. R.*, 148 Fed. Rep. 41 (1906).

² *Mills v. Potter*, 189 Mass. 238 (1905).

³ *Louisville & N. R. R. v. Schmidt*, 107 S. W. Rep. 745 (Ky. 1908).

⁴ See § 897, *infra*.

⁵ *Vatable v. New York, etc. R. R.*, 96 N. Y. 49 (1884), the court saying: "It would lead to intolerable inconvenience, confusion, and difficulty if the stockholders of the old company could in such a case take their own time to assent to the plan of reorganization, and to assert their right to

become members of the new company upon such facts as they would be able to establish in a court of equity." Reversing 11 Abb. N. Cas. 133. Concerning the New York statutes on reorganization, see also *Pratt v. Munson*, 84 N. Y. 582 (1881). For various statutes relative to reorganizations, see *Jones, Corp. Bonds, etc.*, § 698. A bondholder who participates in a reorganization under the Maine statutes may enjoin an excessive issue of the reorganization securities to another bondholder. *Lincoln Nat. Bank v. Portland*, 82 Me. 99 (1889). Where

ganization under a statute which releases the stockholders from a part of their liability may be of doubtful legality, yet creditors who accept the benefits thereof cannot afterwards complain.¹

In England there is no such thing as the foreclosure of a railroad mortgage. By act of parliament, however, reorganizations are effected by the decree of a court approving of such a plan of reorganization as a specified proportion of the security-holders may formulate.² A plan of reorganization is submitted to the court upon the application of a certain part of the interested persons, and if the court approves of the plan it is binding upon all stockholders and creditors. This is a statutory reorganization pure and simple. It is simple, effective, and in the end is substantially the same as American reorganizations, except that the latter involve prolonged litigation, expense, and loss, disproportionate to the results effected.³ The English decisions on the statutes for reorganizations are instructive and are given in the notes below.⁴

reorganization is under a statute whereby mortgages of the reorganized company are to be subordinate to all subsequent judgments of a certain class, such a judgment has no precedence if the reorganized company's mortgage has been foreclosed and sale made before such judgment. Reorganization need not be under the statute. *Jeffrey v. Moran*, 101 U. S. 285 (1879). Even though a corporation is put into a receiver's hands, under a statute relative to insolvent corporations, and notice for the presentation of claims is given, and, in accordance with the statute, all claims not presented within four months are barred and the property is then sold, yet a non-resident creditor who had no actual notice may attack the proceedings on the ground that they were fraudulent and for the purpose of reorganizing the company in fraud of creditors. *Dobson v. Peck Bros. & Co.*, 103 Fed. Rep. 904 (1900).

¹ *Hunt v. Roosen*, 91 N. W. Rep. 259 (Minn. 1902). Where a reorganization is had under a statute without foreclosure and some of the old stockholders do not take part and the reorganized company becomes insolvent, the statutory liability of the old stock-

holders continues only after the liability of the new stockholders is exhausted. *Willius v. Mann*, 91 Minn. 494 (1904).

² Concerning this subject see the Act of Parliament, 30 & 31 Vict. (1867) 127, §§ 6-20; also *Re Cambrian Rys.*, L. R. 3 Ch. 278 (1868); *Munns v. Isle of Wight Ry.*, L. R. 8 Eq. 653 (1869); *Re Bristol, etc. Ry.*, L. R. 6 Eq. 448 (1868); *London, etc. Assoc. v. Wrexham, etc. Ry.*, L. R. 18 Eq. 566 (1874); *Re Devon, etc. Ry.*, L. R. 6 Eq. 610 (1868); *Re Devon, etc. Ry.*, L. R. 6 Eq. 615 (1868); *Stevens v. Mid-Hants Ry.*, L. R. 8 Ch. 1064 (1873). Similar acts exist in Canada. See *Jones v. Canada, etc. Ry.*, 46 U. C. Q. B. 250 (1881); *Canada Ry. v. Gebhard*, 109 U. S. 527 (1883).

³ See also § 833, *supra*.

⁴ Reconstruction of a company means carrying on substantially the same business by substantially the same persons without all the assets and liabilities necessarily passing to the new company. Amalgamation means the blending of two concerns into one, either by transferring both to a new company or transferring one to the other. *Re South African, etc. Co.*, [1904] 2 Ch. 268. A reorganiza-

A federal court has held that an American stockholder in an English corporation is liable to assessments upon his stock where

tion was confirmed by the court under the English statute in the case *Re Tea Corporation, Ltd.*, [1904] 1 Ch. 12, even though by such reorganization the common shareholders got nothing except the right to take new stock by paying ten shillings on the pound. A reorganization by a transfer of all the assets to a new company on the approval of the court is allowed by statute in England, and a dissenting stockholder cannot prevent it. *Nicholl v. Eberhardt Co.*, 61 L. T. Rep. 489 (1889); *Re Callao Bis. Co.*, L. R. 42 Ch. D. 169 (1889); *Re London Chartered Bank*, [1893] 3 Ch. 540. A provision in an English debenture that a majority of the holders of debentures might "sanction any modification or compromise of the rights of the debenture-holders against the company or against the property" is valid, and such a compromise is binding on the minority. *Sneath v. Valley Gold*, [1893] 1 Ch. 477. In England a reorganization by sale to a new corporation is called a "reconstruction." *Simpson v. Palace Theater*, 69 L. T. Rep. 70 (1893). In *Re English, etc. Chartered Bank*, [1893] 3 Ch. 385, the court allowed foreign creditors to vote abroad by proxy deposited abroad, and to telegraph such vote to the home meeting on a scheme of reorganization. The court also held that a proxy need not state the day of meeting. Under the English statutes authorizing the holders of the securities to reorganize or modify the original plan, provided the court approves the same, the plan may be extended, the court ordering that dissenting security-holders be paid in cash their proportion of the assets as they then exist. *Foreign, etc. Trust Co. v. Sloper*, [1894] 3 Ch. 716, rev'g [1893] 2 Ch. 96. Where by the mortgage a majority of the debenture-holders may bind all by a vote to modify or com-

promise, the majority may compel all to turn in their debentures to a reorganized company and take stock therefor. *Mercantile Inv. Co. v. River Plate, etc. Co.*, [1894] 1 Ch. 578. A person having the right to take part in a reorganization and not doing so, but objecting thereto, cannot long subsequently, after the stock has risen, bring suit to be allowed to take stock, under the English act. *Weston v. New Guston, etc. Co.*, 60 L. T. Rep. 805 (1889); aff'd, 62 L. T. Rep. 275 (1889); aff'd, H. of L., 64 L. T. Rep. 815 (1891). Reorganization may be compelled in England on a certain vote and with the approval of the court, and even the secured creditors may be compelled to take stock in payment. *Re Empire Min. Co.*, L. R. 44 Ch. D. 402 (1890). For an instance and full discussion of a plan of reorganization opposed by unsecured creditors, but approved by the court, see *Re East, etc. Dock Co.*, L. R. 44 Ch. D. 38 (1890). Where a plan of voluntary reorganization is adopted and carried out, a party who refuses to go into it cannot claim that creditors prior to him have lost such priority by reason of their accepting subordinate securities under the reorganization scheme. He cannot take advantage of that fact. *Stevens v. Mid-Hants Ry.*, L. R. 8 Ch. 1064 (1873). Where, upon a voluntary dissolution of a corporation, a reorganization scheme is carried out by which the property is turned over to a new company for its shares, and a reasonable time is fixed within which the old stockholders must exercise their option to take stock or have it sold by the liquidator, a stockholder cannot exercise his option after that time, although he was ignorant of the whole matter, nor can he have the scheme set aside. *Postlethwaite v. Port Phillip, etc. Co.*, L. R. 43 Ch. D.

such assessment has been levied in accordance with the English statutes, even though the stock originally was fully paid.¹ But the New York courts refused to hold a New York stockholder in an English corporation liable for his unpaid subscription, where, under a plan of reorganization, sanctioned by the English courts, in accordance with English law, a portion of the amount collected is to go to the reorganized company, while other stockholders were not required to pay their subscriptions, if they took part in the reorganized company and paid a small sum, especially where, if all the stockholders had paid in full, the amount would have been more than necessary to pay the debts. The court also held that an American stockholder in an English corporation is not estopped from complaining of an unfair, illegal scheme of reorganization, merely because he did not oppose it before it was sanctioned by the English courts in accordance with the English statute, where it is shown that he did not know anything about it, and that a reorganization of an English company sanctioned by the English courts is not personally binding on a New York stockholder, except as he has property or is in England.²

In Canada special statutes sometimes provide that upon corporate insolvency a certain proportion of the security-holders may agree upon a plan subject to the approval of the court, whereby the interests of all the security-holders may be arbitrarily reduced in

452 (1889); *Weston v. New Guston Co.*, 62 L. T. Rep. 275 (1889); *aff'd*, H. of L., 64 L. T. Rep. 815 (1891). As to the rights of creditors, see also *Re Cambrian Ry.*, L. R. 3 Ch. 278 (1868); *Re Devon, etc. Ry.*, L. R. 6 Eq. 610 (1868); *London, etc. Assoc. v. Wrexham, etc. Ry.*, L. R. 18 Eq. 566 (1874). Concerning the provision in the English statutes for buying out dissenting stockholders by paying an amount fixed by arbitrators, see *Re Mysore, etc. Co.*, L. R. 42 Ch. D. 535 (1889). For a case of a complicated reorganization under the English statutes, see *Re Neath, etc. Ry.*, [1892] 1 Ch. 349. In *Re Alabama, etc. Ry.*, [1891] 1 Ch. 213, a reorganization scheme was approved by the court and became effective, although it deprived former debenture-holders of their security. The property of the company consisted of stock in American railroad companies, the pur-

pose being to acquire the control of the American companies. The scheme of reorganization is given in the report. The approval of the court was in accordance with the statute.

¹ *Giesen v. London, etc. Mort. Co.*, 102 Fed. Rep. 584 (1900). An English corporation may be reorganized in accordance with the English statutes, and American stockholders therein cannot object. Even though a notice of a meeting of the stockholders in an English corporation is so short as not to reach American stockholders in time for the meeting, yet if such notice was in accordance with the English law and was not in violation of the charter or by-laws, it is legal. *Republican, etc. Mines v. Brown*, 58 Fed. Rep. 644 (1893), *rev'g Brown v. Republican, etc. Mines*, 55 Fed. Rep. 7. See 98 L. T. Rep. 809.

² *Bank of China v. Morse*, 168 N. Y. 458 (1901).

value. This is legal and binds all parties.¹ Even in the United States if a legislature authorizes a reorganization without foreclosure, and the bondholders are given a certain time to consent, those who do not act within that time are held to have assented.² After a strict foreclosure the legislature may authorize the trustee to convey the property to a new corporation on certain terms. All the bondholders and stockholders are bound.³

§ 890. *Status of a purchaser of the property at foreclosure sale—He takes the property free from claims of unsecured creditors and the contracts and liabilities of the old company—His duty as to completing and operating the road—He may operate the road but does not succeed to the corporate existence—Exemptions from taxation—The purchaser takes with notice of certain claims.*—The foreclosure cuts off the rights of the unsecured creditors as well as the stockholders of the old company. Junior liens are also cut off. The purchaser takes the property free and clear of all claims and debts excepting liens, subject to which he buys.⁴ He is not liable for the debts of the old company, unless he purchases expressly subject to those debts.⁵ The decree of foreclosure may leave the pur-

¹ Canada Southern Ry. v. Gebhard, 109 U. S. 527 (1883).

² Gilfillan v. Union Canal Co., 109 U. S. 401 (1883). The legislature may by statute allow stockholders to vote on a plan to relieve the corporation from its embarrassments, and may prescribe that votes not cast within three months shall be counted in the affirmative. Union Canal Co. v. Gilfillan, 93 Pa. St. 95 (1880).

³ Gates v. Boston, etc. R. R., 53 Conn. 333 (1885); Middletown v. Boston, etc. R. R., 53 Conn. 351 (1885).

⁴ See §§ 860 and 673, *supra*.

⁵ See § 673, *supra*. A railroad corporation purchasing property of another railroad corporation at foreclosure sale is not liable for the debts of the latter. Hoard v. Chesapeake, etc. Ry., 123 U. S. 222 (1887). A company purchasing a property on foreclosure is not liable on a judgment against the receiver. Brockert v. Iowa Cent. Ry., 93 Iowa, 132 (1894). A reorganized company after foreclosure was held not to have assumed the old bonds in Fernschild v. Yueng-

ling Brewing Co., 15 N. Y. App. Div. 29 (1897). A reorganized company that purchases the property at foreclosure sale and assumes all the old debts excepting the mortgage bonds cannot be held liable by one of the old bondholders as having assumed the payment of his bond. Fernschild v. Yuengling, etc. Co., 154 N. Y. 667 (1898). A tax on the capital stock is a tax on personality, and is cut off by a foreclosure of a mortgage executed and recorded before the tax was levied. The purchaser at the foreclosure sale takes the property free from such tax. Cooper v. Corbin, 105 Ill. 224 (1883). Cf. Osterberg v. Union T. Co., 93 U. S. 424 (1876). The purchasers at foreclosure sale take subject to a debt created by order of the court for the purpose of purchasing rolling-stock; the rolling-stock being part of the property sold at the foreclosure sale. "The court was not divested of its power and duty of managing the property by reason of a sale which the purchasers delayed or neglected for many years to com-

chaser at foreclosure sale liable for part or all of the debts which are

plete." The debt created for rolling-stock will be paid out of the proceeds of the sale, unless bonds are turned in in payment; in the latter case the purchasers must pay such debt. *Vilas v. Page*, 106 N. Y. 439 (1887). As to such debts see §§ 873-875, *supra*.

Where in the decree of sale to a reorganization company it is expressly provided that the old indebtedness is not cut off, the new company is liable for breach of warranty of title by the old company. *Wood v. Dubuque, etc. R. R.*, 28 Fed. Rep. 910 (1886). Unsecured creditors who are given an opportunity to come into the reorganization, but do not do so, are cut off entirely by the foreclosure. *Hancock v. Toledo, etc. R. R.*, 11 Biss. 148 (1882); s. c., 9 Fed. Rep. 738. A purchaser at foreclosure sale is not liable for the debts of the mortgagor. *Lincoln Tp. v. Kansas City, etc. R. R.*, 108 N. W. Rep. 140 (Neb. 1906). Where corporate property is sold on foreclosure and a new corporation is organized, which then purchases the property, the latter is not liable for the debts of the old corporation, even though it has the same members. *Allen v. North Des Moines Church*, 127 Iowa, 96 (1905). Where debts against one corporation are transferred to a new corporation for stock of the latter, such debts continue against the former. *McEwen v. Harriman, etc. Co.*, 138 Fed. Rep. 797 (1905). The purchaser at the foreclosure sale is not liable for the debts or obligations of the company which has been foreclosed. *Menasha v. Milwaukee, etc. R. R.*, 52 Wis. 414 (1881); *Cook v. Detroit, etc. Ry.*, 43 Mich. 349 (1880); *Hopkins v. St. Paul, etc. R. R.*, 2 Dill. 396 (1872); s. c., 12 Fed. Cas. 494; *Gilman v. Sheboygan, etc. R. R.*, 37 Wis. 317 (1875); *Vilas v. Milwaukee, etc. Ry.*, 17 Wis. 497 (1863); *Wright v. Milwaukee, etc. Ry.*, 25 Wis. 46 (1869); *Smith v. Chicago, etc. Ry.*, 18 Wis. 17 (1864); *Pennsylvania Transp.*

Co.'s Appeal, 101 Pa. St. 576 (1882). The purchaser takes the property free and clear from all claims against the receiver unless the statutes provide otherwise. *Howe v. St. Clair*, 8 Tex. Civ. App. 101 (1894). Where a final decree vesting the title in the purchaser vests title free from the receiver's debts or certificates, the lien of such debts and certificates is transferred to the proceeds of the sale. *Mercantile Trust Co. v. Kanawha, etc. Ry.*, 58 Fed. Rep. 6 (1893). In the case of *Grand Trunk Ry. v. Central Vermont R. R.*, 103 Fed. Rep. 740 (1900), where, in 1872, the receivers issued, under the order of the court, a large amount of thirty-year eight per cent. bonds constituting a lien on property, and in 1883, upon reorganization, these bonds were made exchangeable for first-mortgage bonds, and in 1899 such mortgage was foreclosed, and in the decree the court provided for distribution of the selling price among the bondholders secured by the mortgage, without making provision for certain bonds issued by the receiver and not actually exchanged for mortgage bonds, the court held that it could not order the purchaser at foreclosure sale to pay any outstanding receiver's bonds, inasmuch as the court, having sold and transferred the property, had no further jurisdiction to entertain a petition to enforce such receiver's bonds or to require the purchaser to pay them. As to the status where the property is sold by a receiver and is acquired again by the corporation, see § 884, *supra*. Where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company, who seeks to set the sale aside on the ground that the mortgage was invalid, is in the position of one who asks to be let in to redeem from the mortgagee in possession under an un-foreclosed mortgage. He cannot in the same action ask that the pur-

prior to the mortgage¹ or for receiver's certificates or debts.² Although the purchaser is bound by the decree to pay outstanding claims, yet the court will first pass upon them. It will enjoin a suit in a state court relative thereto.³

chaser at foreclosure sale, who is about to bond the property, shall pay the judgment creditor's claim out of such bonds. *Merriman v. Chicago, etc. R. R.*, 64 Fed. Rep. 535 (1894).

¹ *Wood v. Dubuque, etc. R. R.*, 28 Fed. Rep. 910 (1886). Where the decree provides that the purchaser at the sale shall pay all liabilities which were prior in lien to the mortgage, such purchaser may be held liable for a fund held in trust by the mortgagor. *Mercantile, etc. Co. v. St. Louis, etc. Ry.*, 99 Fed. Rep. 485 (1900). The decree may be worded so as to compel the purchasers to pay any liens which may be thereafter found to rest upon the property. *Central Trust Co. v. Georgia Pac. Ry.*, 87 Fed. Rep. 288 (1898). If the purchaser is bound to pay liens prior to two mortgages which are foreclosed, he must pay a lien prior to one but not to the other. *Central, etc. Ry. v. Grantham*, 143 Fed. Rep. 43 (1906). A provision in a decree confirming a foreclosure sale that the purchaser shall pay claims against the receiver does not exclude claims in litigation, even though a subsequent order fixed the time when all claims must be presented and that time had elapsed, the court having retained jurisdiction of the case for the enforcement of its decree. *Southern Ry. v. Townsend*, 161 Fed. Rep. 310 (1908).

² See ch. LI, *supra*; *Central Nat. Bank v. Hazard*, 30 Fed. Rep. 484 (1887). Even though the receiver on his appointment is directed to pay claims accruing within twelve months prior thereto, and thereafter the purchaser is by the decree obligated to pay claims which are prior in right to the mortgage, yet holders of unsecured claims for damages cannot recover from the purchaser. *Atchi-*

son, etc. Ry. v. Osborn, 148 Fed. Rep. 606 (1906). Where the purchaser at foreclosure sale assumes all the obligations of the receiver, such purchaser is bound to accept railroad tickets issued by the receiver. *Erie R. R. v. Littell*, 128 Fed. Rep. 546 (1904).

³ *Jesup v. Wabash, etc. Ry.*, 44 Fed. Rep. 663 (1890). A purchaser who assumes the obligations of the receiver is not liable on a claim against the old company unless the court appointing the receiver has first held that the receiver is liable thereon. *Ferguson v. Toledo, etc. R. R.*, 85 N. Y. App. Div. 352 (1903). After a receiver has been discharged he cannot be sued for the negligence of his agents during his receivership, but where the purchaser at foreclosure sale has assumed his liabilities the purchaser may be sued if the state practice so allows. *Gray v. Grand Trunk, etc. Ry.*, 156 Fed. Rep. 736 (1907). Where by decree of foreclosure of the federal court the purchaser has to pay such claims as the court might direct, the federal court will enjoin proceedings in the state court on such claims. *Stewart v. Wisconsin, etc. Ry.*, 117 Fed. Rep. 782 (1902). Where the purchaser at foreclosure sale in the United States court is by the decree of the court to pay the obligations of the receiver, such obligations may be enforced in a state court. *Atchison, etc. Ry. v. Cunningham*, 59 Kan. 722 (1898). Where a federal court in turning over the property to the purchaser at foreclosure sale renders the purchaser liable for liabilities of the receiver to be determined by the court, the court may enjoin a suit in the state court growing out of such liabilities. *Fidelity, etc. Co. v. Norfolk & W. Ry.*, 88

The court may decree a sale whereby a purchaser must pay the receiver's obligations, the receiver being required to file a statement so that the purchaser may purchase with knowledge.¹ A purchaser may contest the validity of claims against the receivers where he purchased subject thereto, even though the court reserved the right to compel him to pay such claims.² A provision in the decree that

Fed. Rep. 815 (1898). In the case of *Central Trust Co. v. Western N. C. R. R.*, 89 Fed. Rep. 24 (1898), where a railroad had been sold under foreclosure and the purchaser made a party to the suit, and the final decree contained a provision for the court passing upon claims and entering orders from time to time, the court enjoined a stockholder from subsequently instituting a suit in the state court attacking the validity of the mortgage which had been so foreclosed in the federal court.

¹ *Bound v. South Carolina Ry.*, 58 Fed. Rep. 473 (1893). "The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree." If the decree does not make him liable for claims against the receiver, he cannot, after the purchase, be made liable by a change in the decree. *Chicago, etc. R. R. v. McCammon*, 61 Fed. Rep. 772 (1894). Where the purchaser is to pay the receiver's obligations, this may include the obligations incurred by the receiver before foreclosure was commenced. *Central R. R. etc. Co. v. Farmers' L. & T. Co.*, 79 Fed. Rep. 158 (1897). The sale may be made subject to existing claims, thereby making the purchaser liable for pending claims, but interest will not usually be allowed on such claims as against him. *New England R. R. v. Carnegie Steel Co.*, 75 Fed. Rep. 54 (1896). Where by the decree the purchaser assumes all claims against the receiver, a suit for damages for negligence may be brought at law against the purchaser alone. *Thompson v. Northern, etc. Ry.*, 93 Fed. Rep. 384 (1899). A provision in the foreclosure decree that the purchaser

shall compromise, settle, or defend against all claims for damages arising during receivership and to pay any judgment rendered thereon is proper. *Central Trust Co. etc. v. Denver, etc. R. R.*, 97 Fed. Rep. 239 (1899). Where the receiver has been discharged, and the purchaser at foreclosure sale is liable for all the receiver's liabilities, by the terms of the deed to the purchaser, such purchaser may be sued on such claims. *Memphis, etc. R. R. v. Glover*, 78 Miss. 467 (1901). The purchaser at a foreclosure sale who has assumed the receiver's liability may be brought in as a party defendant. *Winters v. King*, 51 N. Y. App. Div. 80 (1900). Where the decree makes the purchaser and the property liable for the debts of the receiver, and afterwards the purchaser is required to pay a certain sum into court to meet such claim, and the bank in which it is deposited fails, the loss does not fall upon the purchaser. *St. Louis, etc. Ry. v. Jackson*, 95 Fed. Rep. 560 (1889). Where the purchaser is obligated to pay the receiver's debts, such debts, when paid, cease to exist, and the purchaser cannot claim any lien therefor. *Morgan's, etc. R. R. v. Moran*, 91 Fed. Rep. 22 (1898). Where a person having a claim against the old corporation intervenes in the distribution proceedings and claims that the new corporation is liable therefor, and a full hearing is had, the court will not throw the claim out on the ground that an independent bill should have been filed. *Central of Georgia Ry. v. Paul*, 93 Fed. Rep. 878 (1899).

² *Southern Ry. v. Carnegie, etc. Co.*, 176 U. S. 257 (1900).

certain claims and the receiver's expenses should be a prior claim upon the property binds the property, and is a lien ahead of all subsequent mortgages and deeds of the property by the purchaser.¹ The legislature may prescribe that as to future mortgages a purchaser at the foreclosure sale of a railroad shall be liable for the debts and obligations of that road.² But after the foreclosure sale the legislature cannot pass a law compelling the purchaser to pay certain of the old debts, even though the purchaser is a railroad corporation which was organized under a special charter for the purpose of making such purchase.³ Under a statute giving to a reorganized company all the powers of the old, the new company is not liable for the debts of the old.⁴ A statute conferring on a reorganized company all the rights of the old company may contain a provision that the new company shall be subject to a statute fixing rates of transportation, even though the old company was not subject thereto.⁵ Where all the parties entitled to participate in the proceeds of the sale consent that a certain liability shall be paid, this is a waiver of their rights to that extent, and they cannot compel the purchaser to pay in sufficient cash in lieu of bonds to make up the amount of the claim so allowed.⁶ Where the purchaser pays taxes incurred by the receiver without authority from the court, the purchaser will not be reimbursed from the proceeds of the sale.⁷ The rule of *caveat emptor* applies to a purchaser at a foreclosure sale and he cannot have a reduction from the price on account of unpaid taxes, nor on

1 Continental Trust Co. v. American Surety Co., 80 Fed. Rep. 180 (1897).

2 St. Louis, etc. R. R. v. Miller, 43 Ill. 199 (1867); County Com'rs Case, 143 Mass. 424 (1887); Hatcher v. Toledo, etc. R. R., 62 Ill. 477 (1872), where the statute was construed not to have a retroactive effect. But the legislature cannot release the former company from such obligations. Bruffett v. Great, etc. R. R., 25 Ill. 353 (1861). A railroad company purchasing the railroad of another company under the Ohio statutes is not liable for the debts of the latter, even though the statutes stated that the purchaser should be subject to the "duties, obligations and restrictions" of the vendor. Rice v. Norfolk, etc. Ry., 153 Fed. Rep. 497 (1907). A statute that a purchaser of a railroad shall be liable for the debts of the vendor does not apply to a foreclos-

ure sale. Kansas City, etc. Ry. v. King, 74 Ark. 366 (1905). Even under the Kansas statute to the effect that a purchaser at a foreclosure sale is liable on the obligations of the old corporation, and even though the deed of foreclosure was subject to the obligations of the receiver, yet the new corporation is not liable on a contract of employment of the old corporation. Keeler v. Atchison, etc. Ry., 92 Fed. Rep. 545 (1899).

3 Woodward v. Central, etc. Ry., 62 N. E. Rep. 1051 (Mass. 1902).

4 National, etc. v. Oconto, etc. Co., 105 Wis. 48 (1899).

5 Commissioner, etc. v. Grand Rapids, etc. Ry., 89 N. W. Rep. 967 (Mich. 1902).

6 Central Trust Co. v. Cincinnati, etc. Ry., 58 Fed. Rep. 500 (1892).

7 Central Trust Co. v. Cincinnati, etc. Ry., 58 Fed. Rep. 500 (1892).

account of interest not yet due on prior mortgage bonds, unless the decree so provided.¹ A purchaser at foreclosure sale is liable for money due on condemnation proceedings. Such a debt follows the property.²

The mortgagee and the purchaser at the foreclosure sale are not bound by contracts of the mortgagor made subsequently to the execution of the mortgage, whether those contracts are leases, sales, mortgages, guaranties, traffic contracts, or debts.³ An agreement between the receiver of a street railway and a city by which the

1 *Terre Haute, etc. Ry. v. Harrison*, 96 Fed. Rep. 907 (1899). A nominal purchaser of property at foreclosure sale who at once transfers his interest cannot afterwards file a petition to compel the receiver to pay certain taxes. *Boyle v. Farmers', etc. Co.*, 101 Fed. Rep. 184 (1900).

2 See § 856, *supra*. This principle, however, does not sustain an agreement to give passes for life, it being shown that the purchaser did not know of such agreement. *Missouri, etc. Ry. v. Henrie*, 5 Kan. App. 614 (1896).

3 See § 860, *supra*. The purchaser of a railroad on foreclosure sale is not liable on a contract of the old company that it would maintain a depot at a certain place. *Hukle v. Atchison, etc. Ry.*, 71 Kan. 251 (1905). If the mortgage debt is fully paid, chattel improvements added by a purchaser of the equity of redemption may be removed by such purchaser, and will not go to the purchaser at foreclosure sale. *Georgetown Water Co. v. Fidelity, etc. Co.*, 117 Ky. 325 (1904). The purchaser at foreclosure sale, who, instead of abandoning a leasehold right which the mortgagor possessed, took possession of the leased railroad and operated it, is liable for the rental while in possession, but may abandon the property at any time. By agreement between the lessor and lessee the rental may be reduced and the mortgagee not yet in possession cannot complain. *Frank v. New York, etc. R. R.*, 122 N. Y. 197 (1900). A lease made by the

mortgagor pending foreclosure may be discontinued by the purchaser at the foreclosure sale. Accepting rent for thirty days is no waiver of this right. *Farmers' L. & T. Co. v. Chicago, etc. Ry.*, 44 Fed. Rep. 653 (1890). As to leases, etc., see also §§ 873-875, *supra*. The purchaser of a railroad at a foreclosure sale is not bound to perform its contract to construct a siding or branch road. *Hoard v. Chesapeake, etc. Ry.*, 123 U. S. 222 (1887). A mortgagee is not bound by a subsequent dedication, by the mortgagor, of land for a street. *Newport News, etc. Co. v. Lake*, 43 S. E. Rep. 566 (Va. 1903). The purchaser of a railroad and franchises at an execution sale takes it free from any contract to maintain a depot at a certain place. *Gulf, etc. Ry. v. Newell*, 73 Tex. 334 (1889). The purchaser at foreclosure sale is not liable on an agreement to pay part of the cost of a station even though he continues to use that station. The agreement of the purchasers to set aside a certain sum for small claims gives no right to any particular claimant. *Moyer v. Fort Wayne, etc. R. R.*, 132 Ind. 88 (1892). Where an express company has an exclusive contract with a railroad company for the entire system of that company and the system becomes insolvent and disintegrates, and the receiver of the main company refuses to continue the contract, the contract fails as to the entire system. *Smith v. Wells, etc. Co.*, 96 Fed. Rep. 375 (1899).

street railway is discontinued on a certain street does not bind the purchaser at foreclosure sale, such agreement having been made after the decree of foreclosure.¹ Where the purchaser ratifies a contract previously made with the company, such contract has been held to continue and not to be affected by the foreclosure proceedings.² The new company may assume such obligations as it desires.³ But a contract to assume such obligations does not arise from the acts of the secretary of the company.⁴

A purchaser at a foreclosure sale of a system of railroads is not

1 *Thompson v. Schenectady Ry.*, 131 Fed. Rep. 577 (1904).

2 *Western U. Tel. Co. v. Atlantic, etc. Tel. Co.*, 7 Biss. 367 (1877); s. c., 29 Fed. Cas. 791. By acts of ratification a reorganized company may become bound by a contract between the old company and a telegraph company. *Western U. Tel. Co. v. American, etc. Tel. Co.*, 9 Biss. 72 (1879); s. c., 29 Fed. Cas. 790. If the purchaser at foreclosure sale continues to use a leased road he is bound by the terms of the lease. *Jacksonville, etc. Ry. v. Louisville, etc. R. R.*, 150 Ill. 480 (1894). A corporation taking over the business of a partnership may assume any contract of the latter, but the assumption of one contract does not prove the assumption of other contracts. The assumption of such contract may arise by the corporation proceeding to live up to it and carry it out. *Hall v. Herter*, 83 Hun, 19 (1894). See s. c., 90 Hun, 280, and 157 N. Y. 694. See also § 673, *supra*. Where the purchaser accepts the benefit of a contract by which the mortgagor agreed to give all the traffic to a certain railroad, he, the purchaser, is bound to live up to such contract. *Bald Eagle Valley R. R. v. Nittany Valley R. R.*, 171 Pa. St. 284 (1895). See §§ 859, 860, *supra*. The purchaser may be entitled to the benefit of certain contracts. See § 852, *supra*. A contract between a reorganization committee and a person who agrees to certain things in behalf of the proposed reorganized corporation may be assumed by the reorganized

corporation, and such assumption may release the individual with whom it was made. *Munson v. Magee*, 22 N. Y. App. Div. 333 (1897); *aff'd*, 161 N. Y. 182. A reorganized company may, by accepting the benefits of a contract and liability of the old company, become liable therefor, although the meeting of the directors authorizing the contract was informal. *Baker v. Harpster*, 42 Kan. 511 (1889). A mortgage covering after-acquired property may cover a lease which the mortgagor takes of union depot facilities, and if the purchaser at the foreclosure sale continues to use those facilities he is liable for the rent according to the lease. *St. Joseph U. D. Co. v. Chicago, R. I. & P. Ry.*, 89 Fed. Rep. 648 (1898). The liability of a corporation on a contract of the old company which the new company continues to act under is somewhat similar to the liability of a corporation for contracts of its promoters which the corporation assumes by accepting the benefits thereof. See § 707, *supra*. Where a person purchases a mill, to which a railroad track runs on the property of the mill, he is bound to take notice of such contract and is bound by its terms. *Michigan Central R. R. v. Chicago, etc. Ry.*, 93 N. W. Rep. 882 (Mich. 1903).

3 *Lake, etc. Ry. v. Griffin*, 92 Ind. 487 (1883); *Taylor v. Atlantic, etc. R. R.*, 57 How. Pr. 26 (1878).

4 *American, etc. Ry. v. Miles*, 52 Ill. 174 (1869).

bound to pay underlying mortgages on separate divisions before taking possession.¹

Where a company owing debts allows a foreclosure of a mortgage, and buys in the property, and holds it secretly in the name of a trustee, an execution may be levied on it by a judgment creditor of the company.²

A purchaser at a foreclosure sale takes the rolling-stock, but not the money and surplus earnings in the receiver's hands. These belong to the bondholders.³ If the purchaser, with the consent of the court, delays the completion of his purchase, the income during that time coming to the receiver goes to the receiver's fund and not to the purchaser.⁴ The question of whether a purchaser at a foreclosure sale may contest the validity of a prior mortgage is considered elsewhere.⁵

The purchaser is not liable in damages for accidents occurring while the old company or receiver was in possession, unless he purchased the property expressly subject to such damages.⁶

¹ *Central T. Co. v. Wabash, etc. Ry.*, 30 Fed. Rep. 332 (1887).

² *State v. McBride*, 105 Mo. 265 (1891).

³ *Strang v. Montgomery, etc. R. R.*, 3 Woods, 613 (1879); s. c., 23 Fed. Cas. 218. Money in the hands of the receiver does not pass at the sale. *Washington, etc. Co. v. California, etc. Co.*, 115 Fed. Rep. 20 (1902).

⁴ *Osterberg v. Union Trust Co.*, 93 U. S. 424 (1876), holding also that if the mortgagee assents to release certain property, and it is sold, and is not included in the foreclosure sale, the purchaser is not entitled to that fund. The purchaser is not entitled to the earnings after the sale and before he completes the purchase where he delays in such completion. *Boyle v. Farmers' L. & T. Co.*, 88 Fed. Rep. 930 (1898). Where a grain-dealing corporation becomes insolvent and a trustee is appointed and thereafter the president continues to do business on his own account, but uses the name of the corporation, moneys received by him are not subject to the debts of the corporation. *Boyle v. Northwestern, etc. Bank*, 125 Wis. 498 (1905).

⁵ *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548 (1883). See also § 848 (j), *supra*.

⁶ A purchaser who takes subject to liens must pay. *Swann v. Wright*, 110 U. S. 590 (1884). The purchasing company at foreclosure sale is not liable for injuries to an employee of the receiver, and the receiver himself is not personally liable if he has been discharged. Moreover, even though by the deed to the company it assumed the obligation of the receiver, the employee, being a third party, cannot claim payment under such deed, and the word "liability" in such deed does not apply to such an unliquidated claim for damages. Moreover, a state court has no jurisdiction of such a case, the receiver having been appointed by the federal court. *Tobin v. Central, etc. Ry.*, 185 Mass. 337 (1904). A new corporation to which property is deeded after a purchase at foreclosure sale is not liable for personal injuries sustained while the property was in the hands of the receivers. *Archambeau v. New York, etc. R. R.*, 170 Mass. 272 (1898). Where the purchaser takes a deed subject to liabilities incurred during

The franchises and property of a railroad may be purchased by an individual on foreclosure sale and transferred by him to a new

the receivership, the mortgagee of the purchaser takes subject to the same liabilities. *Central Trust Co. v. Sloan*, 65 Iowa, 655 (1885). A statute allowing the purchasers at foreclosure sale to organize as a corporation which shall have all the powers of the old corporation does not render the new corporation liable for the debts of the old. *Morgan County v. Thomas*, 76 Ill. 120 (1875). Although the purchaser of a road is vested with all the corporate power of the mortgagor corporation, yet damages for an accident occurring after the purchase cannot be collected from him in a suit brought against the old corporation. *Wellsborough, etc. Co. v. Griffin*, 57 Pa. St. 417 (1868); *Metz v. Buffalo, etc. R. R.*, 58 N. Y. 61 (1874). The purchaser is not liable for accidents which occurred after the sale, but before the consummation of the same. *Stratton v. European, etc. Ry.*, 74 Me. 422 (1883). A purchaser is not liable for an accident occurring after the sale, but while the receiver was still in charge. *Holman v. Galveston, etc. Ry.*, 14 Tex. Civ. App. 499 (1896). The court, in confirming a sale on foreclosure, may insert a provision that the purchaser shall be liable for all liabilities incurred during the receivership. The purchaser is bound by such a provision. *Farmers' L. & T. Co. v. Central R. R.*, 17 Fed. Rep. 758 (1883); *Schmid v. New York, etc. R. R.*, 32 Hun, 335 (1884). As to the liability where trustees have operated the road, see § 823, *supra*. Where the court, upon confirming a sale of the property and discharging the receiver, retains the suit in order to provide for damage suits, and makes an order that the damages shall be a lien upon the property, the property will be subject thereto, even in the hands of the purchaser. *Farmers' L. & T. Co. v. Central R. R.*, 17 Fed. Rep. 758 (1883).

Where the party purchasing at foreclosure sale takes expressly subject to liabilities incurred during the receivership, such liabilities may be enforced against him. *Sloan v. Central Iowa Ry.*, 62 Iowa, 728 (1883). Where an injury is done during the receivership, and afterwards the property is sold under foreclosure, and the grantee takes subject to liability for all disabilities incurred during the receivership, the remedy of the person injured is not by a bill in equity against the grantee. *Brown v. Wabash Ry.*, 96 Ill. 297 (1880). Where the receiver has been discharged and the purchaser placed in possession subject to liabilities incurred during the receivership, the court will try the cases with or without a jury, according to the claim, upon notice to the purchaser, and if the purchaser does not pay the amount will sell the property itself. *Farmers' L. & T. Co. v. Central R. R.*, 7 Fed. Rep. 537 (1881). Receivers are not liable for the loss of baggage where such loss occurred after the property had been deeded and presumably delivered to the purchaser at foreclosure sale. *Corser v. Russell*, 20 Abb. N. Cas. 316 (1887). After a receiver has been discharged he is not liable for damages accruing during his receivership, although he may continue liable for any personal fault. The purchaser of property at a foreclosure sale is not liable for damages occurring during a receivership. But where the purchaser gives a bond of indemnity to the receiver, this bond inures to the benefit of persons damaged during the receivership. Although a receiver has been discharged, yet damages occurring during the receivership are a lien on the income received during the receivership. *Ryan v. Hays*, 62 Tex. 42 (1884). The new company operating the road and also the pur-

corporation.¹ Where three persons purchase a partially constructed railroad at foreclosure sale, they may convey a portion of the same to a new company subject to such public obligations and rights in third parties as may exist.² Where the old company has completed but part of its road, and this part is sold under foreclosure, the purchaser is not bound to go on and complete the whole road;³ but he must obey an order of the court against the old company that the whole road be operated.⁴ It is clearly established that the purchasers at the foreclosure sale do not succeed to the corporate capacity and franchise of the old corporation;⁵ but the purchaser succeeds to the right to operate the road and collect tolls.⁶ A purchaser of a railroad at foreclosure sale cannot claim that it is free from conditions imposed upon the mortgagor corporation by the act of congress which granted a right of way to the railroad mortgagor.⁷ Where the purchaser at the foreclosure sale organizes a new railroad corporation to take over the property such new railroad corporation

chasing committee may be jointly liable for accidents occurring after the purchase, but before a final carrying out of the decree. *Lockhart v. Little Rock, etc. R. R.*, 40 Fed. Rep. 631 (1889). Where a mortgage on a plank road is foreclosed and the property is purchased by an individual, damages for an accident occurring subsequently, while he is operating it, cannot be recovered from the old company. *Wellsborough, etc. Co. v. Griffin*, 57 Pa. St. 417 (1868). The purchasers at the foreclosure sale are liable for damages done by the railroad, the same as common carriers are. *Roger v. Wheeler*, 43 N. Y. 598 (1871).

1 *Parker v. Elmira, etc. R. R.*, 165 N. Y. 274 (1901).

2 *Jack v. Williams*, 106 Fed. Rep. 259 (1901).

3 Failure on their part to complete it is no defense to an action on a subscription. *Chartiers Ry. v. Hodgins*, 85 Pa. St. 501 (1877).

4 A purchaser of a road at foreclosure sale in the federal court must obey a decree in the state court against the old company ordering it to operate the whole of its line. *State*

v. Iowa Cent. Ry., 83 Iowa, 720 (1891).

5 See § 790, *supra*.

6 See § 790, *supra*.

7 *Union Pac. R. R. v. Mason City, etc. R. R.*, 128 Fed. Rep. 230 (1904). Where in a charter granted by congress to a railroad corporation for a bridge, the right is retained to congress to alter, amend or repeal, and thereafter another act of congress provides that such bridge shall be open for the use of other railroads on a reasonable compensation, and thereafter a mortgage given by the corporation is foreclosed, the purchaser takes the bridge, subject to the obligation to allow other railroads to use the bridge, even though the mortgage was executed before the second statute was enacted. The court came to this conclusion without stopping to inquire whether the foreclosure and sale "was anything more than a reorganization under the form of a judicial proceeding," nor whether, if it were a *bona fide* sale to an independent third party, the sale took the property out of the jurisdiction of congress. *Union Pacific Co. v. Mason City Co.*, 199 U. S. 160 (1905).

is bound by existing statutes governing rates of fare and incorporation fees exacted by the state.¹

An exemption from taxation contained in the old charter does not pass to the new corporation, even though it succeeds to the rights of the old, unless the legislature, by the words used, showed a clear intent that the exemption should continue. The reason of this rule is that exemptions from taxation are not favored by the courts.²

A purchaser of the property and franchises of a street railway company at foreclosure sale may file a bill in equity to protect such franchises.³ A purchaser at foreclosure sale has a right to intervene in another foreclosure suit brought by an unenclosed lienholder.⁴ The new company may enforce the right of the old one to indemnity.⁵ Where a contract between a mortgagor water-works company and a city for rentals is covered by the mortgage, the mortgagee cannot in the foreclosure suit compel payment. His remedy is at law.⁶ The purchaser at foreclosure sale cannot revive an

1 *Grand Rapids, etc. Ry. v. Osborn*, 193 U. S. 17 (1904).

2 See ch. XXXIV, *supra*. Exemption from taxation does not pass to the succeeding corporation. *Louisville, etc. R. R. v. Palmes*, 109 U. S. 244 (1883); *Memphis, etc. R. R. v. Railroad Com'rs*, 112 U. S. 609 (1884). An exemption from taxation of a corporation does not pass to a company succeeding to all of its "franchises, rights, and privileges." *Chesapeake, etc. Ry. v. Miller*, 114 U. S. 176 (1885). See also *Picard v. East Tennessee, etc. R. R.*, 130 U. S. 637 (1889). A purchaser at a mortgage sale does not take the property with an exemption from taxation given by the old charter. *State v. Chicago, etc. Ry.*, 89 Mo. 523 (1886). In a mortgage foreclosure a new corporation taking over the property does not succeed to an exemption from taxation, even though it is given by statute all the "franchise rights and privileges" of the old corporation. *Lake Drummond, etc. Co. v. Commonwealth*, 103 Va. 337 (1905). Bondholders are not bound by a decision against the corporation relative to taxation, the bonds having been issued before the decision, and no one representing

them being a party to the suit. *Wicomico, etc. v. Bancroft*, 135 Fed. Rep. 977 (1905).

3 *Knoxville v. Africa*, 77 Fed. Rep. 501 (1896). Where a city made a grant to a water-works company the prices to be as agreed between the company and the consumers, but not to exceed certain rates, the city cannot thereafter reduce the rates below such specified rates, and a purchaser of the plant at foreclosure sale is entitled to equal protection. *Omaha Water Co. v. City of Omaha*, 147 Fed. Rep. 1 (1906). Where the purchaser intervenes and deposits money with the court to pay bonds not yet due, such purchaser may be liable for costs to the clerk of the court for receiving and paying out such money. *In re Michigan, etc. R. R.*, 124 Fed. Rep. 727 (1903).

4 *Connor v. Tennessee, etc. Ry.*, 109 Fed. Rep. 931 (1901).

5 *Miller v. Lancaster*, 5 Coldw. (Tenn.) 514 (1868). Or may settle a suit against the old one. *Paine v. Lake Erie, etc. R. R.*, 31 Ind. 283 (1869). In general, see *Slattery v. St. Louis, etc. Co.*, 91 Mo. 217 (1886).

6 The remedy of a mortgagee to collect water rentals from a city under

action begun by the mortgagor after the giving of the mortgage to enjoin the collection of taxes.¹ A sale of the assets at foreclosure sale, and purchase thereof by a reorganized company, does not carry a cause of action against promoters for fraud.² A reorganized company may be charged with notice of the reorganization agreement, and may be estopped from complaining that a part of the securities issued by the old corporation were overissues.³ The reorganized company may be liable for the fees of lawyers engaged in the litigation.⁴ An owner of bonds, which were guaranteed by another company, which latter company has been foreclosed and reorganized, cannot maintain a suit in equity to compel the reorganized company to pay the bonds. His remedy is at law.⁵ The reorganized company is not a *bona fide* purchaser of the property. It is bound to take notice of all equities connected with the property.⁶ So, also,

a contract which was subject to the mortgage must be at law. *City of Eau Claire v. Payson*, 109 Fed. Rep. 676 (1901). A mortgagee of a water-works company cannot bring suit in the federal court to collect from the city water rents when the city and the company are citizens of the same state. Such a suit must be at law and cannot be by a proceeding in a foreclosure suit. *City of Eau Claire v. Payson*, 107 Fed. Rep. 552 (1901). Where an insolvent water-works company is in the hands of a receiver, the contract of the city to pay hydrant rates may be enforced in that same suit. *Cunningham v. City of Cleveland*, 98 Fed. Rep. 657 (1899). Where a water-works mortgage is foreclosed, and on the sale the purchaser is a citizen of another state, he can bring suit in the federal court to collect, under a contract between the old company and the city for the supply of water, even though the company itself could not have brought suit in the federal court, it being a citizen of the same state as the city. *Portage City, etc. Co. v. City of Portage*, 102 Fed. Rep. 769 (1900).

¹ *Keokuk, etc. R. R. v. Scotland County Court*, 152 U. S. 318 (1894).

² *Central T. Co. v. East Tennessee, etc. Co.*, 116 Fed. Rep. 743 (1902). See also § 852, *supra*.

³ *Davidson v. Mexican Nat. R. R.*, 11 N. Y. App. Div. 28 (1896).

⁴ In *Meddaugh v. Wilson*, 151 U. S. 333 (1894), the original reorganization scheme was abandoned and a new one carried through. Under the facts in the case it was held that the purchaser had undertaken equitably to pay the fees of counsel for various parties in the litigation, and the claim was an equitable lien on the new stock.

⁵ *Sawyer v. Atchison, etc. R. R.*, 119 Fed. Rep. 252 (1902); *aff'd*, 129 Fed. Rep. 100.

⁶ A reorganized company having the same officers and attorneys as the old company are not *bona fide* purchasers without notice, even though the sale was by a receiver. *Oregon, etc. Co. v. Balfour*, 90 Fed. Rep. 295 (1898). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an under-

a mortgagee of the purchasing company is chargeable in certain cases with notice of the facts.¹ Although the new company is, by statute,

lying mortgage. *Farmers', etc. Co. v. Penn. etc. Co.*, 103 Fed. Rep. 132, 157 (1900); *aff'd*, 186 U. S. 434. The reorganized company may be bound by contracts of the vendor of the property, where the corporation is chargeable with notice of the same, such contracts being the reorganization contracts. *Continental Trust Co. v. Toledo, etc. R. R.*, 86 Fed. Rep. 929 (1898). Even though by a reorganization plan a new company is to assume certain floating debts of the old company whose property is purchased at the foreclosure sale, yet the holders of such debts have no claim, either in law or in equity, against the new company. *Columbus, etc. R. R. Appeals*, 109 Fed. Rep. 177 (1901). Where the mortgaged property is burned and the insurance money is paid over to the trustee, and the trustee, with the consent of all the bondholders and in pursuance to an order of the court, pays over the money to the reorganized company on representations that the money will be used to rebuild the buildings, and the reorganized company uses only part of the money for that purpose, a bill in equity to compel the new company to account for the remaining part and to apply it to the rebuilding of the buildings will not lie. *Dallett v. Staten Island, etc. Co.*, 48 Atl. Rep. 231 (N. J. 1901). A reorganization company to which the foreclosed property is deeded is not a *bona fide* purchaser of the property as against judgment creditors of the insolvent corporation. *Frazier v. East Tennessee, etc. R. R.*, 88 Tenn. 138 (1889). A fractional interest in a reorganization will be protected by the courts as a lien equal to the reorganization mortgage. *Blair v. St. Louis, etc. R. R.*, 23 Fed. Rep. 524 (1885). Where the purchaser at foreclosure sale releases his interest to a reorganized company, the reorgan-

ized company takes everything that passed by the sale. *Gray v. Massachusetts Cent. R. R.*, 171 Mass. 116 (1898). A person who pays for land by transferring worthless mining stock is not a *bona fide* purchaser. *Sewell v. Nelson*, 67 S. W. Rep. 985 (Ky. 1902). See also § 350, *supra*.

¹ See ch. XL, *supra*. *Bona fide* purchasers of first-mortgage bonds issued by a reorganized company, which took the property after a foreclosure sale, are protected against a prior lien which the court in the foreclosure suit held to be valid, where the holder of such lien was the purchaser at foreclosure sale and conveyed the property to the new company in payment of the mortgage bonds and had diverted a part of the bonds from their proper purposes. *Venner v. Farmers' L. & T. Co.*, 90 Fed. Rep. 348 (1898). Where a creditor of an insolvent corporation reorganizes it, and then by fraudulent representations induces another company to sell its property to the reorganized company in exchange for stock of the latter, and a mortgage is at the same time placed upon the combined properties, and default takes place and foreclosure is commenced, the parties so selling the property in the said mortgage may still rescind unless innocent bondholders' rights have intervened, in which case money damages may be had against the parties bringing about the reorganization and making the misrepresentations. Such misrepresentations may consist of statements as to what will be done in the way of improvements out of the bonds, as well as statements as to the current net profits. *Old Colony Trust Co. v. DuBuque, etc. Co.*, 89 Fed. Rep. 794 (1898). In the case of *Collins v. Stoffer's Ex'rs*, 52 S. W. Rep. 940 (Ky. 1899), the court held that where the purchaser at foreclosure sale of a gas

given all the property, rights, and privileges of the old company, yet it is a new corporation,¹ and irregularities in the organization of the new company may not be fatal to the organization, even where they would be fatal in the case of a corporation organized to build a railroad.² After foreclosure and sale, *quo warranto* lies at the instance of the state to dissolve the old corporation.³

plant sold the property to an individual on credit, and the latter, instead of operating it himself, operates it in the name of the insolvent corporation, creditors who become such thereafter have no lien prior to the purchase-money lien of the vendor of the property, no deed by the latter having been made. A company taking a railroad from parties purchasing it at foreclosure sale takes it subject to any vendor's lien. Where the purchasers of a road pay only a part of the purchase price and then deed the property to a new corporation, the latter takes it subject to a purchase-money lien. *Western N. C. R. R. v. Drew*, 3 Woods, 691 (1879); s. c., 29 Fed. Cas. 747. A corporation is chargeable with notice of facts known to its directors whereby the corporation acquired title to a large property from the bondholders of a foreclosed company. *Rogers v. New York, etc. Land Co.*, 134 N. Y. 197 (1892).

¹ *People v. Cook*, 110 N. Y. 443 (1888). A reorganization under the usual statute has the effect of creating a new corporation. It is not a mere amendment of the old charter. *Marshall v. Western, etc. R. R.*, 92 N. C. 322 (1885). The incorporation of a reorganized company, giving it all the rights, etc., of the old company, does not give it title to a judgment obtained by the old company. *Wilmington, etc. R. R. v. Downward*, 14 Atl. Rep. 720 (Del. 1888).

² Under a statute authorizing the purchaser to organize a new corporation having the powers of the old, mere irregularities in organizing are no grounds for forfeiture of the new charter, since the individual who purchased at the sale may perhaps be looked upon as the new corporation. *Commonwealth v. Central Pass. Ry.*, 52 Pa. St. 506 (1866).

³ *People v. Northern R. R.*, 42 N. Y. 217 (1870).

